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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MELANIE H., individually, Plaintiff, v. DEFENDANT DOE 1, DOES 2 through 1000, inclusive, Defendants.	Case No. 04 CV 1596 WQH (JFS) BRIEF OF AMICI CURIAE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND THE CALIFORNIA CATHOLIC CONFERENCE IN SUPPORT OF COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT
SISTERS OF THE PRECIOUS BLOOD, Counterclaimant, v. MELANIE H., individually, ROBERT ROE and COUNTERCLAIM DEFENDANTS Roes 2 through 10, inclusive, Counterclaim Defendants.	

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Amicus Curiae United States Conference of Catholic Bishops and the California Catholic Conference respectfully urge the court to grant Counterclaimants' pending Motion for Summary Judgment. Senate Bill No. 1779 (Burton) (hereinafter "SB 1779") is an unconstitutional effort by the California Legislature to punish Catholic religious institutions in the State of California and to deprive them of charitable resources essential to conduct their religious ministries. SB 1779 violates the Religion Clauses of the First Amendment and the procedural due process guarantees included in the Fourteenth Amendment. Amici Curiae respectfully submit that the statute is unconstitutional and should be declared as such by this Court.

I. THE BISHOPS OF CALIFORNIA AND THE UNITED STATES HAVE TAKEN RESPONSIBILITY FOR CLERGY MISCONDUCT

> In the name of all the Bishops, I express the most profound apology to each of you who have suffered sexual abuse by a priest or another official of the Church.[1]
>
> I sincerely apologize to anyone who has suffered from sexual misconduct or abuse by a priest, deacon, lay minister, employee or volunteer of the Archdiocese.[2]

Care of the young has deep Biblical roots. Jesus himself expressed a special solicitude for children[3] and admonished his followers to do the same.[4] Thus, Catholic religious leaders and the faithful throughout the United States are truly horrified by reports of child sexual abuse by priests and others who minister. It hardly needs stating that an act of sexual abuse is a total departure from the life and work of Jesus Christ and those dedicated to carrying on his mission in

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[1] Bishop Wilton D. Gregory, President of the United States Conference of Catholic Bishops, *A Catholic Response to Sexual Abuse: Confession, Contrition, Resolve* (June 13, 2002), available at www.usccb.org/bishops/presidentialaddress/shtml.

[2] Cardinal Roger Mahony, Archbishop of Los Angeles, reprinted in *Report to the People of God: Clergy Sexual Abuse, Archdiocese of Los Angeles: 1930-2003* (hereinafter *Report of Archdiocese of Los Angeles*), available at http://cardinal.la-archdiocese.org/pdf/2004/White%20Paper-4-28-2004.pdf.

[3] *E.g.*, Mt 19:14 ("Let the children come to me").

[4] Mt 18:5 ("And whoever receives one child such as this in my name receives me.")

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the world.[5] It is no surprise that the abuse of children is condemned by the Cardinal Archbishop of Los Angeles, the President of the United States Conference of Catholic Bishops, and other representatives of the religious community. In the Catholic community, the bishops have frequently and openly expressed profound sorrow, and apologized repeatedly and publicly, for the injuries that some priests and other ministers have caused to young people.

The response of dioceses and bishops to sexual misconduct has by no means ended with a mere apology. Dioceses in California and throughout the United States have attempted, and continue to attempt, to act responsibly in addressing past wrongs and in preventing future ones. They have made serious and significant attempts to reach out to victims and their families, to offer healing and to bring closure and peace to victims and their families.[6] This outreach has included the provision of counseling, support groups, and other social services agreed upon by the victim and diocese.[7] All dioceses in the United States have (and have had) mechanisms in place to respond to allegations of sexual abuse, and to coordinate assistance for the immediate pastoral care of people who have been sexually abused by clergy or other church personnel.[8] Dioceses around the country have been attempting to resolve claims, even in situations where

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[5] United States Conference of Catholic Bishops (hereinafter "USCCB"), Preamble to the Charter for the Protection of Children and Young People (hereinafter "Charter") ("the sexual abuse of young people is 'by every standard wrong and rightly considered a crime by society; it is also an appalling sin in the eyes of God'"), available at http://www.usccb.org/ocyp/charter.shtml; *Report of Archdiocese of Los Angeles*, at i (acknowledging that acts of sexual abuse are "a sin, a crime and a horrific violation of a child or young person").

[6] Charter, art. 1.

[7] Charter, art. 1; *see, e.g.*, The Archdiocese of San Francisco, *Sexual Misconduct by Clergy and Other Church Personnel: A Short Summary of the Policies and Procedures of the Archdiocese of San Francisco* (2003) (stating that the Archdiocese will provide counseling and outreach to victims and their families), available at http://www.sfarchdiocese.org/summary-english.html. Overall costs associated with treatment of victims is nearly $20 million. John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States* 105, Table 6.1.1(2004) (hereinafter "John Jay Study"), available at http://www.usccb.org/nrb/johnjaystudy/index.htm.

