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California Civil Liberties Advocacy
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Tuesday, March 26, 2019

Senator Jerry Hill
California State Capitol
Room 5035
Sacramento, CA 95814

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

Dear Senator Hill:

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. With all of the rhetoric in today's media about "religious liberty," we feel it is important to provide some background to the CCLA's rationale for supporting SB 360, and for even bringing the matter before this legislature starting in 2018. The CCLA feels that the U.S. Supreme Court's holding in *Employment Division v. Smith* (1990) should inform this Legislature on matters purported to infringe on "religious liberty" as interpreted by religious institutions. Likewise, the CCLA believes that religious institutions have failed to uphold the rights and liberties of children subjected to abuse or neglect, and a rational basis for regulating clergy-penitent privilege exists in the fact that the privilege is a statutory invention, not borne of the common law.

Religious Liberty or Religious Dominionism?

The concept of "religious liberty" has become a changeling of sorts, substituted by the very narrow view espoused by conservative religious institutions and political candidates. The crux of the issue is stated plainly by the Family Research Council, in that "[t]he whole idea of religious freedom came from the notion that man has an obligation to laws higher than human laws—the laws of God," and further that, "[h]uman beings can only have an obligation to follow God's law over human law."ⁱ The flaw in this reasoning is *ipso facto* unconstitutional because it presumes the state recognizes the existence of a given religious institution's deity. Because the state has no business establishing a religion for citizens to adhere to, the state must be indifferent

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

— Justice Kennedy, U.S. Supreme Court

(but not hostile) as to the existence of deities and the veneration thereof. Likewise, the Heritage Foundation argues for a “return of religion and faith-based institutions to their central role in the nation’s civic and public life.”ⁱⁱ Such statements smack of “religious dominionism,” described by another religious institution as follows: “Christian Dominionists believe that God desires Christians to rise to power through civil systems so that His Word [sic] might then govern the nation . . . the idea that God wants only Christians to hold government office and run the country according to biblical law is called ‘hard dominionism.’”ⁱⁱⁱ But if believers of various faiths and nonbelievers alike are to coexist in a peaceful society, then the “laws” of a given deity (which are often left to doctrinal interpretation), cannot trump the “laws” of another given deity, or impose their “laws” upon nonbelievers. Even the Family Research Council states that “[f]or religious freedom to work, everyone must agree to the same standard of protection for everyone else—regardless of their faith.”ⁱ Though the CCLA largely disagrees with the bulk of the Family Research Council’s literature, we can find very narrow agreement with the spirit of such a statement. Indeed, for a society to embrace true religious liberty, we must all agree to the same standard of protection regardless of an individual’s belief, or nonbelief. That standard cannot promulgate or impose religion, whether one or many, upon unwilling citizens.

United States Supreme Court versus the Religious Freedom Restoration Act of 1993

In *Employment Division v. Smith*^{iv}, the late Justice Scalia, writing for the majority of the U.S. Supreme Court, held that an individual’s religious beliefs do not excuse them from compliance with an otherwise valid and neutral law prohibiting conduct that the state is free to regulate, and that, while the First Amendment protects the right of individuals to believe whatever they wish, it does not necessarily protect the right to act on those beliefs. The decision energized religious institutions and civil liberties groups alike to lobby Congress for what ultimately became the Religious Freedom Restoration Act of 1993 (RFRA). According to Americans United for Separation of Church State, the law was intended to protect the right of religious expression, “it was meant to be a shield, not a sword.”^v Over the years, the RFRA has been broadly interpreted; for example, the U.S. Department of Justice released a memo on religious liberty guidance that effectively allows taxpayer-funded organizations, corporations, and individuals to use religion as a basis to discriminate against others.^{vi} That particular issue is beyond the scope of SB 360, but it serves to illustrate our point that the reaction to the Supreme Court’s holding in *Smith* has been disproportionate. In 2018, Senator Kamala Harris introduced the Do No Harm Act, which would have made the RFRA inapplicable to laws or the implementation of laws that, among other things, “protect against child

labor, abuse, or exploitation.”^{vii} The “No Harm Principle” is based on the ideology that, while the government has no business interfering with individual beliefs, there must be a limit: when a religious actor’s conduct causes harm to another person.^{viii} Thomas Jefferson once wrote that “[t]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”^{ix} In sum, the CCLA takes the position that the government may not regulate belief or conscience, but that bad actors should not be afforded the opportunity to hide behind the façade of “religious liberty” in order to escape criminal and civil liability for reprehensible conduct; thus, the No Harm Principle.

