

February 24, 2023

House Human Services, Youth & Early Learning Committee  
Washington State Legislature  
260A John L. O'Brien Building  
P.O. Box 40600  
Olympia, WA 98504-0600

**Re: Public Comment on Substitute House Bill 1098**

Dear Committee Members,

Thank you for the opportunity to offer comment on Substitute House Bill 1098 (SHB 1098), currently pending before the Washington State Legislature.

This session, three identical bills have been introduced—HB 1036, HB 1098, and SB 5280<sup>1</sup>—each proposing to amend Washington State's mandatory reporter law, RCW 26.44.030. These bills would make two changes that would bring Washington State in line with the vast majority of other states: first, they would add clergy to the state's list of mandatory reporters; second, they would ensure that clergy's legal duty to report does not infringe on a Catholic priest's solemn vow to never—even upon pain of torture of death—reveal what is said in the confessional.

In late January, however, the House Committee on Human Services, Youth & Early Learning voted to advance a substitute version of HB 1098 (SHB 1098).<sup>2</sup> If this substitute bill were enacted, it would make Washington State's mandatory reporter law an extreme outlier. No existing mandatory reporter law explicitly overrules the clergy penitent privilege while leaving the attorney client privilege untouched. Based on my experience as a religious liberty lawyer, I believe that enacting SHB 1098 would set Washington State up for a civil rights lawsuit that I am confident it would lose.

While I applaud the Washington State Legislature's desire to protect children and strengthen the State's mandatory reporter law, I believe SHB 1098 is ill advised.

I am writing to you as a Fellow with the Ethics and Public Policy Center (EPPC) in Washington, DC, where my work focuses on protecting rights of conscience and religious liberty. The views expressed in my comment are my own and do not represent any official position of EPPC. I have also been a civil rights lawyer for nearly twenty years, protecting and vindicating the First Amendment and statutory rights of religious organizations, and helping public entities advance important governmental interests without violating their constituents' rights.

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<sup>1</sup> See, e.g., House Bill 1098 (2023), available at <https://lawfilesexst.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1098.pdf?q=20230209143818>.

<sup>2</sup> Substitute House Bill 1098 (2023), available at <https://lawfilesexst.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1098-S.pdf?q=20230209143818>.

While SBH 1098 would affect many religious traditions, the Catholic Church's size and its much-publicized child abuse crisis usually place it at the center of debates over child sexual abuse and the clergy penitent privilege. As such, my analysis in the attached memorandum focuses on how this bill would affect Washington State Catholics, and why the State does not need to intrude on a Catholic sacrament in order to protect its citizens. Though I focus on the Catholic Church here, the general rationale and particularly the legal arguments set out in the memorandum's final section would apply to other religious traditions as well.

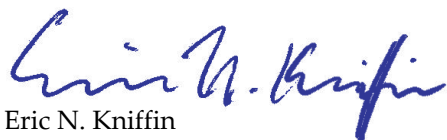
The memorandum focuses on five major points:

1. The Catholic Church in the United States and in Washington State is committed to preventing and reporting child abuse;
2. The absolute confidentiality of what is said in the confessional is a longstanding and fundamental part of a Catholic sacrament;
3. The clergy penitent privilege is not "loophole" —it is a venerable part of our legal system, and there is no evidence that the seal of the confessional has contributed to the sexual abuse crisis in the Catholic Church;
4. No existing mandatory reporting law directly attacks the Catholic Church's sacraments as would SHB 1098; and
5. A mandatory reporting law that eliminates the clergy penitent privilege would likely be found unconstitutional.

To be clear, I do not represent and cannot speak for the Washington State Catholic Conference or any of the Catholic dioceses in the State. However, I have over my career worked with and represented dozens of Catholic dioceses, as well as the United States Conference of Catholic Bishops. I believe that my testimony here accurately represents the Catholic Church's positions on the matters now before the Legislature, including the Church's commitment to combating child abuse and its commitment to respecting the privacy of what people reveal in the sacrament of confession.

I hope that the background information provided here is helpful to your Committee, and the Washington State Legislature as a whole, as you deliberate over proposed changes to the State's mandatory reporter law. Please let me know if I may be of any further assistance to you in this matter.

Sincerely,



Eric N. Kniffin  
Fellow, Ethics & Public Policy Center

CC: Committee counsel Luke Wickham and Omeara Harrington;  
HB 1098 Bill Sponsor Amy Walen;  
Mario Villanueva, Executive Director, Washington State Catholic Conference

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**MEMORANDUM**

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**TO:** Washington State Legislature

**FROM:** Eric Kniffin, Fellow, Ethics and Public Policy Center

**DATE:** February 24, 2023

**SUBJECT:** Background Information Related to Substitute House Bill 1098

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**INTRODUCTION**

This session, three identical bills have been introduced before the Legislature that would amend Washington State’s mandatory reporter law: HB 1036, HB 1098, and SB 5280.<sup>1</sup> These bills would do two things to bring Washington State’s mandatory reporter law in line with the vast majority of states: first, they would make clergy mandatory reporters for child abuse and neglect; second, they would ensure that the legal duty to report does not infringe on a Catholic priest’s solemn vow to never—even upon pain of torture or death—reveal what a penitent confesses in the sacrament of penance.

But in late January, the House Committee on Human Services, Youth & Early Learning voted to advance a substitute version of HB 1098.<sup>2</sup> If Substitute House Bill 1098 (SHB 1098) were enacted, it would make Washington State’s mandatory reporter law the most radical in the country. By explicitly overruling the clergy penitent privilege, while leaving the attorney client privilege untouched, Washington State would go where no state has gone before, setting the State up for a civil rights lawsuit I am confident it would lose.

While I applaud the Legislature’s desire to protect children and strengthen the State’s mandatory reporter law, this is not the best way to advance the State’s interests in protecting children and bringing sexual predators to justice. For the reasons set out in the analysis below, SBH 1098’s attack on religious exercise is unwarranted, unprecedented, and unconstitutional.

I am writing to you as a Fellow with the Ethics and Public Policy Center in Washington, DC, where my work focuses on protecting rights of conscience and religious liberty. The views expressed in my testimony are my own and do not represent any official position of EPPC. I have also been a civil rights lawyer for nearly twenty years, helping vindicate the First Amendment and statutory rights of

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<sup>1</sup> See, e.g., House Bill 1098 (2023), available at <https://lawfilesexternal.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1098.pdf?q=20230209143818>.

<sup>2</sup> Substitute House Bill 1098 (2023), available at <https://lawfilesexternal.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1098-S.pdf?q=20230209143818>.

religious organizations, and helping governmental bodies advance their interests without violating their constituents' rights.

While SHB 1098 would affect many religious traditions, debates over child sexual abuse and the clergy penitent privilege usually focus on the Catholic Church. As such, my analysis focuses on the progress the Catholic Church has made since its problems with child sexual abuse hit the headlines in 2002, as well as how SHB 1098 would affect the Catholic Church in Washington State and the State's nearly one million Catholic citizens. Other religious traditions that offer confidential means of confessing sins would be able to present similar stories, and would be able to raise similar religious liberty claims.

I do not represent and cannot speak for the Washington State Catholic Conference or any of the Catholic dioceses in the State. However, I have over my career worked with and represented dozens of Catholic dioceses and the United States Conference of Catholic Bishops. I believe that my testimony here accurately represents the Catholic Church's positions on the matters now before the Legislature, including the Church's commitment to combat child abuse and its commitment to respecting the private nature of what is said inside the confessional.

The memorandum begins in **Section I** by demonstrating that the Catholic Church—in the United States and in Washington State in particular—is committed to preventing and reporting child abuse. Although RCW 26.44.030(1)(A) does not currently name clergy as mandatory reporters, each Catholic diocese in Washington State already requires priests to report suspected child abuse to civil authorities, except when precluded by their vow to keep confessions confidential.

**Section II** explains how the Catholic sacrament of penance works, focusing particularly on one aspect of this sacrament: the religious obligation Catholic priests are under to keep all confessions confidential, sometimes called the "seal of the confessional." This section shows how the Catholic Church's canon law describes this obligation and the serious penalties it sets out for priests who break this sacred trust. This requirement has been a part of the Catholic tradition for more than 1500 years. The seriousness with which Catholics take this requirement is reflected in the much-celebrated stories of priests that have withstood torture and death rather than break the seal of the confessional. Finally, this section outlines practical approaches priests can take to both respect the seal of the confessional and promote justice and healing for abuse victims outside of the sacrament.

**Section III** argues that it is deeply misleading for the Associated Press and others to refer to the clergy penitent privilege as a "loophole." This privilege has been part of the American legal system for over 200 years and Washington State law for over 150. Furthermore, both the United States Supreme Court and the Washington State Supreme Court recognize that the clergy penitent privilege serves critical privacy interests, just like the attorney client privilege. Moreover, despite intense scrutiny over the past twenty years, I am not aware of any documented case where the Catholic Church's seal of the confessional has prevented or delayed government from helping an abuse victim or bringing an abuser to justice.