[8] Charter, art. 2.

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there is no remedy available in the civil courts.[9] It will continue to do so, in California and elsewhere, regardless of the outcome of this litigation. The dioceses take their responsibility to redress past injury seriously, and they are attempting to carry out that responsibility in a manner that is effective, timely, and fair to all – victims, their families, and those accused of wrongful conduct. Mark E. Chopko, *Continuing the Lord's Work and Healing His People: a Reply to Professors Lupu and Tuttle*, 2004 BYU L. Rev. 1897, 1901 (2004).

Dioceses in California and elsewhere have likewise taken far-reaching steps to ensure that acts of sexual misconduct never occur again. In a ground-breaking meeting in Dallas in June 2002, the bishops of the United States publicly committed themselves to collaborative and consistent steps to combat and prevent abuse.[10] Diocesan policies require an evaluation of the background of all personnel who have regular contact with minors, utilizing the resources of law enforcement and other community agencies, in addition to screening and various techniques for deciding the fitness of candidates for ordination.[11] It is the law of the Church in the United States that priests whose abuse has been admitted or established will be permanently removed from ministry.[12] And the bishops have pledged that no priest or deacon found to have committed

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[9] Large and highly publicized settlements have been made, for example, in Orange, Covington, Boston, Louisville, and other jurisdictions. See Rachel Zoll's June 9, 2005, Associated Press story on settlement costs.

[10] In Chicago, as we write, the bishops are renewing their commitment to the Charter. See www.usccb.org/ocyp/charterreview.shtml.

[11] Charter, art. 13. For example, all dioceses in California require fingerprinting and background checks for all clergy, employees and volunteers who have regular contact with children and have established detailed policies ensuring a safe environment for children and young people at church and when participating in church ministries. See, e.g., http://www.diocese-sacramento.org/.

[12] In 2002, the bishops approved two documents, the Charter (a set of operating principles for diocesan policy) and the Essential Norms, which, through a process of "recognitio " by the Holy See, has become particular canon law for dioceses in the United States. http://www.usccb.org/ocyp/norms.shtml. In addition, diocesan policy also makes clear the removal from ministry of any clergy or employee who has abused a minor. *E.g.*, *Report of the Archdiocese of Los Angeles* at 2 ("anyone who is determined to have abused a minor will be removed swiftly, decisively and permanently from any parish or ministry in the Archdiocese.... This policy is not subject to change."); The Archdiocese of San Francisco, *Sexual Misconduct by*

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an act of sexual abuse will be transferred to a ministerial assignment anywhere.[13] This, too, is the law of the Church in the United States.[14] Other preventative measures undertaken by dioceses include the development and implementation of "safe environment" programs.[15] These entail cooperation with parents, civil authorities, educators, and community organizations to provide education and training to make and maintain a safe environment for children.[16]

These developments are not new. They have evolved over time. Nationwide initiatives to address the problem of sexual abuse within dioceses began in the 1980s.[17] In 1993, the Conference of Bishops appointed an Ad Hoc Committee on Sexual Abuse and in 1994 it published the first of three volumes, entitled *Restoring Trust*, a resource for U.S. dioceses. Individual dioceses acted even earlier. California dioceses have taken a proactive role in implementing such procedures and policies for nearly two decades. Long before the present crisis emerged, all California dioceses had developed and implemented policies and guidelines for responding to sexual abuse claims made against diocesan clergy and employees, as well as related policies applicable to maintaining safe environments for children and young people.

Clergy and Other Church Personnel: A Short Summary of the Policies and Procedures of the Archdiocese of San Francisco (2003) ("The Archdiocese will permanently remove from employment or ministry any individual found to have sexually abused a minor."), available at http://www.sfarchdiocese.org/summary-english.html; Charter, art. 5 (stating that in all dioceses, even for a single act of sexual abuse of a minor – past, present or future – an offending priest or deacon is "permanently removed from ministry.")

[13] Charter, art. 14.

[14] Essential Norms, Norm 12, available at http://www.usccb.org/ocyp/norms.shtml.

[15] Charter, arts. 8 and 12; *see, e.g.*, The Archdiocese of San Francisco, *Sexual Misconduct by Clergy and Other Church Personnel: A Short Summary of the Policies and Procedures of the Archdiocese of San Francisco* (2003) (noting the implementation of a Safe Environment program designed to train and education children, youth, parents, ministers, educators, and others on how to recognize, respond to, and prevent abuse), available at http://www.sfarchdiocese.org/summary-english.html,

[16] Charter, art. 12.

[17] For a chronology of the USCCB's work, see www.usccb.org/comm/kit2.shtml.

