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Submitted Electronically

Senate Appropriations Committee
California State Capitol
State Capitol, Room 2206
Sacramento, CA 95814

RE: **Support for Senate Bill 360 (Hill)**

Dear Committee Members:

The California Civil Liberties Advocacy is writing to express **support** for Senate Bill 360. If enacted, SB 360 would remove the exemption for clergy-penitent communications involving child abuse or neglect. We strongly feel that SB 360 will not have a significant fiscal impact on California, but even so we also believe that this important legislation deserves consideration as a matter of equal protection being extended to children raised in religious households. Some of the issues we hereby submit for consideration include the cost of adjudicating and incarcerating noncompliant members of California's clergy, costs offset by court-imposed and statutory fees, and indirect cost reductions yielded by enhanced child abuse prevention afforded by this bill.

In order to properly determine the number of clergy members who may fail to report and thus increase the caseloads in California's criminal justice system, it is important first to note the doctrinal practices of each faith, the types of penalties imposed for noncompliance, along with the proportion of membership of those denominations.

According to the New World Encyclopedia, Roman Catholics believe that confidentiality of all statements made during confession is absolute and priests may not reveal what they learn during a confession.ⁱ Eastern Orthodox and Eastern Catholics may choose an individual they trust, which is usually a parish priest, but may be any individual, male or female, who receives permission from the bishop to hear confession; the seal of the confessional is treated the same way as the Roman Catholic belief.ⁱⁱ Protestants, on the other hand, believe that no intermediary is necessary between the believer and God, instead confessing their sins in private prayer. Confession is sometimes encouraged when wrongs are committed against other human beings, in which confession is then made to the victim as part of reconciliation, while public confession

"Indifference to personal liberty is but the precursor of the state's hostility to it."

— Justice Kennedy, U.S. Supreme Court

is often a prerequisite for readmission.ⁱⁱⁱ In Anglican tradition, there is no requirement for private confession, but is permissible,^{iv} while other Protestant denominations have no formal tradition of confession or absolution.^v Buddhists confess their wrongdoings directly to Buddha,^{vi} while in Judaism, confession is made to God and not to man, except in asking forgiveness from the victim.^{vii} The same is true of Islam, in that confession is made directly to God, or Allah.^{viii} The Mormon church, however, requires confession to the bishop when a member commits sins that “affect a person’s church membership” while the “sin and repentance process are kept private unless the sinner himself chooses to violate that privacy.”^{ix} Jehovah’s Witnesses, however, do not clearly state their view of confession or absolution, only that they believe that “[i]n matters involving serious violations of God’s law, responsible men in the congregation would have to judge matters and decide whether a wrongdoer should be “bound” (viewed as guilty) or “loosed” (acquitted),” and that clergy members are guided by “God’s holy spirit and in harmony with God’s directions given through Jesus Christ and the Holy Scriptures.”^x According to Pew Research Center, about 72% of adults in California adhere to some form of religious belief.^{xi} Of this statistic, the overwhelming majority are Christian, with 32% Protestant, 28% Catholic, 1% Orthodox Christian, 1% Mormon, 1% Jehovah’s Witnesses, and 1% designated as “Other Christian.”^{xii} And the Bureau of Labor Statistics reported that there were 5,620 clergy members in California in 2018.^{xiii} Based on the doctrinal practices discussed above, it would appear that the groups most likely to refuse compliance with SB 360, if passed, would be clergy members in California’s Catholic, Mormon, and possibly Jehovah’s Witnesses populations, or about 30% of California’s clergy.

Some organizations have been found to wrongly invoke clergy-penitent privilege, using it as a shield from government inquiries and matters for which it has no application. For instance, some of these institutions conduct disciplinary investigations into violations of their own rules and beliefs, which may include criminal conduct, in order to render church discipline and to prepare for litigation.^{xiv} And documented cases reveal that such communications are freely discussed, documented, and distributed among church leadership, in which clergy-penitent privilege is often invoked.^{xv} In other cases, priests have admonished victims to remain silent about abuse and to “ ‘sweep it under the floor and get of rid it’ because “too many people would be hurt” if the victim were to disclose the abuse to others.^{xvi} These are not the kinds of situations in which clergy-penitent privilege may be invoked. Evidence Code § 1032 defines the privilege as “a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who . . . is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.” The plain meaning of this statute has been affirmed by *Conti v. Watchtower Bible & Tract Society of New York, Inc.*^{xvii}, *Roman Catholic Archbishop of Los Angeles v. Superior Court*^{xviii}, and *People v. Edwards*^{xix}. Since the courts have already made clear that, pursuant to Evidence Code § 1032, a penitential communication cannot be disclosed to a third party, removing the exemption for child abuse and neglect reporting will do no more damage to the seal of the confessional (as claimed by this bill’s opponents) than has already been done by the religious entities who seek to invoke it. Abuse and neglect victims seeking help from a clergy member do not qualify as a penitential

communication. Third-party reports by others who reasonably suspect abuse do not constitute a penitential communication. When applied properly, clergy-penitent privilege does not operate in the same way as attorney-client privilege, which has its own limitations subject to the law. Thus, the passage of SB 360 should not significantly increase the number of reports, but instead will clarify California's public policy on child abuse and neglect so that clergy members who fail to report can be held accountable, including third-party clergy members who learn of the abuse from fellow clergy members, who themselves break the seal of the confession.