Before the Washington State Legislature takes any further steps toward abridging a central practice of the Catholic faith, it should push through the rhetoric and consider the facts on the ground. The Catholic Church's guarantee that the confessional is a safe place to unburden one's soul has not been used as a shield to protect sexual predators. The available evidence shows that there is no public

need—in Washington or elsewhere—that would justify invading the religious practices of the Catholic Church and nearly one million Washington Catholics.

**Section IV** looks closely at the claim that SHB 1098 would be unremarkable because many other states have already prioritized clergy’s duty to report abuse over the state’s clergy penitent privilege. While there are only six states that deny the penitential privilege in cases of child abuse or neglect, and only one that has done so explicitly, if SHB 1098 should pass, Washington law would be more extreme than any other state law by explicitly denying the penitential privilege while maintaining a secular corollary, the attorney-client privilege. No bill meeting this description has ever been passed.

Finally, **Section V** examines case law that strongly suggests that SHB 1098 would be unconstitutional under the U.S. Constitution. By privileging secularly motivated confidential communications over religiously motivated confidential communications, this bill would violate the Free Exercise Clause. Given that more than forty states have found ways to address child abuse without criminalizing a sacrament of the Catholic Church, it is highly likely that SHB 1098 would not pass strict scrutiny. Further, the right of a Catholic priest to offer the sacraments and the right of Catholics generally to receive the sacraments are among the fundamental rights and liberties protected by the Fourteenth Amendment.

For all these reasons, I urge the Committee and the Washington State Legislature to vote against SHB 1098 in its present form.

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## ANALYSIS<sup>3</sup>

### **I. The Catholic Church in the United States and in Washington State is committed to preventing and reporting child abuse.**

Many religious traditions include confidential penitential communications that would be impacted should Washington State pass SHB 1098 into law.<sup>4</sup> However, as conversations about the privilege generally center on the Catholic Church, and given that I have more experience representing Catholic entities than other potentially affected religious groups, my analysis will focus there.

At the start, it is important that the Washington State Legislature understand that the Catholic Church supports efforts to protect children from child abuse and neglect. While the sexual abuse crisis in the Catholic Church has been tragic, any fair accounting must recognize the extraordinary steps the U.S. Catholic Church has taken to address its past failures, to assist victims, to promote healing, and to prevent future abuse. The John Jay College of Criminology found in 2011 that “No other institution [besides the Catholic Church] has undertaken a public study of sexual abuse” and urged other organizations to “follow suit.”<sup>5</sup>

The Catholic Church’s efforts to prevent child abuse is evident at the national level and here in Washington State, where Catholic dioceses have cooperated with independent audits and require priests to report suspected abuse both internally and to civil authorities.

### **A. The Catholic Church in the United States has undertaken important reforms to hold itself accountable and protect children.**

In June 2002, the United States Conference of Catholic Bishops (USCCB) responded to the abuse crisis in the Catholic Church by establishing the Charter for the Protection of Children and Young

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<sup>3</sup> Copies of the authorities cited in this memorandum are on file with the author and available on request.

<sup>4</sup> Although debates over the clergy-penitent privilege typically focus on the Catholic Church, many other religious traditions also include penitential communications that clergy are obliged to keep secret. For example:

- The Orthodox Christian Church: (“[T]he need to maintain the secrecy of confession comes from the fact that the priest is only a witness before God. One could not expect a sincere and complete confession if the penitent has doubts regarding the practice of confidentiality.”) Orthodox Church in America, *Guidelines for Clergy Compiled under the Guidance of the Holy Synod of the Orthodox Church in America* at 14 ¶ 6, <https://oca.org/PDF/official/clergyguidelines.pdf>;
- The Church of Jesus Christ of Latter-day Saints: Taylor L. Anderson, *The Priest-Penitent Privilege: A Mormon Perspective*, 41 Idaho L. Rev. 55, 69-72 (2004);
- The Lutheran Church Missouri Synod: (“[U]nder no circumstances should a pastor reveal anything told him in confession by a penitent.”) Lutheran Church-Missouri Synod, *The Pastor-Penitent Relationship: Privileged Communications* at 9, Sept. 1999, <https://www.lcms.org/Document.fdoc?src=lcm&id=412>;
- The Episcopal Church: (“In some states, the priest may be asked by a court of law to divulge information but must refuse even though this may lead to imprisonment.”) The Episcopal Church, *An Episcopal Dictionary of the Church: Seal of Confession*, <https://www.episcopalchurch.org/library/glossary/seal-confession>; and
- Christian Science: “[M]embers of this Church shall hold in sacred confidence all private communications made to them by their patients.” “A failure to do this shall subject the offender to Church discipline.” Mary Baker Eddy, *The First Church of Christ Scientist: Manual of the Mother Church* at 46.

<sup>5</sup> John Jay Coll. of Crim. Just., *The Causes and Contexts of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010* (“2011 John Jay Report”), at 5, <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf>.

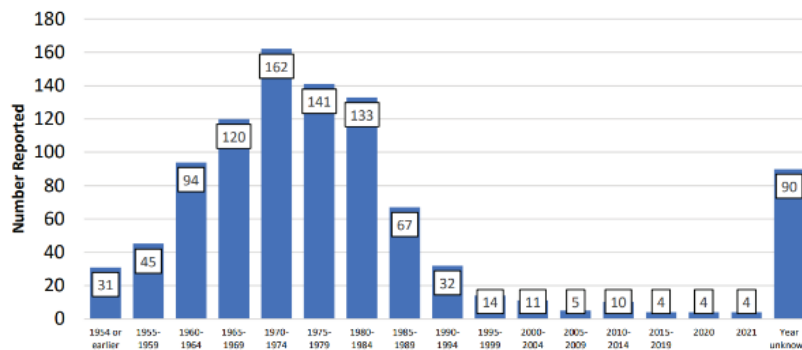
People.<sup>6</sup> The Charter offers a comprehensive set of procedures for addressing allegations of sexual abuse of minors by Catholic clergy. The Charter also includes guidelines for reconciliation, healing, accountability, and prevention of future acts of abuse.

Pursuant to this Charter, the Catholic Church in the United States has established the Committee for the Protection of Children and Young People<sup>7</sup> and its Secretariat of Child and Youth Protection.<sup>8</sup> The Catholic Church has also established the National Review Board, an outside advisory board of lay people, male and female, tasked with helping the USCCB prevent the sexual abuse of minors.<sup>9</sup> The USCCB also commissions annual reports of all US dioceses, conducted by an outside consulting firm, which collects data and performs on-site audits of dioceses and parishes.<sup>10</sup>

At the ground level, Catholic dioceses and parishes are committed to providing safe-environment training for youth and adults that participate in Church programs, and to performing background checks on clergy, candidates for ordination, educators, employers, and volunteers who minister to children and young people. The USCCB’s 2021 Annual Report, released in May 2022, summarizes the Church’s efforts in these areas from 2014 to the present.<sup>11</sup>

The statistic that matters most, of course, is whether the Catholic Church’s efforts have helped protect kids. By all measures, they have. The 2021 Annual Report found that U.S. received 968 new credible allegations of sexual abuse of a minor by a diocesan priest or deacon between July 1, 2020, and June 30, 2021. But of these 968, almost all reports were from adults reporting incidents from decades ago; only eight (0.8 percent) involved children that were under the age of 18 in 2021.<sup>12</sup>

**Figure 7. Year the Alleged Offense Occurred or Began: Dioceses and Eparchies**



<sup>6</sup> USCCB, *Charter for the Protection of Children and Young People* (2d. Rev., 2011), <http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm>.

<sup>7</sup> USCCB, Comm. for the Prot. of Children and Young People, <http://www.usccb.org/about/child-and-youth-protection/committee-for-the-protection-of-children-and-young-people.cfm>.

<sup>8</sup> USCCB, Child and Youth Prot.: Who We Are, <http://www.usccb.org/about/child-and-youth-protection/who-we-are.cfm>.

<sup>9</sup> USCCB, Child and Youth Prot.: The National Review Board, <http://www.usccb.org/about/child-and-youth-protection/the-national-review-board.cfm>.

<sup>10</sup> USCCB, Child and Youth Prot., Ann. Rpts., <https://www.usccb.org/node/25762>.

<sup>11</sup> USCCB, 2021 Ann. Rept. at 26-27, [https://www.usccb.org/resources/2021%20CYP%20Annual%20Report.PDF%20\(1\).pdf](https://www.usccb.org/resources/2021%20CYP%20Annual%20Report.PDF%20(1).pdf).

<sup>12</sup> *Id* at 37.