[19] Incidents of abuse cross denominational lines. *See, e.g.*, Philip Jenkins, *Pedophiles and*

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There is compelling evidence that these initiatives have been highly effective. A January 2005 study by the Center for Applied Research in the Apostolate ("CARA") at Georgetown University found that of nearly 900 reported allegations of abuse in all dioceses in the United States, fewer than 20 pertained to incidents allegedly occurring in the period 2000 to 2004, and fewer than 30 for the entire decade 1995-2004. CARA, 2004 Survey of Allegations and Costs: A Summary Report for the Office of Child and Youth Protection, United States Conference of Catholic Bishops (January 2005). The greatest number of reported incidents of abuse, the CARA study shows, are claimed to have occurred between 1960 and 1979. *See also* Chopko, *Continuing the Lord's Work and Healing His People*, 2004 BYU L. Rev. at 1900 (claims against dioceses alleging sexual abuse, "by an overwhelming margin, are for (mis)conduct that occurred twenty or more years ago"), and citations therein; John Jay Study at pp. 5 & 28, Table 2.3.1 (confirming that priest-child abuse occurred mostly in the 1970s).

The experience of dioceses in California reflects a similar and marked decline in reports of incidents of abuse in California over the last decade and a half. Of 128 people alleging sexual abuse in the Diocese of San Diego, for example, only three alleged abuse beginning in the period 1990-99, and none in the period 2000-03. A Report on Sexual Abuse by Priests in the Diocese of San Diego (February 24, 2004), available at http://www.diocese-sdiego.org/set.asp?link=SexualAbuseResponses.htm&in=Bishops. In the Archdiocese of San Francisco, only six of 148 victims reported abuse after 1990. Letter to the Faithful of the Archdiocese of San Francisco (Jan. 30, 2004), available at http://www.sfarchdiocese.org/johnjay.html. Of 244 personnel accused of sexual abuse in the Archdiocese of Los Angeles, only "seven … are alleged to have abused since 1995." *Report of the Archdiocese of Los Angeles* at i. In the Diocese of Sacramento, one of ten accused priests is alleged to have abused children since 1990 and there are no allegations of abuse by priests of the Diocese that are alleged to have occurred since 1994.

Obviously, even a single incident of sexual abuse involving a minor is one incident too

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many. Nevertheless, the decline in reported abuse nationally and in California suggests that the problem is largely historic, not recent.[19] This decline in incidents of abuse over the last decade-and-a-half has gone hand in hand with advances in secular knowledge about, and treatment of, psychopathologies directed at minors. Dioceses, acting upon those advances since the mid-1980s, have made great progress in preventing abuse by implementing policies and safeguards that reflect this clearer understanding of the pathology of sexual abuse. A psychologist with extensive clinic experience in this area notes that "countless instances of child abuse have been prevented by the Church's activism around the treatment of child abusers." Frank Valcour, *Expectations of Treatment for Child Molesters* (1994), at 9.

Dioceses acknowledge a moral responsibility to resolve cases (even very old ones), to redress past injuries, and to prevent future harm. News reports indicate Catholic dioceses may have paid more than $1 billion in settlements, counseling, medical care and fees. The commitment of dioceses to the healing of victims, including monetary compensation, is noteworthy and unwavering. The dioceses have done much and there is more to do. At the same time, it must realistically be questioned whether open-ended liability in the civil courts, potentially handing over untold millions more to victims and their lawyers, does anything for healing and reconciliation or to further the ends of justice. Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. Rev. 949 (2003). Because of the size of the demands, both sides have resorted to extraordinary legal efforts to attack and defend positions, resources that could be better used in healing and restoration – a process to which bishops and dioceses are already firmly committed. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 Cath. U. L. Rev. 125, 150-154 (2003).

In justice, this must not translate into crippling the present faith community as a worshipping church and charitable institution. Forcing the wholesale diversion of funds from the present sacramental and charitable work of dioceses based on conduct that occurred a generation (or generations) ago is unfair. Such a diversion of resources at the command of the State,

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implemented retroactively as SB 1779 does, would have constitutional implications even if directed at a secular entity, and these problems are only compounded in light of the dioceses' religious character. *See, e.g., People ex rel. Deukmejian v. Worldwide Church of God*, 127 Cal.App.3d 547, 551, 178 Cal.Rptr. 913, 915 (Cal. App. 1981) (stating, in dicta, that a government attempt to control church property and the receipt and expenditure of church funds would violate the constitutional prohibition against government establishment and interference with the free exercise of religion). In its larger practical consequences, unlimited liability threatens to cripple dioceses and their institutions. Indeed, it has led presently to bankruptcy filings in three dioceses in the United States. The end result is potentially to deprive millions of innocent people of the assets needed to operate their Church, depriving thousands of needy people, many of whom are not Catholic, of the services of the faith community.[20] Those who will suffer most will be those whom the dioceses feed, cloth, house, educate, heal, and to whom they minister. The public interest in continuing that work is essential, for if the Church must close facilities and curtail its charity, thousands will go without needed services, in turn punishing the beneficiaries of those services and creating an enormous drain on public resources.

