



<http://www.caliberties.org/>

California Civil Liberties Advocacy
1017 L Street, No. 791
Sacramento, CA 95814
(916) 426-9338

Wednesday, July 3, 2019

Submitted Electronically

Assembly Public Safety Committee
1020 N Street Room 111
Sacramento, California 95814

RE: **Support for Senate Bill 360 (Hill): Clergy-Penitent Privilege**

Dear Committee Members:

The California Civil Liberties Advocacy is writing to express **support** for Senate Bill 360 (SB 360). If enacted, the current version of SB 360 would clarify the definition of clergy-penitent privilege for purposes of exemptions under the Child Abuse and Neglect Reporting Act (CANR).ⁱ Additionally SB 360 will remove the applicability of the exception from confessions made by or between clergy members and religious employees.

Why the CCLA Supports SB 360

The CCLA brought this concept before legislative offices as early as December 2018, including Senator Hill's office. There has been confusion as to the CCLA's stance and the rationale for supporting a bill that some perceive as attacking religious liberty. Our reasoning is based on the idea that the children of religious households should be afforded the equal protection of CANR, just as children whose abuse or neglect is not caused, facilitated, or kept secret by religious institutions. This is based on the "No Harm Principle," discussed below.

Religious Freedom and the No Harm Principle

In *Employment Division v. Smith*ⁱⁱ, 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

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

— Justice Kennedy, U.S. Supreme Court

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.”ⁱⁱⁱ 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.^{iv} 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.”^v 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.^{vi} 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.”^{vii} 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.”^{viii} 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.^{ix} 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.^x And documented cases reveal that such communications are freely discussed, documented, and distributed among church leadership, in which clergy-penitent privilege is often invoked.^{xi} 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.^{xii} “According to the Catholic Catechism, the act of confession is an intrinsically private communion between God and the sinner, with the priest as mediator.”^{xiii} But it is clear that religious entities have failed to uphold their own principle—a principle protected under California law.

Clarifying Clergy-Penitent Privilege and Excluding Clergy from Exemption

It is important to note that SB 360 does not amend the California Evidence Code or have any effect on evidentiary privileges. SB 360 merely clarifies what clergy-penitent privilege is, for purposes of CANR, and excludes clergy and religious employees from the exemption. By narrowing the definition, as discussed above, religious institutions will no longer be able to excuse skirting CANR by broadly applying the exception to any matter where a clergy member may be present. Further, since much abuse is perpetrated by clergy members and religious employees, excluding such ones from the privilege will ensure that abusers are detected and afforded due process. However, beyond the initial report, the privilege is still intact for evidentiary purposes as SB 360 amends no part of the Evidence Code.

The CCLA also argues that the exclusion of clergy and church employees is constitutionally sound under the holding in *Roman Catholic Archbishop of Los Angeles v. Superior Court* (hereinafter "*Roman Catholic*"),^{xiv} that a law which is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. In deciding whether clergy-penitent privilege protected against disclosure of subpoenaed documents in a grand jury investigation, the plaintiff invoked both the ministerial exception doctrine and the ecclesiastical abstention doctrine.

Under the First Amendment, the ministerial exception doctrine generally bars judicial inquiry into protected employment decisions and applies equally to ministers and a variety of nonordained employees with duties functionally equivalent to those of ministers.^{xv} But the court in *Roman Catholic* held that ministerial exception did not apply to subpoenaed documents in a grand jury investigation involving priests who had sexually molested children because the case was criminal in nature and not related to employment matters. The ecclesiastical abstention doctrine is based on the determination that the Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs.^{xvi} Likewise, the *Roman Catholic* court held that the ecclesiastical abstention doctrine, as an exception to the general rule that the right of free exercise, does not relieve an individual of the obligation to comply with valid and neutral laws of general applicability, and so does not apply to a religious institution required to disclose subpoenaed documents as part of grand jury investigation into allegations that church priests had sexually molested children, because the case did not involve an internal church dispute, but rather, a criminal investigation.^{xvii} Furthermore, the courts have generally held that to withstand the strictures of the establishment clause, government action must not foster excessive government entanglement with religion.^{xviii} But the *Roman Catholic* court equally held that the disclosure of the subpoenaed documents, as part of the grand jury investigation, was not barred by the establishment clause of the federal Constitution since disclosure would not result in the government's excessive entanglement with questions of religious doctrine, and the core issue was whether children were molested by priests, which had no religious doctrine aspect.^{xvii}

-
- ⁱ Pen.Code, § 11164, et seq.
- ⁱⁱ *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872.
- ⁱⁱⁱ 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.
- ^{iv} Office of the Attorney General, Implementation of Memorandum on Federal Law Protections for Religious Liberty (2017) U.S. Department of Justice, Washington, D.C.
- ^v Do No Harm Act, S. 2918 (2018) 115th Cong.
- ^{vi} Hamilton, *God vs. the Gavel: The Perils of Extreme Religious Liberty*. (2014) 2nd ed., Cambridge University Press, New York, NY.
- ^{vii} Jefferson, *Notes on the State of Virginia with an Appendix* (1965) H. Sprague, Boston, MA.
- ^{viii} *Trammel v. U.S.* (1980) 445 U.S. 40, 51.
- ^{ix} 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.
- ^x Gledhill, Judge questions whether confession privilege should extend to Jehovah's Witnesses (Nov. 10, 2015) Christian Today.
- ^{xi} Recent Clergy Privilege Case Serves as a Tale of Caution (Nov. 16, 2016) TeliosLaw.
- ^{xii} Jenkins, Unholy Secrets: The legal loophole that allows clergy to hide child sexual abuse (Aug. 8, 2016) ThinkProgress.
- ^{xiii} Deagon, Religious freedom, the confessional and the Royal Commission (Sep. 27, 2017) Asia & The Pacific Policy Society.
- ^{xiv} *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417.
- ^{xv} *Sumner v. Simpson University* (2018) 27 Cal.App.5th 577; *Puri v. Khalsa* (2018) 321 F.Supp.3d 1233.
- ^{xvi} *Puri v. Khalsa* (2018) 321 F.Supp.3d 1233.
- ^{xvii} *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417.
- ^{xviii} *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 809.
- ^{xix} "Church, State, & Trump." NBC News. MSNBC. (Aug. 1, 2018) New York, N.Y.