Collective data from 2004 to 2021 show the same picture: of the allegations received over this entire span, only 4% of alleged offences occurred or began after 2000.<sup>13</sup>

These statistics show that the Catholic Church in the United States has made a great deal of progress over the past twenty years, and also that there is much more work to do. As the USCCB President, Archbishop Jose Gomez of Los Angeles said last summer, the Catholic Church in the United States affirms Pope Francis' commitment "that everything possible must be done to rid the Church of the scourge of the sexual abuse of minors and to open pathways of reconciliation and health for those who were abused."<sup>14</sup>

Without excusing the Catholic Church's failures, it is important to recognize that by all accounts sexual abuse is not just a Catholic problem but a huge epidemic that touches every major institution in society. Public schools,<sup>15</sup> private schools, Protestant churches,<sup>16</sup> Boy Scouts, Olympic teams, Hollywood, and major universities all have had major abuse scandals in recent years.

Moreover, the Catholic Church's record on sexual abuse since the turn of the century has greatly improved. The broader world has taken notice of the great strides the Catholic Church has taken to address and prevent the sexual abuse of minors. Even institutions that are generally critical of the Catholic Church and hostile to its worldview have lauded the efforts the Catholic Church has taken in response to the abuse crisis.

For example, in 2016, the *New York Times'* national religion correspondent, Laurie Goodstein, spoke to how the Catholic Church has changed in the 22 years she has been covering the abuse scandal.

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<sup>13</sup> *Id.* at 48.

<sup>14</sup> USCCB, *Statement of USCCB President on Twenty Years Since Passage of the Charter for the Protection of Children and Young People*, June 9, 2022, <https://www.usccb.org/news/2022/statement-usccb-president-twenty-years-passage-charter-protection-children-and-young>.

<sup>15</sup> A 2004 study by the U.S. Department of Education (DOE) found that **nearly 10% of K-12 students were subjected to sexual harassment, rape, or sexual abuse at the hands of a public school employee**. The study estimated that 290,000 students experienced some sort of physical sexual abuse by a public school employee from 1991 to 2000. Carol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. Dep't of Education, Policy and Program Studies Service, Jun. 2004, at 17-18, <https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.doc> (emphasis added).

By contrast, the first John Jay study found 10,667 sexual abuse allegations against priest and deacons over a much longer timeframe, 1950 to 2002.

Based on these numbers, the DOE study's author said that **"the physical sexual abuse of students in schools is likely more than 100 times the abuse by priests**. Caroline Hendrie, *Sexual Abuse by Educators Is Scrutinized*, Education Week, Mar. 10, 2004, <https://www.edweek.org/ew/articles/2004/03/10/26abuse.h23.html> (emphasis added).

<sup>16</sup> The three companies that insure a majority of Protestant churches—Church Mutual Insurance Company, GuideOne Insurance Company, and Brotherhood Mutual Insurance Company—said they typically receive upward of 260 reports a year of children younger than 18 being sexually abused by members of the clergy, church staff members, volunteers, or congregants. *Data Shed Light on Child Sexual Abuse by Protestant Clergy*, New York Times, Jun. 16, 2007, [http://www.nytimes.com/2007/06/16/us/16protestant.html?\\_r=1&l](http://www.nytimes.com/2007/06/16/us/16protestant.html?_r=1&l). See also Boz Tchividjian, 'Spotlight': It's Not Just a Catholic Problem, Religion News Service, Dec. 7, 2015, <http://religionnews.com/2015/12/07/spotlight-its-not-just-a-catholic-problem/>; <http://prospect.org/article/next-christian-sex-abuse-scandal>; Artur Rosman, *Catholic and Evangelical Sex Scandals Are Structurally Different*, Cosmos the in Lost, Feb. 7, 2014, <http://www.patheos.com/blogs/cosmostheinlost/2014/02/07/catholic-protestant-sex-scandals-structurally-different/>.

Ms. Goodstein credited the Catholic Church for taking huge steps to address abuse and acknowledged that new reports had dropped precipitously.<sup>17</sup>

A 2012 article in Psychology Today marking the beginning of the Penn State child abuse trial said that Penn State could learn a lot from the Catholic Church:

**Only the Roman Catholic Church has undertaken an extensive and comprehensive research study to investigate institutional child sexual abuse** (see the John Jay studies, 2004 and 2011). The crisis in the Catholic Church has led to a decade of research, policies, and procedures to keep children safe within the Church. Much can be learned from this decade of crisis and **other organizations can take a page from the Church’s playbook to help keep children safe within their organizations.** The crisis in the Church created a tipping point to ensure that all of the best science and clinical practices comes into play to make sure that children are safe and that those who might harm children are not allowed access to potential victims. Penn State is learning these lessons now as are other institutions that service youth. Now, if we can get everyone to follow these state-of-the-art policies and procedures then no child will be abused in the future.<sup>18</sup>

**B. The three Catholic dioceses in Washington State are likewise committed to accountability and reporting suspected abuse to civil authorities.**

The three Catholic dioceses in Washington State—the Diocese of Yakima, the Diocese of Spokane, and the Archdiocese of Seattle—are active participants in the Catholic Church’s efforts to protect children.

The previous section described the USCCB’s ongoing commitment to having an independent auditor collect data and perform on-site audits of Catholic dioceses each year. Each of the State’s Catholic dioceses has received an on-site audit in recent years: Seattle in 2021, Spokane in 2020, and Yakima in 2019. Additionally, apart from whatever Washington State’s mandatory reporter law may require, Washington Catholic priests *are already mandatory reporters under diocese policies.*<sup>19</sup>

As such, while I do not speak for the Catholic dioceses in Washington, I believe these dioceses would support the Legislature’s effort to update State law to match the dioceses’ own reporting policies.

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<sup>17</sup> Susan Lehman, *Insider Podcasts: Reporting on Abuse in the Church: What’s New? Plenty*, N.Y. Times, April 20, 2016, <https://www.nytimes.com/2016/04/20/insider/reporting-onabuse-in-the-church-whats-new-plenty.html>.

<sup>18</sup> Thomas G. Plante, *Keeping Kids Safe from Institutional Child Sexual Abuse: There is much to learn from the Catholic Church and Penn State this week*, Psychology Today, Jun. 11, 2012, <https://www.psychologytoday.com/blog/do-the-right-thing/201206/keeping-kids-safe-institutional-child-sexual-abuse> (emphases added).

<sup>19</sup> Archdiocese of Seattle, *Policy for the Prevention and Response to Sexual Abuse, Sexual Misconduct, and Sexual Harassment* at 5, <https://archseattle.org/wp-content/uploads/2021/08/Safe-Environment-Program-Policy-Prevention-Response-Eng-8.31.2021.pdf>; Diocese of Spokane, *Excerpt from the Diocese of Spokane Administrative Policies/Procedures: Prevention, Education, and Reporting of Abuse*, <https://files.ecatholic.com/6397/documents/2021/11/The%20Duty%20to%20Report.pdf?t=1637774089000>; Diocese of Yakima, *Policy Regarding Sexual Abuse of Minors by Clerics, Men and Women Religious, Seminarians, Employees, and Volunteers* at §2003, <https://yakimadiocese.org/wp-content/uploads/2015/12/Sexual-Abuse-Policies-2017-English-with-VAC-protocol.pdf>.

## **II. The absolute confidentiality of what is said in the confessional is a longstanding and fundamental part of a Catholic sacrament.**

It is also important for members of the Washington State Legislature to understand that a Catholic priest's refusal to disclose anything that is spoken during the sacrament of penance is deeply rooted in the Catholic Church's laws and tradition. Furthermore, this privilege has always existed to protect those who confess their sins to God—not to protect the institutional Church or a sexual abuser.

This section provides an overview of the Catholic sacrament of penance, often simply called confession, and shows what the Catholic Church's canon law says about a priest's absolute obligation to maintain confidentiality. It also shows that this obligation has been a constant in the Catholic Church since its earliest centuries and a universal law of the Church for 800 years. The Church's commitment to maintaining the privacy of the confessional is shown most clearly through the stories of heroic priests who have been faithful to their vows even under threat of torture and death. Finally, this section outlines practical approaches that Catholic bishops, priests, and seminaries have developed and taught to help priests hearing confessions balance their obligation to respect privacy with their pastoral efforts to help abuse victims seek justice and healing.

I hope this background information will also help Legislators understand that the Catholic Church's longstanding and unwavering commitment to protecting the privacy of what people reveal in the confessional is not a scheme used to protect the Catholic Church from scrutiny but a sacred promise that protects individual privacy and gives individual Catholics the confidence necessary for them to unburden their souls before God. I hope this section—especially the examples at the end of priests who accepted death rather than reveal someone's confession—shows that it would be futile for the State to try to force Catholic priests to violate the seal of the confessional.

### **A. An overview of the Catholic sacrament of penance.**

Before the Legislature votes on a bill that would impinge on a central practice of the Catholic faith, it may be helpful for Committee members to understand what the Catholic practice of going to confession entails.