At a simpler and more profound level, an entire generation of Catholic people and those they serve, those who had nothing whatsoever to do with the judgments and misconduct that occurred decades ago, will suffer unjustly. SB 1779 does an injustice to the blameless, a faith community whose members, in many cases, were not even born at the time the claims revived by SB 1779 arose. Because of SB 1779, hundreds of thousands of innocent Catholic young people in California now face the sobering, but very realistic, prospect of being denied access to vital Church ministries, such as education, access to sacraments, social services, and other critical aspects of Catholic life. The American justice system has traditionally rejected the notion that one is responsible for the sins of an earlier generation. Yet, that is precisely the underlying

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[20] The concern is not exaggerated. In bankruptcy proceedings filed by dioceses in Spokane and Portland, for example, claimants have demanded that the courts secure the property of parishes, schools and cemeteries to satisfy claims against the dioceses.

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premise of SB 1779. We respectfully submit that this Court should also reject this premise, which is so antithetical to the notion of fundamental fairness that animates our Constitution and the system of justice that it establishes.

II. SB 1779 OFFENDS FUNDAMENTAL CONSTITUTIONAL PROTECTIONS.

The substantive legal issues have been ably briefed by the counterclaimants. We concur with the arguments that they have asserted in support of the constitutional infirmity of SB 1779. However, in light of the pastoral nature of the plea we make here, two aspects of the position asserted in Counterclaimants' briefing is of particular importance to Amici Curiae: i.e., the inherent injustice and constitutional infirmity of the retroactive imposition of punishment implicit in SB 1779 and the unmistakable and deliberate burden SB 1779 imposes upon the constitutionally protected religious liberty rights of the Catholic community in California. Moreover, although not directly addressed by Counterclaimants, we shall also address concerns regarding the facial invalidity, on Fourteenth Amendment due process grounds, of the provisions of SB 1779 dealing with certificates of corroborative fact that the statute requires to be filed with the trial court, but to which the accused defendants are expressly precluded access.

A. SB 1779 Retroactively Punishes Diocesan Conduct that Occurred Decades Ago.

That the largest number of abuse claims date to earlier decades has an immediate bearing on the retroactive nature of the statute challenged in this litigation. At its core, Senate Bill 1779 is an attempt to scrutinize decades-old conduct on the part of former diocesan leadership and personnel through the lens of contemporary standards and then, decades after the fact, to punish the Catholic community and its current leaders for such conduct applying contemporary standards and using current understandings regarding detection and prevention of child abuse. SB 1779 invites the application of contemporary laws, standards of conduct, and psychiatric understanding to decades-old conduct, which at the time was understood and treated very differently than it is today. This is anachronistic in the extreme. SB 1779 sweeps up the innocent with the guilty and, by creating new causes of action and new standards of recovery for injuries that are now decades old, irrespective of settlements that may have already been made

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for such injuries, violates constitutional guarantees with respect to due process, unlawful taking, interference with contract, bills of attainder, ex post facto penalties, and religious freedom.

"As late as the mid-1970s, the standard psychiatric textbooks either scarcely mentioned pedophiles or trivialized the condition, emphasizing that the behavior was 'a one-time activity.'" Jenkins at 67, citing A.W. Richard Sipe, *A Secret World, Sexuality and the Search for Celibacy* (1990), at 182-83. Though it may come as a surprise in light of present-day experience, opinions about the potential harm of sexual abuse at that time were as understated in the professional literature as estimates of its frequency. Jenkins at 89, fn 67 (noting a dominant view in the literature, as late as the 1970s, that abuse did not always or necessarily cause significant lasting harm). Views within the Church mirrored those prevalent in society at the time, namely, that such cases reflected a moral failing rather than a psychological addiction, and that the perpetrator could be effectively treated with appropriate professional therapy. As the late Cardinal John O'Connor of New York observed, it was assumed that a priest "had learned his lesson by being caught, reported and embarrassed." *Id.* at 91, quoting Peter Steinfels, "Policy is Issued on Investigating Abuse by Priests," N.Y. Times, July 2, 1993, p. A1; *see also Report of the Archdiocese of Los Angeles* at 3 ("Even as recently as ten years ago, there remained the belief that treatment of some kind could be effective and reliable, often qualifying a priest-offender to return to ministry").

SB 1779 is inherently unfair. It requires courts and juries to apply contemporary standards and understandings to decades-old conduct of former Church officials, many of whom may be deceased (or, if alive, are aged, infirm, and whose memories have dimmed over the ensuing decades), in responding to alleged wrongful conduct by priests and other church personnel, many of whom are also now deceased or unavailable.[21] On the basis of present-day

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[21] A national audit by an outside contractor found that a majority of new allegations related to claimed incidents that began or occurred between 1965 and 1974, and in most of these cases (80%), the priest or deacon charged with misconduct had been removed from ministry or was deceased, laicized, or missing. United States Conference of Catholic Bishops, *Report on the Implementation of the Charter for the Protection of Children and Young People* (Feb. 2005), at

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monetary values, SB 1779 permits juries to award damages for past acts or omissions found to violate present-day standards using contemporary damages standards. *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (noting that in both the civil and criminal context, the purpose of statutes of limitation is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared"), quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

Thirty or forty years ago, multi-million verdicts against employers—particularly churches—based upon the sexual misconduct of employees were unthinkable. Insurance policy limits in effect at the time most often reflected "worse case scenarios" in which verdicts in the hundreds of thousands dollars would be returned against employers for egregious acts of negligence. Multi-million dollar verdicts were unknown and, thus, not insured for at the time most of the revived claims arose. Hence, applying contemporary damage standards to decades old conduct creates an unconscionable (and patently punitive) disconnect between the level of insurance carried by dioceses in the 1960s and 1970s and the magnitude of 21st century verdicts in cases of this nature.