The California Penal Code provides two types of noncompliance with different fines and penalties. PC § 11166(c) provides that failure to report a known or reasonably suspected incident shall be punished by up to six months in county jail, a \$1,000 fine, or both.^{xx} PC § 11166.01(a) provides for the same, while subdivision (b) provides that willfully failing to report, or inhibiting the reporting of abuse or neglect, where the abuse or neglect results in death or great bodily injury, shall be punished by up to one year in county jail, a \$5,000 fine, or both.^{xxi} It is unrealistic to predict that all 5,620 California clergy will be prosecuted for willfully failing to report child abuse or neglect. Interestingly, the number of prosecutions against mandated reporters is already very low. According to the San Bernardino Sun^{xxii}, from 2012 to 2017, less than one dozen workers in Los Angeles, Orange, San Bernardino, and Riverside counties were prosecuted for failure to report. It is impossible to tell how many members of the clergy may refuse to comply with SB 360 if passed. As mentioned, it is unlikely that all 5,620 clergy members will learn of and fail to report child abuse or neglect, especially all at once, unless there were a concerted effort by the priesthood to cover up the abuse.^{xxiii} If the data provided by Pew Research and the Bureau of Labor Statistics is correct, then it may be assumed that, as an extreme example, 30% of California's clergy may become noncompliant with the law at some point, based on their doctrinal practices (see above). The latest data available on jail costs comes from a report issued by the Board of State and Community Corrections, which reported the average daily cost to house an inmate in county jail to be \$113.87 per day.^{xxiv} If a clergy member was detected as having failed to report child abuse willfully under PC § 11166.01, they could face up to a year in jail. Multiplied by \$113.87, the total cost to house an inmate would come to \$41,562.55. Other costs include an estimated average of \$380 in court costs, as reported by the Legislative Analyst's Office.^{xxv} If all 1,686 clergy members were convicted over a period of 10 years, the state could be faced with nearly \$7.1 million per year in court and county jail costs. But this would necessarily mean that about 169 clergy members per year would be detected, prosecuted, and convicted. This presents two problems: (1) whether it is reasonable to assume that as many as 169 clergy members will be convicted each year and (2) if that is a reasonable number, then can California afford the ethical and moral toll of allowing such a high rate of clergy members to conceal child abuse and neglect? In 2015, in all 58 counties, 500,976 children were reported as suspected victims of child abuse and neglect.^{xxvi} How many more cases could be detected before children have to endure repeated abuse or neglect? Even as a fiscal matter, California's lawmakers cannot ignore the moral impact of this policy and must prioritize society's most vulnerable above less urgent budget considerations.

There are, of course, cost offsets. The example above assumes that clergy members would fall into the category of defendants prosecuted under PC § 11166.01, incurring a \$5,000 maximum fine. A recent report issued by the Assembly Public Safety Committee found that defendants typically pay court-related fines and fees at an average amount of \$13,607.00^{xxvii}. Assuming the maximum fine is assessed, along with the additional court fees, costs could be offset by nearly \$3.1 million per year, reducing the hypothetical number of \$7.1 million to about \$4 million annually, in a worst-case scenario. Indirect cost offsets would come in the form of preventing abuse from occurring or continuing. In a comprehensive study in Santa Clara County, it was found that “[t]he total annual economic burden of child abuse in Santa Clara County is \$628.9 million.”^{xxviii} And the total costs to ten Bay Area counties using verified cases of abuse totaled \$2.2 billion annually! The long-term effects of passing SB 360 remain to be seen, but it is reasonable to assume that if child abuse can be detected and treated as early as possible, or prevented altogether, the cost savings to the state would be astronomical.

For all of the abovementioned reasons, the CCLA urges an Aye vote on SB 360 because children deserve the equal protection of the law, regardless of the religious propensities of their parents or caretakers; because combatting child abuse should take precedence over less urgent fiscal matters, and because we strongly believe that SB 360 will result in long-term cost savings to the state, thus reducing any ostensibly significant fiscal impact.