Saint Paul says in the book of Romans that “all have sinned and fallen short of the glory of God.”<sup>20</sup> The Catholic Church teaches that sin damages a person's relationship with God and with the Church.<sup>21</sup> The Church teaches that sinners cannot repair this damage on their own, but must rely on God's grace:

Grace is favor, the free and undeserved help that God gives us to respond to his call to become children of God, adoptive sons, partakers of the divine nature and of eternal life.<sup>22</sup>

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<sup>20</sup> Romans 3:23.

<sup>21</sup> Catechism of the Catholic Church ¶ 1440.

<sup>22</sup> *Id.* ¶ 1996.

The Catholic Church teaches that while God pours out his grace upon his creation in countless ways, he established seven sacraments (or “mysteries”) as established channels through which the Church makes this grace available to Christians:

The purpose of the sacraments is to sanctify men, to build up the Body of Christ and, finally, to give worship to God. . . . They not only presuppose faith but by words and objects they also nourish, strengthen, and express it.<sup>23</sup>

One of these sacraments is the sacrament of penance. This sacrament or mystery is rooted in Jesus’ charge to his disciples, recorded in John 20:23: Jesus breathed on his disciples “and said to them, ‘Receive the Holy Spirit. If you forgive the sins of any, they are forgiven.’”

Though the Catholic priest is the minister of the sacrament, the Catholic Catechism is clear that “Only God forgives sins.”<sup>24</sup> Priests, like Jesus’ first apostles, “are sent out ‘on behalf of Christ’ with ‘God making his appeal’ through him and pleading: ‘Be reconciled to God.’”<sup>25</sup>

Under canon law, all Catholics are required to go to confession at least once a year.<sup>26</sup>

Every Catholic parish has posted times set aside for confession. During these set times, priests typically sit in a small room called a “confessional” and hear the confessions of many people, one at a time, for an hour or more. Although in recent years many priests offer people the opportunity to make a confession “face to face,” where both the priest and penitent sit facing each other a few feet away, canon law requires that people be given the option to confess their sins anonymously, with a fixed grille or screen between the penitent and the priest.<sup>27</sup>

Catholics are free to confess to any priest at any parish.<sup>28</sup> While many Catholics already know the confession times at their own parish, the internet makes it easy for Catholics to look when confession is available at other parishes, any day of the week. Catholic dioceses’ websites, parish websites, and other resources like MassTimes.org make it easy for Catholic to find a nearby parish and convenient confession times.

When someone enters the confessional and closes the door, the person is greeted by the priest and then the priest and penitent together make the Sign of the Cross, saying: “In the name of the Father, the Son, and the Holy Spirit.”<sup>29</sup> The priest then invites the penitent to have trust in God, sometimes citing a passage from the Bible that proclaims God’s mercy and calls man to conversion.

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<sup>23</sup> *Id.* ¶ 1123.

<sup>24</sup> *Id.* ¶ 1441.

<sup>25</sup> *Id.* ¶ 1442 (quoting 2 Cor 5:20).

<sup>26</sup> Code of Canon Law, Canon 989.

<sup>27</sup> Canon 964 § 2.

<sup>28</sup> See, e.g., Canon 969 § 1 (bishops generally grant priests the faculty “to hear the confessions of any whomsoever of the faithful”).

<sup>29</sup> For an overview of the steps and prayers of the sacrament of penance, see *Rite for Reconciliation of Individual Penitents*, Congregation for Divine Worship. For a video overview of the sacrament, see Ascension Press, *CHOSEN: Lesson 10, Seg. 3, The Power of Confession*, YouTube (Dec. 17, 2013), <https://youtu.be/C4hGM3ItKk>.

The penitent then brings the confession with these or similar words: "Bless me, Father, for I have sinned. It has been (give days, months, or years) since my last confession." The penitent then states in simple terms all the serious sins that he or she can recall having done since his or her last confession. If someone is unsure what to say, he or she can ask the priest for help. Catholic parishes also generally have published guides available to help people examine their consciences and think through what it is that they need to confess to God.<sup>30</sup> Once the penitent is done listing his or her sins, the penitent concludes by saying, "I am sorry for these and all my sins," or something similar.

The priest then offers some spiritual guidance or encouragement before proposing an act of penance. An act of penance is generally a prayer or a charitable act that is intended to demonstrate the penitent's desire to love God and others better.<sup>31</sup>

The priest will then invite the penitent to say an act of contrition. Many Catholics have memorized an act of contrition; otherwise, confessionals generally have a short prayer printed out for use. A common prayer is as follows:

My God, I am sorry for my sins with all my heart. In choosing to do wrong and failing to do good, I have sinned against You whom I should love above all things, I firmly intend, with Your help, to do penance, to sin no more, and to avoid whatever leads me to sin.

In the place of a more formal prayer, someone might simply say, "Lord Jesus, have mercy on me, a sinner."

Once the penitent has finished the act of contrition, the priest blesses the penitent and says a prayer absolving or forgiving the penitent of his or her sins:

God, the Father of mercies, through the death and resurrection of his Son has reconciled the world to himself and sent the Holy Spirit among us for the forgiveness of sins; through the ministry of the Church may God give you pardon and peace, and I absolve you from your sins in the name of the Father, and of the Son, and of the Holy Spirit.

After the absolution, the priest says, "Give thanks to the Lord, for he is good." The penitent answers, "His mercy endures forever." The priest then says, "The Lord has freed you for your sins. Go in peace," or something similar. A confession typically takes less than five minutes.

**B. The Catholic Church absolutely prohibits priests from disclosing anything that is said in the confessional.**

It is also important for members of the Washington State Legislature to understand that a priest's refusal to disclose anything said during the sacrament of penance is deeply rooted in the Catholic Church's tradition and laws. This solemn obligation has been a constant in the Catholic Church since its earliest centuries and has been a universal law of the Church for 800 years. The Church's rules,

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<sup>30</sup> See, e.g., Archdiocese of Washington, *Welcome Home: The Light is On For You, Examination of Conscience*, <http://thelightison.org/wp-content/uploads/2019/02/TLIO-examination-1.pdf>.

<sup>31</sup> See Catechism ¶ 1460.

and the theology behind these rules, make clear that promise of confidentiality is there to protect the sacred encounter between a repentant sinner and God, not to protect the Church.

**1. Priests that break the seal of the confessional are automatically excommunicated.**

Much like a political entity like a state or nation, the Catholic Church has its own set of laws, called canon law. Canon law is a set of ordinances and regulations made by ecclesiastical authority for the government of the Catholic Church and its members. In the Latin or Western Church, the governing code is the 1983 Code of Canon Law.

Book IV, Part I of the Code of Canon Law covers the Catholic Church's seven sacraments. Title IV of this part, canons 959 to 997, covers the sacrament of penance, also known as the "sacrament of reconciliation" or simply "confession."<sup>32</sup>

Canon law says that the seal of the confessional is "inviolable." Canon 983 § 1. It is "absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion." *Id.* The Latin word *nefas*, here translated "absolutely wrong," has no direct equivalent in English. It conveys that the breaking the seal of the confessional would be wickedly sinful and cannot be permitted under any circumstances.<sup>33</sup>

The penalty for violating the seal of the confessional is excommunication. Canon 1388 § 1. The code states that this penalty applies "*latae sententiae*," which means that it applies automatically when a priest violates the seal of the confessional, without any need for any penal process. Canon 1314.

Excommunication is the most serious penalty that the Catholic Church can inflict on one of its members. An excommunicated person is forbidden:

- from saying the mass or any other ceremony of public worship;
- from celebrating any sacrament;
- from receiving any sacrament; and
- from exercising any ecclesiastical offices, ministries, functions or acts of governance.

Canon 1331 § 1.

Violating the seal of the confessional is so serious that the Catholic Church puts it in a select category of offences where the excommunication can only be lifted with special permission from the pope. *Id.* (Other such crimes include desecrating the blessed sacrament, canon 1367, and physically assaulting the pope, canon 1370.)

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<sup>32</sup> For an overview of what canon law says about the seal of the confessional, see *Can a Priest Ever Reveal What is Said in Confession?*, Canon Law Made Easy, Dec. 4, 2008, <http://canonlawmadeeasy.com/2008/12/04/can-a-priest-ever-reveal-what-is-said-in-confession/>.

<sup>33</sup> Cathy Caridi, J.C.L., *Can Priests Ever Reveal What is Said in Confession*, Catholic Exchange, Dec. 4, 2008, <https://catholicexchange.com/can-priests-ever-reveal-what-is-said-in-confession/>; see also Archbishop Gomez, *Confession is Sacred*, Angeles News, May 15, 2019, <https://angelusnews.com/voices/archbishop-gomez/archbishop-gomez-confession-is-sacred>.