Moreover, SB 1779 eliminates legal defenses that would have been available *at the time the act or omission occurred.* The statute even purports to negate past settlement agreements, which contractual rights vested long ago. This is the sort of retroactive law-making, punishment, and interference with contract that the Constitution forbids.

The due process and ex post clause facto problems associated with such retroactive revival are manifest and multi-faceted.

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2. The experience in California is similar. *See* Bishop William K. Weigand, *An Open Letter to the People of the Diocese of Sacramento* (Jan. 10/11, 2004) (noting that of ten priests accused of misconduct, "two (2) are deceased, three (3) fled the country years ago, one (1) is a religious [rather than Diocesan] priest no longer in the Diocese, and one (1) has left the Church"), available at www.diocese-sacramento.org/PDFs_2004/newestopenletter7.pdf.

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First, ascertaining the truth in many, if not most, cases has been, and continues to be, a virtual impossibility because those with exculpatory information are now likely unavailable, deceased, or unable to recall decades-old events, making allegations of misconduct virtually impossible to defend against. *See Stogner v. California*, 539 U.S. 607, 611 (2003) (noting that the Ex Post Facto Clause ensures the provision of "fair warning" that might lead to the preservation of "exculpatory evidence"). It was precisely to guard against such injustice that statutes of repose were enacted in the first place.

Second, imposing present-day duties on past conduct based on present knowledge and standards, and removing defenses that would have been available at that time the claims arose, is fundamentally unjust because it imposes a penalty for past conduct, the very effects that the Ex Post Facto and Due Process Clauses are meant to guard against. *Stogner*, 539 U.S., at 611 (the Ex Post Facto Clause "protects liberty by preventing governments from enacting statutes with 'manifestly unjust and oppressive' retroactive effects.'", quoting *Calder v. Bull*, 3 U.S. 386, 391 (1798)); *Chenault v. United States Postal Service*, 37 F.3d 535 (9th Cir. 1994) ("a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme"); *Landgraf v. USI Film Prods., 507 U.S. 908*; 113 S.Ct. 1483, 1499, 1505 (1993) (government may not "attach[] new legal consequences to events completed before [the law's] enactment, ... impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"), quoted in *Rodriguez v. General Motors Corp.*, 27 F.3d 396, 398 (9th Cir. 1994).

Legislative attempts to revive expired tort claims are, as one might expect, rare. This is hardly surprising insofar as the excessive passage of time erodes the reliability, effectiveness, and fairness of the civil justice system. The events of two, three, four or five decades ago are difficult (if not impossible) to scrutinize with the precision a fairly administered system of justice requires. The only case of which we are aware involving a constitutional challenge to an attempt to revive expired sexual abuse tort claims holds that such an attempt violates the federal Due

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Process Clause. *Ackerman v. Ackerman*, 42 Va. Cir. 103, 1997 WL 1070559 (Va. Cir. Ct. April 3, 1997).

B. SB 1779 Represents a Wholesale Abrogation of Constitutionally-Protected Religious Liberty Rights.

By potentially disrupting the religious worship and charitable work for millions of Californians, specifically to punish Catholic institutions, SB 1779 violates the most fundamental of precepts regulating the behavior of the State – i.e., that the State has no business targeting any church or community of religious believers for punishment because of public or political antipathy regarding such church or faith community. *United States v. Ballard*, 322 U.S. 78 (1944); *Lundman v. McKown*, 530 N.W.2d 807 (Minn. App. 1995). Such a role could be no more alien to the nature of civil government in the United States. Thomas J. Curry, *Farewell to Christendom*, 5, 79 (2001) ("government has no power whatsoever to interfere with the religious freedom citizens already possess by natural right…"). This is not the Church retreating behind some archaic exception to the rule of law. It is the rule of law found in the Religion Clauses of the Constitution, that government lacks the power to intend to single out and punish churches and the government must not disrupt (and in a sense punish) the work of religious charity.