Very truly yours,



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Cc: Senator Anthony Portantino (Chair)
Senator Patricia Bates
Senator Steven Bradford
Senator Jerry Hill
Senator Brian Jones
Senator Bob Wieckowski

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- ⁱ Confession of Sins - New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Confession_of_Sins (last visited Apr 17, 2019).
- ⁱⁱ Ibid.
- ⁱⁱⁱ Ibid.
- ^{iv} Ibid.
- ^v Ibid.
- ^{vi} Ibid.
- ^{vii} Ibid.
- ^{viii} Ibid.
- ^{ix} How Do Mormons Confess Their Sins?, How Do Mormons Confess Their Sins? (2009), <https://mormonchurch.com/651/mormons-confess-their-sins> (last visited Apr 15, 2019).
- ^x Confession of Sins—Man’s Way or God’s?, Watchtower ONLINE LIBRARY (1991), <https://wol.jw.org/en/wol/d/r1/lp-e/1991201> (last visited Apr 15, 2019).
- ^{xi} Religion in America: U.S. Religious Data, Demographics and Statistics, Pew Research Center's Religion & Public Life Project (2015), <https://www.pewforum.org/religious-landscape-study/state/california/> (last visited Apr 15, 2019).
- ^{xii} Ibid.
- ^{xiii} Occupational Employment and Wages, May 2018 21-2011 Clergy, Occupational Employment Statistics (2019), <https://www.bls.gov/oes/current/oes212011.htm> (last visited Apr 15, 2019).
- ^{xiv} Ruth Gledhill, Judge questions whether confession privilege should extend to Jehovah's Witnesses | Christian News on Christian Today (2015), <https://www.christiantoday.com/article/judge-questions-whether-confession-privilege-should-extend-to-jehovahs-witnesses/70169.htm> (last visited Apr 16, 2019).
- ^{xv} Recent Clergy Privilege Case Serves as a Tale of Caution, (2016), <https://telioslaw.com/blog/recent-clergy-privilege-case-serves-tale-caution> (last visited Apr 16, 2019).
- ^{xvi} Jack Jenkins, Unholy secrets: The legal loophole that allows clergy to hide child sexual abuse (2016), <https://thinkprogress.org/unholy-secrets-the-legal-loophole-that-allows-clergy-to-hide-child-sexual-abuse-9a6899029eb5/> (last visited Apr 17, 2019).
- ^{xvii} *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214 (“The privilege for penitential communications does not apply unless the communication is made in the presence of no third person so far as the penitent is aware.”)
- ^{xviii} *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 (“Clergy-penitent privilege did not apply to subpoenaed documents that were part of a grand jury investigation into whether church priests had sexually molested children . . . inasmuch as the priests were aware that their communications were likely to be transmitted to third persons, including the vicar for clergy.” “In order for a statement to be privileged under the clergy-penitent privilege, it must satisfy all of the conceptual requirements of a penitential communication: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and (3) such member of the clergy must have a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret.”)
- ^{xix} *People v. Edwards* (1988) 203 Cal.App.3d 1358, certiorari denied 489 U.S. 1027 (“Theft defendant's confidential statements to Episcopalian priest did not constitute “penitential communication” privileged from nonconsensual disclosure, in view of priest's testimony that . . . when he offered to help, requiring that confidential subject matter be divulged, defendant willingly agreed.”)
- ^{xx} Pen. Code § 11166, subd. (c).
- ^{xxi} Pen. Code §§ 11166.01.
- ^{xxii} Beau Yarbrough & Beau Yarbrough, If child abuse is so rampant, why are prosecutions so rare for those who fail to report it? (2018), <https://www.sbsun.com/2018/05/11/if-child-abuse-is-so-rampant-why-are-prosecutions-so-rare-for-those-who-fail-to-report-it/> (last visited Apr 17, 2019).
- ^{xxiii} Richard Winton, Teen molested by Catholic school teacher gets record \$8 million from L.A. archdiocese (2019),

<https://www.latimes.com/local/lanow/la-me-archdiocese-sex-abuse-settlement-20190416-story.html> (last visited Apr 16, 2019).

^{xxiv} Gary Wion, Average Daily Cost to House Inmates in Type II and III Local Detention Facilities (2012).

^{xxv} California's Criminal Justice System: A Primer (2013), <https://lao.ca.gov/reports/2013/crim/criminal-justice-primer/criminal-justice-primer-011713.aspx#4> (last visited Apr 17, 2019).

^{xxvi} Reports of Child Abuse and Neglect, Kidsdata.org, <https://www.kidsdata.org/topic/1/childabuse-reports/> (last visited Apr 16, 2019).

^{xxvii} Financial Implications of Criminal Justice Fines and Fees, (2019).

^{xxviii} The Economics of Child Abuse: A Study of Santa Clara County, [https://www.sccgov.org/sites/cac/Documents/EconomicsOfAbuse_SantaClara%20\(1\).pdf](https://www.sccgov.org/sites/cac/Documents/EconomicsOfAbuse_SantaClara%20(1).pdf)