Father John Paul Kimes, a Catholic priest and professor at Notre Dame Law School, served as a canon lawyer for over a decade in a Vatican office that deals with priests who are guilty of such crimes. He has explained why it is that the Catholic Church takes the violation of the seal of the confession so seriously:

In Catholic theology, there is no moment in the life of the faithful in which they are more spiritually vulnerable than in the act of confession, when we take our deepest secrets and lay them bare before a priest who represents Christ. . . .

It's a moment of supreme intimacy. We use the term confidentiality a lot, but it sacramentally goes well beyond confidentiality. The seal is only defined as being inviolable. With a confidentiality requirement, there's always a workaround. With the sacramental seal, there's no work around. It is absolutely inviolable, because of the vulnerability of the penitent in that moment.<sup>34</sup>

The Church's teaching on the seal of the confessional also appears in the Catechism of the Catholic Church, a one volume summary of Catholic teaching:

Given the delicacy and greatness of this ministry and the respect due to persons, the Church declares that every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him. He can make no use of knowledge that confession gives him about penitents' lives. This secret, which admits of no exceptions, is called the "sacramental seal," because what the penitent has made known to the priest remains "sealed" by the sacrament.<sup>35</sup>

## **2. The seal of the confessional is deeply rooted in Catholic theology and history.**

The Catholic Church's rules prohibiting priests from disclosing anything learned in the confessional are deeply rooted in its theology and history, and have been a universal rule since the Fourth Lateran Council in 1215:<sup>36</sup>

- The *Decretum*, a collection of edicts of previous councils and other ecclesiastical laws published about 1151, states:  
Let the priest who dares to make known the sins of his penitent be deposed. And during all the days of his lifetime let him continue as an ignominious wanderer. *Id.*
- Canon 21 of the Fourth Lateran Council (1215) made the obligation of secrecy a universal rule:  
Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner. . . . For whoever shall dare to reveal a sin

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<sup>34</sup> Tad Walch, *Should a member of the clergy report sex abuse of the penitent? A look inside the priest-penitent privilege*, Deseret News, Aug. 19, 2022, <https://www.deseret.com/faith/2022/8/19/23297074/should-clergy-be-required-to-report-sex-abuse-cases>.

<sup>35</sup> Catechism of the Catholic Church ¶ 1467.

<sup>36</sup> Richard Nolan, *The Law of the Seal of Confession*, The Catholic Encyclopedia (1912).

disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office but that he shall also be sent into the confinement of a monastery to do perpetual penance. *Id.*

- The catechism of the Council of Trent (1556) reassured Catholics that priests were required to keep their confessions secret:

Since each one is most anxious that his sins and defilements should be buried in oblivion, the faithful are to be admonished that there is no reason whatever to apprehend that what is made known in confession will ever be revealed by the priest to anyone, or that by it the penitent can at any time be brought into danger of any sort. The laws of the Church threaten the severest penalties against any priests who would fail to observe a perpetual and religious silence concerning all the sins confessed to them.<sup>37</sup>

- The catechism of Pope Pius X (1908) reaffirmed that “the confessor is bound by the seal of confession under the gravest sin and under threat of the severest punishments both temporal and eternal.”<sup>38</sup>

### C. **Priests have been tortured and killed rather than break the seal of the confessional.**

It is no secret that Catholics represent a broad spectrum of perspectives on a wide view of political and social issues. But there are certain convictions that all Catholics share. One of those undoubtedly is the conviction that priests must prioritize the obligation to hear people’s confessions above all else and must keep people’s confessions secret at all costs.

Father Pius Pietrzyk, a Catholic priest and professor of canon law, has testified, “I know priests all along the theological and ideological spectra, none of them would ever consider breaking the seal of the confessional.”<sup>39</sup> Deeply engrained in each Catholic priest is the conviction that *he should rather face torture and death than betray the seal of the confessional.*

Bishop Robert Barron, a popular Catholic speaker and author, has shared what he was taught about the seal of confession in seminary:

**I realize that non-Catholics and nonbelievers might not appreciate how precious the sacrament of Confession is to Catholics and why the seal of Confession matters so profoundly.** In my last year in the seminary, my classmates and I took a course in the theology and practice of the sacrament of Reconciliation (to give it its proper title). Our professor said something that has stayed with me for the thirty-three years of my priesthood, burned into my mind and soul. He told us, “If someone asks, ‘Father, would you hear my confession?’, the answer is always yes. **Even if hearing that confession puts**

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<sup>37</sup> The Catechism of the Council of Trent 183, trans. John A. McHugh, O.P. (1923).

<sup>38</sup> Brian Fraga, *Why priests refuse to break the seal of confession*, OSV Newsweekly, May 15, 2019, <https://www.osvnews.com/2019/05/15/the-seal-of-confession/>.

<sup>39</sup> Fr. Pius Pietrzyk, *California bill targets Catholic priests first, but rights of all religions are at risk*, USA Today, April 28, 2019, <https://www.usatoday.com/story/opinion/voices/2019/04/28/california-religious-freedom-catholic-sex-abuse-column/3574921002/>.



**your own life in danger, the answer is always yes.”** And he went on, “If a person inquires about what was said during a confession, you should act as though the confession never even happened. **And if doing so puts your own life in danger, you should still act as though the confession never happened.”**<sup>40</sup>

This teaching is more than mere rhetoric. *Many Catholic priests have indeed given their lives instead of revealing the contents of the confessions they have heard.* The Catholic Church celebrates these priests as heroes of the faith, as saints and martyrs. Their stories are important for several reasons. First, these stories offer comfort to individual Catholics, who know that they can be brutally honest in confession because priests would *never* divulge what is said in the confessional, *no matter what.* Second, these stories inspire and embolden priests to follow their example. Finally, this proud tradition is a heads up to State of Washington that curtailing the priest-penitent privilege *would not* succeed in forcing priests to break their religious vows. It would merely succeed in turning priests into martyrs.

These martyr priests include:<sup>41</sup>

- **St. John Nepomucene**, a late-fourteenth-century priest and confessor to Queen Johanna of Bohemia, in the modern-day Czech Republic.

Her husband, King Wenceslaus IV, was known for his paranoia, anger, and jealousy-driven outbursts. The King suspected his wife was unfaithful and demanded that St. John tell him what she confessed. The priest refused to betray the queen, even as the king threatened to torture him. On March 20, 1393, at the king's orders, St. John was burned, thrown off a bridge, and drowned in the Vltava River.

His body was found the next day and the people immediately revered him as a saint for considering the seal of the confessional more important than his life. St. John of Nepomuk is considered the first martyr of the seal of the confessional.

- **St. Mateo Correa Magallanes**, a priest in Mexico during the Cristero War.

In 1927, the priest was arrested by federal army forces. A few days later, a military general sent Father Correa to hear the confessions of a group of rebels sentenced to die. After Father Correa finished administering the sacrament and encouraging the men to die honorably, the general demanded that the priest reveal what he had heard.

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<sup>40</sup> Bishop Robert Barron, *It's time for Catholics (and all religious people) to wake up: the real danger posed by the California confession bill*, May 7, 2019 (emphasis added), <https://www.wordonfire.org/resources/article/its-time-for-catholics-and-all-religious-people-to-wake-up-the-real-danger-posed-by-the-california-confession-bill/>.

<sup>41</sup> See, e.g., Brian Fraga, *Why priests refuse to break the seal of confession*, OSV Newsweekly, May 15, 2019, <https://www.osvnews.com/2019/05/15/the-seal-of-confession/>; *These priests were martyred for refusing to violate the seal of confession*, Catholic News Agency, Dec. 16, 2017, <https://www.catholicnewsagency.com/news/these-priests-were-martyred-for-refusing-to-violate-the-seal-of-confession-44847>; Chaz Muth, *Priestly Martyrdom to Uphold Seal of Confession Not a New Phenomenon*, Orange County Catholic, June 5, 2019, <https://ocatholic.com/priestly-martyrdom-to-uphold-seal-of-confession-not-a-new-phenomenon/>.

Father Correa refused to violate the seal of the confessional. When the infuriated general threatened to shoot him, the priest responded “You may do so, but you ignore the fact, General, that a priest must keep the secret of confession. I am ready to die.”

At dawn the next day, a group of soldiers took Father Correa to the edge of a graveyard, where he was killed in a hail of bullets. Father Correa was canonized by St. John Paul II in the year 2000.

- **Fr. Felipe Císcar Puig**, a priest during the Spanish Civil War.

During the Spanish Civil War, revolutionary and republican forces engaged in violent battles for power, often targeting Catholics for religious persecution. In 1936, Fr. Felipe Císcar Puig was swept up in a raid and imprisoned. There, a Franciscan friar named Andrés Ivars asked Fr. Císcar to hear his confession before the friar faced the firing squad.

Prison officials tried to force Fr. Císcar to reveal what the friar had said. But Fr. Císcar replied, “Do what you want but I will not reveal the confession. I would die before that.” The priest was then hauled away before a sham court, where he again insisted that he would die before he would betray the friar’s confession.