1. SB 1779 Targets the Catholic Church for Punishment.

We recognize the State has a special responsibility to protect the common good of society, especially by punishing those who do wrong. But justice tempers this power in at least two ways – by assuring that those who do wrong are timely brought to justice and avoiding unique penalties. Targeting religious groups for punishment likewise violates a fundamental principle of the Religious Clauses of the First Amendment. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). The government cannot overtly or covertly discriminate against religion. This is especially true when the government identifies a specific religion or religious doctrine for approbation. *Id.* at 532-33.[22]

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[22] One would be tempted to cite the cases involving the targeting of the Church of Jesus

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The record before this Court amply demonstrates that, in enacting SB 1779 in 2002, the Legislature was responding to unprecedented national media attention focused upon the sexual abuse crisis in the Catholic Church and specifically targeted to the legislation upon the Catholic Church in California. The enactment of SB 1779 during the summer of 2002 was no mere coincidence, nor did the author of the bill, Senator Burton, make any secret, as Counterclaimants note, of the fact that his bill was directed to the Catholic Church. Such being the case, we respectfully submit that the arguments regarding targeting asserted by Counterclaimants are well-taken and that SB 1779 runs afoul of the First Amendment's Religion Clauses.

2. *Targeting a Charitable Organization for Financial Destruction is Contrary to the Public Good and Runs Afoul of the First Amendment When that Charitable Organization is a Church.*

"[C]haritable organizations are important to the maintenance of a free, diverse, and prosperous democracy." Catharine Pierce Wells, *Church, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy*, 44 B.C. L. Rev. 1201, 1209 (2003). For that reason, government's role vis-à-vis charities have been not to regulate them like commercial activities, but rather to protect their functioning. *Id.* at 1209 ("the government does not regulate charities in the same way that it regulates car dealers"; "[i]nstead, the model for government action has been oversight rather than regulation,...empowerment rather than constraint"). Government's protective role with respect to charities is vividly illustrated by cases in which, through the doctrine of charitable trusts or other means, the government (usually a State Attorney General) seeks to protect a charity's assets so that they are used in a manner consistent with the donors' intent. This is to ensure that the charity's work is not disrupted.

Christ of Latter-day Saints as evidence that it might be legitimate to target conduct that harms society, even if religiously motivated. See *Reynolds v. United States*, 98 U.S. 145, 166 (1879) (court discusses social harms from polygamy). Here however and prescinding from the principal argument, it must be noted that the counseling of the accused which the legislature excludes as a reasonable act was part of how society in general treats abusers when it recognizes that mental illness is present. See Jenkins at 83-94 (discussing historic responses to pedophilia and child abuse). Indeed dioceses offer counseling to victims as well. Polygamy, on the other hand, seemed to be practiced only within limited communities.

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SB 1779 inverts these values. Instead of protecting charitable assets, the California Legislature has facilitated the invasion of those assets it once protected by reviving previously barred claims by private parties, however old and regardless of whether those claims had been previously settled. By doing so, the government assumes a power that is totally foreign to its historic role in protecting charities. Wholly ignored and disadvantaged are the many potential beneficiaries of the dioceses' charitable work. What the Legislature has done, we submit, is to treat charities like a commercial enterprise in total disregard of government's traditional role with respect to charities.

The legislative record and arguments of the diocesan plaintiffs in this case indicate that the Legislature acted against the background of an unparalleled outpouring of public antipathy and negative media attention directed at the Catholic Church, its bishops, clergy, and lay leaders. We do not intend to suggest, or even imply, that this crisis was not of our own making or that it is the product of the media—serious crimes have been committed and grave injury has been inflicted in our own faith community in part as a result of decisions made decades ago by the bishops of our Church. The bishops, individually and together, have acknowledged the mistakes made, have taken responsibility for the harm done to our own children, and have been working proactively to heal those injured and ensure that this never, ever happens again in our Church. Our Catholic community is paying dearly for the past mistakes of its leaders, not only through the torrent of litigation that has beset our Church, but through numerous, programs of victim outreach and assistance, the voluntary mediation of claims and demands, and expressions of charity in response to our Gospel call to aid those in need. There have also been serious consequences for the bishops of the United States, which consequences have come in the form of declining financial support, public suspicion and distrust, and diminished credibility as advocates of the Christian message in American society. Mark F. Chopko, *Shaping the Church*, 53 Cath. U. L. Rev. at 154-156.

But public antipathy and negative media attention obscure the fact that:

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- The overwhelming number of abuse incidents occurred in the period from the late 1960's to the early 1990's, by perpetrators who are already out of ministry under Bishops who are no longer in charge of those dioceses for the most part; and,

- The Church of today differs significantly from the Church of the 1960's, 1970's and 1980's, as does society, in its handling of abuse and abusers.

Groups in an adversarial position to the Church argue that, because relatively little punishment (by today's standards) was meted out when the incidents occurred decades ago, this kind of punishment imposed by SB 1779 is justified to bring wrongdoers to justice. But the wrongdoers—those priests and Church employees who committed unspeakable criminal acts of abuse upon our children--are not punished by SB 1779. Indeed, trial courts in California have held, correctly based upon the plain language of the statute, that SB 1779 does not revive claims against the perpetrators—its scope is limited to diocesan and institutional employers. SB 1779 gives the perpetrator a free pass and, instead, targets the institutional Church for punishment. Holding a church accountable for the crimes of its clergy and employees, while at the same time allowing the actual perpetrators of the crimes to be free of any responsibility for their own crimes is simply unjust, if not unconscionable. Indeed, such a "through the looking glass" system is, perhaps, the best evidence that SB 1779 is not an effort to bring wrongdoers to justice, but rather a bald attempt to target and punish the Catholic Church fueled by unprecedented media attention.