The Problem

According to the U.S. Supreme Court, the purpose of the clergy-penitent privilege is to fulfill “the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”^x The privilege should be protected but not to an unlimited degree. It is therefore interesting to note that the privilege in the United States did not exist at common law but was rather the product of statute enacted by state legislatures that was intended to be narrowly construed.^{xi} In a throwback to the sanctuary laws of old England, predating the common law, many organizations conduct similar disciplinary investigations of violations of their own rules and beliefs, including criminal conduct, in order to render church discipline and prepare for litigation.^{xii} And documented cases reveal that such communications are freely discussed, documented, and distributed among church leadership, in which clergy-penitent privilege is often invoked.^{xiii} In other cases, priests have admonished victims to remain silent about abuse and “‘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.”^{xiv} “According to the Catholic Catechism, the act of confession is an intrinsically private communion between God and the sinner, with the priest as mediator.”^{xv} But it is clear that religious entities have failed to uphold their own principle—a principle protected under California law.

The Solution

By removing the exemption for clergy-penitent privilege, California law will ensure that incidences of child abuse and neglect no longer go unreported. Religious institutions have had decades to address this matter internally and they have utterly failed to do so. Had the matter been properly addressed by “God’s law” then this issue

would not be before the Legislature today. Abusers will no longer be protected by the “sanctuary” provided by religious institutions and abuse survivors will no longer be silenced by clerics who admonish them not to disclose the matter to anyone else. If enacted, SB 360 will rightfully restore the civil liberties of society’s most vulnerable, and ensures that children receive the equal protection of the law. To quote the activist-pastor Jonathan Wilson-Hartgrove, “My First Amendment rights end where my neighbor’s Fourteenth Amendment rights begin.”^{xvi}

For all of the abovementioned reasons, the CCLA strongly **supports** SB 360.

Very truly yours,



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Cc: Senate Public Safety Committee
Senator Nancy Skinner (Chair)
Senator John Moorlach (Vice Chair)
Senator Steven Bradford
Senator Hannah-Beth Jackson
Senator Holly Mitchell
Senator Mike Morrell
Senator Scott Wiener

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- ⁱ Weber, *Religious Liberty: An Introduction to Our Freedom to Believe* (2017) Family Research Council.
- ⁱⁱ Spalding, *The Meaning of Religious Liberty* (2007) The Heritage Foundation.
- ⁱⁱⁱ GotQuestions.org, *What is Christian dominionism?* (2012) Got Questions Ministries.
- ^{iv} *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872.
- ^v Boston, *An Important Religious Freedom Law Turns 25 – And It's Time For A Tune-Up* (2018) Americans United for Separation of Church and State.
- ^{vi} Office of the Attorney General, *Implementation of Memorandum on Federal Law Protections for Religious Liberty* (2017) U.S. Department of Justice, Washington, D.C.
- ^{vii} *Do No Harm Act, S. 2918* (2018) 115th Cong.
- ^{viii} Hamilton, *God vs. the Gavel: The Perils of Extreme Religious Liberty*. (2014) 2nd ed., Cambridge University Press, New York, NY.
- ^{ix} Jefferson, *Notes on the State of Virginia with an Appendix* (1965) H. Sprague, Boston, MA.
- ^x *Trammel v. U.S.* (1980) 445 U.S. 40, 51.
- ^{xi} Pudelski, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World* (2004) 98 N.W.U L. Rev. 703, 708.
- ^{xii} Gledhill, *Judge questions whether confession privilege should extend to Jehovah's Witnesses* (Nov. 10, 2015) Christian Today.
- ^{xiii} *Recent Clergy Privilege Case Serves as a Tale of Caution* (Nov. 16, 2016) TeliosLaw.
- ^{xiv} Jenkins, *Unholy Secrets: The legal loophole that allows clergy to hide child sexual abuse* (Aug. 8, 2016) ThinkProgress.
- ^{xv} Deagon, *Religious freedom, the confessional and the Royal Commission* (Sep. 27, 2017) Asia & The Pacific Policy Society.
- ^{xvi} "Church, State, & Trump." NBC News. MSNBC. (Aug. 1, 2018) New York, N.Y.