On September 8, 1936, Father Císcar and Friar Andrés Ivars were put before a firing squad. Fr. Císcar was beatified in 2007.

- **Fr. Fernando Olmedo Reguera**, another priest during the Spanish Civil War.

Fr. Fernando Olmedo Reguera was a Spanish priest in the Capuchin Order of Friars Minor. In 1936 he was arrested and imprisoned. Fr. Olmedo found a new ministry caring for the souls of his fellow prisoners, convincing many to make peace with God by confessing their sins.

Prison officials pressured him to reveal what the prisoners had confessed, but Fr. Olmedo refused. For his defiance, Fr. Olmedo was hauled before a populist tribunal, convicted, and killed by a firing squad. Fr. Olmedo was beatified by the Catholic Church in 2013.

**D. The seal of the confessional does not prevent priests from promoting justice and child safety through other means.**

Though the seal of the confessional is absolute, that is not to say that what is revealed within the sacrament can never lead to external actions or conversations. It may be helpful for the Legislature to know that Catholic bishops, priests, and seminaries have given careful thought to how they can honor the confidentiality the sacrament requires and also fulfill their obligations to promote justice and child safety.

Canon lawyer Father John Paul Kimes emphasizes that the tension between protecting children and respecting religion is “not a binary choice”:

There are ways to do both at the same time, and to see it as a zero-sum game, I think, is horribly reductive. . . . It's not that I cannot protect the sacramental life of the church and the child at the same time. They should not be seen in opposition to each other. There are things that I can do, there are ways that I can work with the victim, to provide protection to the victim, while still maintaining the integrity of the sacramental life of my faith tradition.<sup>42</sup>

During confession, a priest can implore the penitent to come to him later and raise a subject mentioned in the sacrament in a different context. *Outside the confessional*, a priest can then help a domestic victim find support, connect an unemployed person with job prospects, or report sexual abuse to the civil authorities.<sup>43</sup> Father Kimes explains:

[I]f the victim comes to me [outside of the confessional] and says, Father, I've been sexually abused, it was done by so-and-so, there are things that I can do to help the victim. . . . There's nothing that prevents me from helping that person contact the authorities.<sup>44</sup>

Many Catholic dioceses already train their seminarians that, if they hear of abuse during a confession, the priest should encourage the penitent to repeat the confession to him later so the priest can make a report to civil authorities.

A priest has even more options if a perpetrator admits abuse as part of his confession. Contrition is a critical part of any confession. For that reason, a priest can withhold absolution (the proclamation that God forgives the penitent) if the priest suspects that a confession is insincere or that the sinner is unwilling to reform. "The priest doesn't wave a magic wand," said Fr. Pietrzyk. "The Catholic understanding is that for the confession to be truly valid, the priest has to believe that the person is truly contrite."<sup>45</sup>

Sometimes a priest may require someone to take an action outside of the confessional in order to demonstrate that he is sorry for his sins and wants to change. Father Kimes explains:

I can say, "I can't forgive your sins until you show me a sign that there's a genuine conversion of heart. The best way to manifest that is for you to go to the police and tell

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<sup>42</sup> Tad Walch, *Should a member of the clergy report sex abuse of the penitent? A look inside the priest-penitent privilege*, Deseret News, Aug. 19, 2022, <https://www.deseret.com/faith/2022/8/19/23297074/should-clergy-be-required-to-report-sex-abuse-cases>.

<sup>43</sup> Under the terms of the original HB 1098, a Catholic priest would also be a mandatory reporter under these circumstances, as he would have heard about the alleged abuse from a source other than a privileged communication.

<sup>44</sup> *Id.*

<sup>45</sup> Peter Rowe, *'I confess': should the 'seal of the confessional' protect pedophiles?*, San Diego Union-Tribune, Aug. 4, 2019, <https://www.sandiegouniontribune.com/lifestyle/people/story/2019-08-02/i-confess-should-the-confessional-be-a-safe-space-for-pedophiles>.

them what you did. Regardless of the consequences, if you were concerned about the salvation of your soul, this is the way you show it.”<sup>46</sup>

Fr. Kimes’ and Fr. Pietrzyk’s testimony speaks to the careful thought that bishops, priests, and seminary professors continue to give to how to both protect the confidentiality of the confessional and also to use their ministry help sexual abuse victims find both healing and justice.

### **III. The clergy penitent privilege is not a “loophole”: it is a venerable part of our legal system, and there is no evidence that the seal of the confessional has contributed to the sexual abuse crisis in the Catholic Church.**

Recent debates over SHB 1098 and similar proposals have derisively referred to the clergy penitent privilege as a “loophole.” The Associated Press appears to have started this trend with their September 28, 2022, article, “Churches defend clergy loophole in child sex abuse reporting.”<sup>47</sup> Subsequent news articles have piggybacked on this terminology, as have articles and debates over Washington’s mandatory reporter laws.

This language is reckless and unjustified. First, the clergy penitent privilege—like the attorney client privilege—is a deeply rooted part of our legal system that guards fundamental privacy interests.

Second, despite intense scrutiny over the past twenty years, there is scant evidence that the seal of the confessional contributed to the sexual abuse crisis. The Associated Press article from last fall claimed, “This loophole has resulted in an unknown number of predators being allowed to continue abusing children for years despite having confessed the behavior to religious officials.” That sounds ominous, but the reality is that despite more than a dozen grand jury and attorney general reports, despite three detailed investigations by the John Jay College of Criminal Justice, and annual independent audits commissioned by the USCCB, there is no evidence that the seal of the confessional has been a contributing factor to child abuse.

Before the Washington State Legislature takes any further steps toward abridging a central practice of the Catholic faith, it should push through the rhetoric and consider the facts on the ground. The Catholic Church’s longstanding practice of guaranteeing that the confessional is a safe place to unburden one’s soul has not been used as a shield to protect sexual predators. The available evidence shows that there is no public need—in Washington or elsewhere—that would justify violating the free exercise of religion for the Catholic Church and nearly one million Washington Catholics.

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<sup>46</sup> Tad Walch, *Should a member of the clergy report sex abuse of the penitent? A look inside the priest-penitent privilege*, Deseret News, Aug. 19, 2022, <https://www.deseret.com/faith/2022/8/19/23297074/should-clergy-be-required-to-report-sex-abuse-cases>.

<sup>47</sup> Jason Dearen and Michael Rezendess, *Clergy defend clergy loophole in child sex abuse reporting*, Associated Press, Sept. 28, 2022, <https://apnews.com/article/sex-abuse-catholic-church-mormon-5d78129a2fe666159a22ce71323f6da3>.

**A. The clergy penitent privilege, like the attorney client privilege, guards fundamental privacy interests.**

The clergy penitent privilege is deeply rooted in our legal system. It was first recognized in caselaw in the 1813 New York state case of *People v. Daniel Phillips*, which recognized that it would be unconstitutional for civil government to intrude in a sacrament of the Catholic Church:

It is essential to the free exercise of religion, that its ordinances should be administered, and that its ceremonies as well as its essentials, should be protected. . . . To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated.

*People v. Phillips*, 1 W.L.J. 109 (1813).<sup>48</sup> In 1875 the United States Supreme Court recognized that the clergy penitent privilege had long been part of the common law tradition:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial for which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. *On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional.* . . .

In 1980, the United States Supreme Court affirmed that the clergy penitent privilege serves fundamentally important policy interests:

The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. *These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes 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.* The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

*Trammel v. United States*, 445 U.S. 40, 51 (1980) (emphasis added). *Trammel* is especially relevant to the constitutionality of SHB 1098, discussed in Section V below, because it places the penitential privilege right alongside the attorney-client privilege.

Ten years after *Trammel*, the Third Circuit held "that American common law, viewed in the light of reason and experience . . . compels the recognition of a clergy-communicant privilege." *In re Grand Jury Investigation*, 918 F.2d 374, 384 (3d Cir. 1990). The court traced the recognition of this privilege through federal court decisions, concluding:

Both state and federal decisions have long recognized the privilege. The Supreme Court Rules Committee also recognized the privilege. That is doubtless because the clergy-communicant relationship is so important, indeed so fundamental to the western

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<sup>48</sup> Available at <https://books.google.com/books?id=d8ovAQAAAMAJ&pg=PA112&lpg=PA112>.

tradition, that it must be “sedulously fostered.” 8 *Wigmore* at § 2285. *Confidence is obviously essential to maintaining the clergy-communicant relationship. Although there are countervailing considerations, we have no doubt that the need for protecting the relationship outweighs them.*

*Id.* (emphasis added). The court found that the evidence “strongly suggests” that the clergy communicant privilege is, in the words of the Supreme Court ‘indelibly ensconced’ in the American common law. *Id.* at 381 (quoting *United States v. Gillock*, 445 U.S. 360, 368 (1980)).