The dioceses in California and elsewhere have learned from better knowledge about offenders and improvements in child protection, and have acted to ensure that such crimes and misconduct do not happen again. We have made great progress, but recognize that more work needs to be done and have committed ourselves collectively (as bishops, priests, religious sisters, and lay leaders) to doing what needs to be done to ensure that our Church is a safe, supportive, and welcoming environment for children and young people. The leadership of the Church has committed itself to take every possible effort to ensure that our children are protected and that wrongdoers are swiftly and effectively dealt with in a responsible manner.

In enacting SB 1779, the California Legislature, acting with caprice and in response to a tidal wave of public obloquy, ignored all of this and, in an unprecedented act of legislative

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vindictiveness, elected to impose grave punishment upon the Catholic Church. We submit that, in the American constitutional system of government, which places a premium upon fairness, respect, and equal justice under law, this cannot stand. As Counterclaimants have ably argued, SB 1779 offends the Constitution and must be declared invalid.

3. Provisions in SB 1779 Depriving Defendants Access to the Certificate of Corroborative Fact are Facially Invalid Based on the Fourteenth Amendment Due Process Clause.

SB 1779 requires the plaintiff's attorney to file a certificate of corroborative fact before any defendant sued as a "Doe" defendant can be specifically named in an action brought under this section. Code Civ. Proc. § 340.1(m). Procedurally, the plaintiff applies to the court for permission to amend the complaint to substitute the name of the defendant for the fictitious designation. Code Civ. Proc. § 340.1(n). Substantively, in the certificate of corroborative fact the attorney must declare he has discovered one or more facts corroborative of one or more of the charging allegations against the defendant., setting forth in clear and concise terms the nature and substance of the corroborative fact. Code Civ. Proc. § 340.1(n)(1). For purposes of section 340.1, a fact is corroborative of any allegation if it confirms or supports the allegation. *Id.*

If the application to name a defendant is made prior to the appearance in the action, neither the application nor the certificate of corroborative fact are to be served on the defendant. Code Civ. Proc. § 340.1(n)(2). Where the application to name a defendant is made after that defendant's appearance in the action, the application must be served on all parties, but the certificate of corroborative fact shall not be served. *Id.* at subdivision (n)(3). The court reviews the application and certificate of corroborative fact *in camera* and if one or more of the corroborative facts has been shown the court issues an order allowing the plaintiff to amend the complaint. Code Civ. Proc. § 340.1(o). Finally, section 340.1 states, "[t]he court shall keep under seal and confidential from the public and all parties to the litigation, other than the plaintiff, any and all certificates of corroborative fact files pursuant to subdivision (n)."

The Fourteenth Amendments provides that no state government shall deprive any person "of life, liberty, or property, without due process of law." U.S. Const. Amend. 14, § 1. The

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Fourteenth Amendment imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. "A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 33 (1981). As this court is well aware, applying the Due Process Clause is an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. *Id.* at 24-25. The first inquiry in every due process challenge is whether the aggrieved party has been deprived of a protected interest in "property" or "liberty." Only after finding the deprivation of a protected interest does the court look to see if the State's procedures comport with due process. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. *United States v. Provencio*, 554 F.2d 361, 362 (9th Cir., 1977). The Constitution guarantees to an accused that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation and of cross-examination. *United States v. Harber*, 53 F.3d 236, 243 (9th Cir., 1995).

Fundamental fairness demands that any witness who presents statements to the court should, upon timely demand by any party, appear like any other witness and testify subject to the rules of evidence and the right of cross-examination. The same standard equally applies to documentary evidence relied upon by the attorney in his or her certificate of corroborative fact. Accordingly, due process of law mandates the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence.

Furthermore, where evidence filed under seal goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed. Only under extremely limited circumstances, should a party to a civil action be able to file documents sealed from the opposing party's view. It is difficult to conceive of any circumstances, however, which would permit a

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party to a civil action to file documents going to the merits of the action yet unavailable to the defendant.

Fundamental fairness requires evidence presented in the attorney's certificate of corroborative fact be disclosed to institutional defendants for their review and response. The ex parte *in camera* review and sealing of evidence is facially invalid and violates the church defendants' constitutional right of procedural due process by denying them the opportunity to challenge evidence and confront and respond to witnesses relied upon in the attorney's certificate of corroborative fact. The statements of corroborative fact have direct bearing, and pertain expressly to, factual information going to the merits of the claims against the accused defendants. The certificates of corroborative must fact set forth in clear and concise terms the nature and substance of the corroborative fact supporting the claims against the defendant. Code Civ. Proc. § 340.1(n)(1). The plaintiff, his or her counsel, and the court all have access to, and an opportunity to review, these pleadings, which have substantive bearing upon the merits of the plaintiff's complaint.[23] The defendants, in stark contrast, are prohibited from knowing what "corroborative facts"—facts placed into the record before the trial court, no less—purportedly support the plaintiff's claim. SB 1779 expressly deprives the accused defendants of access to these documents, denying them their Fourteenth Amendment right to confront and cross-examine opposing evidence and, in view of such evidence, to oppose with their own evidence. Leaving defendants in the dark about facts stated in sworn pleadings filed with the trial court going to the very substance of the claims made in the plaintiff's complaint smacks of the ancient "star

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[23] This particular provision of SB 1779 has been used by plaintiffs' attorneys throughout the State to argue that SB 1779 precludes defendants from reviewing not only the certificates of corroborative fact, but the certificates of merit required by Code Civ. Proc. § 340.1(g). Subdivision (g) of Section 340.1 includes no requirement that such certificates of merit be sealed, in contrast to subdivision (o) pertaining to certificates of corroborative fact. The certificates of merit have been held, by California appellate courts, to constitute "an aspect of the complaint" itself. See *Doyle v. Fenster* (1996) 47 Cal. App. 4th 1701, 1707. Yet, to date, state trial courts have consistently denied defendant full access to certificates of merit, as well as certificates of corroborative fact. Thus, SB 1779's disturbing and pernicious provisions depriving an accused defendant access to substantive factual allegations made in pleadings filed with the court have been twisted by plaintiffs' attorneys into a basis for addressing the merits of their clients' claims before the court, but without the knowledge of the defendant or affording the defendant an opportunity to meet and confront such factual allegations.

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chamber" and has no place in the fair and equal administration of justice. The provisions of SB 1779 related to certificates of corroborative fact are fundamentally unfair and violate Fourteenth Amendment Due Process guarantees. For this reason alone, SB 1779 is facially invalid.

II. CONCLUSION

The demand for relief is this case is extraordinary, but we believe that SB 1779 was and is extraordinarily unjust. Just as abusing minors was wrong, so too is the Legislature's attempt to punish Catholic institutions in California today, for actions or omissions of, for the most part, a generation ago. The State is not acting in pursuit of legitimate penal ends through the criminal law to bring perpetrators to justice; it is opening the charitable coffers of religious institutions, which are essentially defenseless through the passage of time and the fading of memories and which the Legislature rendered defenseless by refusing them the ability to rely on counseling abused and abuser alike as a means of healing and human compassion. To make matters worse, the Legislature has deprived defendants of the ability to review substantive evidence bearing upon the merits of the case that has been filed with, and reviewed by the trial court. A more blatantly unfair and an unjust system is difficult to imagine.

Punishing the dioceses and other religious institutions in California today can only set back the good work already being accomplished. The public record establishes clearly the historical nature of the problem, and the accountable and transparent Church of today does not harbor abusers. Indeed as Pope John Paul II made clear, "there is no place in the priesthood or religious life for those who would harm the young." No matter what results from the instant case the dioceses in California and elsewhere will continue to reach out to victims and seek a healthy and just resolution of their grievances against the Church. No effort by the Legislature is needed to achieve this result. On the contrary, the record built by SB 1779 so far indicates that the dioceses in California risk joining their sister dioceses in other states in bankruptcy and jeopardize the ability to continue to advance the work of worship and service by draining their resources in litigation.

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This result is not only unconstitutional, it is unjust. Counterclaimants' Motion for Summary Judgment should be granted.

DATED: June 17, 2005 SWEENEY, DAVIDIAN & GREENE LLP

By: _____
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CERTIFICATE OF SERVICE
[Fed.R.Civ.P. 5(b), 5(d), 6(e); LR 5-135]

CASE NAME: *Melanie H. v. Defendant Doe 1, et al, and related actions*
CASE NO.: *04 CV 1596 WQH (JFS)*

I, NICOLE D. BAYNE, declare as follows:

I am over the age of 18 years and not a party to the within action. My business address is 8001 Folsom Boulevard, Suite 101, Sacramento, California, 95826.

On June 17, 2005, I served the following document(s):

BRIEF OF AMICI CURIAE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND THE CALIFORNIA CATHOLIC CONFERENCE IN SUPPORT OF COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT

X **by mail** on the following party(ies) by placing a true copy thereof enclosed in a sealed envelope for mailing in the United States mail, postage prepaid, at Sacramento, California.

____ **by personal delivery** a true copy thereof to the person(s) and at the address(es) set forth below.

____ **by overnight delivery** on the following party(ies) by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, addressed as set forth below. The courier picks up that same day for delivery the following business day.

____ **by facsimile transaction** to the party(ies) set forth below at the facsimile number(s) indicated.

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I declare under penalty of perjury that the foregoing is true and correct and that this document was executed on June 17, 2005.

NICOLE D. BAYNE

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