The Ninth Circuit, the federal court of appeals that encompasses Washington State, affirmed the clergy penitent privilege in *Mockaitis v. Harceroad*, 104 F.3d 1522 (9th Cir. 1997). That case asked whether the State of Oregon could use as evidence a recording it had made of a prisoner’s confession to a Catholic priest that he had committed murder.

Notably, the case was brought by the Catholic priest—Father Mockaitis—that had heard the prisoner’s confession. The court noted that the government had “cited no case in the United States in which a court has given approval to the invasion of the Catholic rite of confession by an agency of government. Our own research has discovered none.” *Id.* at 1533. It further found that “the inviolability of religious confession to the clergy [was] the law of the land, the expectation of every repentant sinner, and the assured confidence of every minister of God’s grace.” *Id.*

Washington State law has recognized the clergy penitent privilege for over a hundred and fifty years. *State v. Martin*, 959 P.2d 152, 157 (Wash. Ct. App. 1998), *aff’d*, 975 P.2d 1020 (Wash. 1999). Only a decade ago, the Washington Supreme Court echoed the other courts cited above in placing the clergy penitent privilege alongside the attorney client privilege:

[S]ome relationships are deemed so important and cannot be effective without candid communication, courts and legislatures have granted them privilege. . . . Thus, the attorney-client, physician-patient, and clergy-penitent privileges are all founded on the premise that communication in these relationships is so important that the law is willing to sacrifice its pursuit for the truth, the whole truth, and nothing but the truth.”

*Lowy v. PeaceHealth*, 280 P.3d 1078, 1086 (Wash. 2012).

**B. There is no evidence that the clergy penitent privilege has contributed to the sexual abuse crisis in the Catholic Church.**

This “loophole” rhetoric intimates that the clergy penitent privilege has been abused to protect the Catholic Church’s reputation and to let child predators escape accountability. There is no evidence to support this charge.

First, as noted in Section I, the Catholic Church has made important strides over the past twenty years in addressing child sexual abuse. Leading scholars and investigators point to the Catholic Church as a model of institutional reform. Despite the intense scrutiny the Catholic Church has received since 2002, and despite the financial incentives that make it more lucrative for plaintiffs’ lawyers to develop cases against the Catholic Church than public schools, there is no evidence that

the Catholic Church has since the turn of the millennium has more incidents of sexual abuse than other institutions that do not qualify for this so-called “loophole.”

Second, though more than a dozen in-depth grand jury or attorney general reports have been produced since 2002,<sup>49</sup> yet none have pointed to the sacrament of confession as a contributing factor, let alone a major factor. The John Jay College of Criminal Justice has issued three in-depth studies on the sexual abuse of minors in the Catholic Church; none pointed to the seal of the confessional as a contributing factor. *Id.* The USCCB’s annual reports, funded by the bishops’ conference but performed by independent auditors, likewise have not found that trying to force priests to divulge confessions would help keep children safe. *Id.*

By all accounts, the Catholic Church’s sacrament of confession is not, and has not been used as, a “loophole.” The Washington State Legislature should look past the rhetoric to the deep and well-established factual record on the sexual abuse crisis before it votes on a law that would infringe on the fundamental rights of Washington State Catholics.

#### **IV. No existing mandatory reporting law directly attacks the Catholic Church’s sacraments as would SHB 1098.**

It is critical that the Legislature understand how out of step SHB 1098 is compared to the mandatory reporting laws in the other 49 states. Recent reporting wrongly suggests this isn’t the case. The September 2022 AP report claimed that only 33 states’ mandatory reporting laws honor the clergy-penitent privilege.<sup>50</sup> A follow-up InvestigateWest article from October, was cited with approval at the Washington Senate’s January 24 hearing on SB5280,<sup>51</sup> put the number at only 31.<sup>52</sup>

If these numbers were right, then the decision before the Legislature would be pretty low risk: seventeen or nineteen other states trying to coerce priests into violating penitents’ trust would give Washington State a lot of cover. But however AP and InvestigateWest reached these numbers, their tallies are deeply misleading. As detailed below, only six states have passed laws whose mandatory reporting statutes override the clergy penitent privilege. The remaining 44 states have concluded that protecting children does not require overriding the privacy of penitential communications. Furthermore, it is not clear that these six states understood that they were passing laws that would infringe on the religious practice of their Catholic (or other religious) citizens.

By all accounts, SBH 1098 would outstrip all of these laws, as it would make Washington’s mandatory reporter law the only one in the country that explicitly infringes on the clergy penitent privilege while leaving the similar attorney client privilege untouched. This clear preference for a secular confidential confession over a religious confidential confession would showing

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<sup>49</sup> Reports collected at Bishop Accountability, Reports of Attorney General, Grand Juries, Individual Commissions, and Organizations, <https://www.bishop-accountability.org/AtAGlance/reports.htm>.

<sup>50</sup> Jason Dearen and Michael Rezendess, *Clergy defend clergy loophole in child sex abuse reporting*, Associated Press, Sept. 28, 2022, <https://apnews.com/article/sex-abuse-catholic-church-mormon-5d78129a2fe666159a22ce71323f6da3>.

<sup>51</sup> YouTube, Senate Bill 5280 Hearing - Washington State. Jan. 24th, 2023. RE: the duty to report child abuse, <https://www.youtube.com/watch?v=ZiM7laoROfE>.

<sup>52</sup> Wilson Criscione, How Washington State Law Lets Clergy Hide Child Sexual Abuse, InvestigateWest, Oct. 21, 2022, <https://www.invw.org/2022/10/21/how-washington-state-law-lets-clergy-hide-child-sexual-abuse/>.

unprecedented hostility towards the free exercise of religion and would tee the State up for litigation.

**A. The Associated Press overstates the number of states that have infringed on the clergy penitent privilege.**

How did these reporters get these counts wrong? Only the AP article provides a list of the 33 states it has in mind,<sup>53</sup> so it is easier to check its work.

First, the AP's count fails to recognize that all fifty states recognize the clergy penitent privilege;<sup>54</sup> just because it isn't explicitly mentioned in a mandatory reporting law doesn't mean it does qualify an individual's legal duty to report abuse. The AP's report inappropriately excludes four states (Iowa, Kansas, New York, and South Dakota) whose mandatory reporting laws do not mention the state's privilege law because clergy are not mandatory reporters at all.<sup>55</sup>

Second, the AP's count includes two states (Nebraska and Indiana) where specific language in the clergy penitent privilege statute controls the broader language in the reporting statute.

Third, the AP's count includes Connecticut and New Jersey, where executive branch officials denied that the law required clergy to violate the seal of the confessional, and where subsequent bills aimed at overriding the clergy penitent privilege failed.

Fourth, the AP's count includes New Hampshire and Mississippi, where state court decisions confirmed that the mandatory reporter law does not supersede the clergy penitent privilege.

Finally, the AP simply gets Hawaii's law wrong. Hawaii amended its mandatory reporter law in 2020,<sup>56</sup> adding a new paragraph that makes clergy mandatory reporters except with respect to information "gained solely during a penitential communication":

Members of the clergy or custodians of records therefor; provided that a member of the clergy shall not be required to report information gained solely during a penitential communication. When a clergy member receives reportable information from any other source, the clergy member shall comply with the reporting requirements of this section, regardless of whether the clergy member received the same information during a penitential communication. For purposes of this paragraph, "penitential communication" means a communication, including a sacramental confession, that is intended to be kept confidential and is made to a member of the clergy who, in the course of the discipline or practice of the applicable religious organization, is authorized or accustomed to hear

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<sup>53</sup> LOCALIZE IT: 33 states exempt clergy from reporting abuse, Associated Press, Sept. 28, 2022, <https://www.independent.co.uk/news/associated-press-ap-catholic-church-alaska-alabama-b2176917.html>.

<sup>54</sup> John Vile, Priest-Penitent Privilege, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/922/priest-penitent-privilege> ("All U.S. states have laws protecting the confidentiality of certain communications under the priest-penitent privilege.").

<sup>55</sup> The District of Columbia, though not a state, has a similar mandatory reporter law.

<sup>56</sup> 2020 Hawaii Laws Act 35 (H.B. 1942).



those communications, and under the discipline, tenets, customs, or practices of the applicable religious organization, has a duty to keep those communications secret.

Haw. Rev. Stat. § 350-1.1(a).

Like Washington State, Hawaii has a dominant Democratic majority in both houses of its legislature.<sup>57</sup> But Hawaii's 2020 additions look a lot like the original SHB 1098, not the substitute bill that would override the clergy penitent privilege. Hawaii's example provides yet another reason for Washington to rethink SHB 1098.

All told, a careful survey shows that number of states whose mandatory reporter laws respect the clergy penitent privilege is not 31, as InvestigateWest reports, or 33, as the Associated Press claims, but 44.

**B. Of the six states whose mandatory reporter laws displace the clergy penitent privilege, none is as radical as SHB 1098.**

The Associated Press' and InvestigateWest's reporting make it seem like it would be easy and safe for a state to pass a bill like SHB 1098, as they suggest that many other states (17 and 19, respectively) already have similar laws. *But that just is not the case.* There are only six states whose mandatory reporting laws, though untested in court, appear to override the state's clergy penitent privilege laws: Oklahoma, North Carolina, Rhode Island, Tennessee, Texas, and West Virginia.

Even then, *a close look at these laws shows that none is as radical as SHB 1098 would be.* Only one other state—Texas—has explicitly abrogated the priest-penitent privilege. The other states abrogate a broad range of privileges without naming them, and most do not even name clergy as mandated reporters. These factors make it unclear whether these states had actually thought through the religious liberty issues involved. And the Texas law, critically, abrogates *all* privileges, whereas Washington's SHB 1098 would leave the attorney-client privilege intact. This distinction is important to our legal analysis in Section V below, which looks at whether SHB 1098 would survive a constitutional challenge.

**Oklahoma's** mandatory reporter law is the most general of any of these six states. It does not name any professions as mandatory reporters, but states that "[e]very person having reason to believe that a child under the age of eighteen (18) years is a victim of abuse or neglect shall report the matter promptly." Okla. Stat. Ann. Tit. 10A, § 1-2-101(B)(1). Likewise, Oklahoma's mandatory reporter law does not explicitly abrogate the penitential privilege; the law states broadly that "[n]othing contained in this section shall be construed to exempt or prohibit any person from reporting any suspected child abuse or neglect." *Id.* § 1-2-101(B)(3). These broad provisions would abrogate both the clergy penitent privilege and the attorney client privilege. There is no evidence that the Oklahoma legislature thought through the broad implications of this law.

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<sup>57</sup> Since 2011, Hawaii's governor has been a Democrat and the party has controlled both houses of its legislature. Ballotpedia, Party Control of Hawaii State Government, [https://ballotpedia.org/Party\\_control\\_of\\_Hawaii\\_state\\_government](https://ballotpedia.org/Party_control_of_Hawaii_state_government).

**Rhode Island's**<sup>58</sup>, **North Carolina's**<sup>59</sup>, and **Tennessee's**<sup>60</sup> laws are similar. As with Oklahoma, clergy are not named in the law but are rather mandatory reporters by virtue of broad, catch-all provisions. Likewise, these states did not explicitly override their general clergy-penitent privilege, but rather said that the obligation to report abuse or neglect overrides all privileges except the attorney-client privilege. Again, these statutes are not as problematic and their interpretation less certain because it is not clear that the legislature understood that they were overriding the privacy of the confessional.

**West Virginia**<sup>61</sup> names clergy as mandatory reporters. But, as with the states above, its mandatory reporter law does specifically override the clergy penitent privilege, but only through a general provision that abrogates all privileges except the attorney client privilege. So, again, neither the text of the law nor any other evidence I have found indicates that the legislature understood that it was passing a law that could make it illegal for clergy to honor their religious vows.

Finally, **Texas'** mandatory reporting law follows several of the states above by stating generally that anyone "having cause to believe" child abuse has taken place must make a report. Tex. Fam. Code Ann. § 261-101(a). But the part of the law that deals with privileges is explicit: *Texas is the only state whose mandatory reporter law explicitly abrogates the penitential privilege*. However, this provision is similar to Oklahoma law in that it *applies equally to all privileges, including the attorney client privilege*. Texas law states:

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<sup>58</sup> Rhode Island requires "[a]ny person who has reasonable cause to know or suspect" child abuse to make a report. R.I. Gen. Laws § 40-11-3(a). Rhode Island's mandatory reporter law again does not address the penitential privilege but states broadly:

The privileged quality of communication between husband and wife and any professional person and his or her patient or client, except that between attorney and client, is hereby abrogated in situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required by this chapter.... *Id.* § 40-11-11.

<sup>59</sup> North Carolina makes "[a]ny person or institution" a mandatory reporter where the person or institution has cause to suspect child abuse. N.C. Gen. Stat. § 7B-301. Neither does the law address the penitential privilege:

No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case. *Id.* § 7B-310.

<sup>60</sup> Tennessee's mandatory reporter law provides a non-exclusive list of mandatory reporters that does not include clergy; clergy are mandatory reporters only under the statute's catch-all "any other person" language. Tenn. Code. Ann. § 37-1-605(a). This law does not specifically speak to the penitential privilege but rather says:

The privileged quality of communication between husband and wife and between any professional person and the professional person's patient or client, and any other privileged communication, except that between attorney and client, . . . shall not constitute grounds for failure to report as required by this part. *Id.* § 37-1-614.

<sup>61</sup> West Virginia names clergy as mandatory reporters, W. Va. § 49-2-803(a), but does not explicitly abrogate the penitential privilege. It merely says:

The privileged quality of communications between husband and wife and between any professional person and his or her patient or his or her client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect. *Id.* § 49-2-811.

The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health care facility that provides reproductive services.

*Id.* § 261-101(c).

**Washington State’s SHB 1098** borrows in different ways from each of these laws:

- Like **Tennessee** and **West Virginia**, SHB 1098 lists professions that are mandatory reporters.
- Like **Tennessee** and **West Virginia**, SHB 1098 lists clergy as a mandatory reporter.
- Like **Texas**, SHB 1098 explicitly abrogates the penitential privilege.
- Finally, like **Rhode Island, North Carolina, Tennessee, and West Virginia**, SHB 1098 preserves the attorney-client privilege.

But only SHB 1098 has all four of these characteristics:

	<b>Lists some professions as mandatory reporters</b>	<b>Clergy named as mandatory reporters</b>	<b>Penitential privilege explicitly revoked</b>	<b>Attorney-client privilege still honored</b>
<b>Oklahoma</b>	N	N	N	N
<b>Rhode Island</b>	N	N	N	Y
<b>North Carolina</b>	N	N	N	Y
<b>Tennessee</b>	Y	N	N	Y
<b>West Virginia</b>	Y	Y	N	Y
<b>Texas</b>	N	N	Y	N
<b>Washington SHB 1098</b>	Y	Y	Y	Y

This comparison shows that SHB 1098 is *unlike any existing law* in that it would knowingly and explicitly require Catholic priests to break the seal of the confessional, while at the same time maintaining the right to certain secular confidential communications.

This comparison yields several insights that may help explain why it appears that the six laws outlined above have not been met with a legal challenge, though I am confident that lawsuits would be brought against SHB 1098, were it to be passed into law without further amendment.

First, the text of these laws gives no indication that they were passed with the same intention to infringe on the religious exercise of the Catholic Church and on Catholic citizens (and other religious traditions). As noted above, four of the six (Oklahoma, Tennessee, Rhode Island, North Carolina) never mention clergy at all. Second, based on my research, it appears that all six laws were passed without significant discussion or controversy over their impact on religious liberty. According to the Associated Press’ report, each of these laws was passed long before the abuse crisis in the Catholic

Church broke as a new story in 2002: “of more than 130 bills introduced since 1987 to amend child sex abuse reporting laws, none of them succeeded in closing the clergy loophole.”<sup>62</sup>

Third, it does not appear that any of these six states have drawn attention to their laws against the penitential privilege by trying to enforce them. We are not aware of any effort to enforce any of these laws against a Catholic priest. Had there been any such efforts, it is a near certainty that Catholic priests would have refused to break their vow and that the Catholic Church would have mounted a significant campaign, including legal challenges, to defend its priests and its sacraments.

**V. A mandatory reporting law that eliminates the clergy penitent privilege would likely be found unconstitutional.**

Finally, members of the Washington State Legislature should be aware that a bill like SHB 1098, which would make it illegal for Catholic priests to maintain the seal of the confessional, would be an obvious target for litigation. Catholic citizens, Catholic priests, and Catholic dioceses would all have strong arguments that the law violates their rights under the First Amendment free exercise clause and the Fourteenth Amendment due process clause.

In 2019, former California State Senator Jerry Hill sponsored SB 360, a bill that like SHB 1098 would have revoked the clergy penitent privilege for purposes of California’s mandatory reporter law. The bill passed a Senate floor vote 30-4 in May 2019 and looked like it was well on its way to becoming law.<sup>63</sup> But shortly thereafter, Catholic entities in California submitted a memorandum to the Legislature making many of the arguments set out here, including the following legal arguments. Those arguments made their way into the California Assembly Committee on Public Safety’s July 8, 2019, Bill Analysis.<sup>64</sup>

The very next day, on June 9, Senator Hill realized his bill had lost support and pulled it bill from a scheduled hearing. Senator Hill told the Associated Press that the “opposition of the Catholic Church was instrumental,” and emphasized that the “Catholic Church made it clear that it would sue if the bill passed.”<sup>65</sup>

The Washington State Legislature should, like its corollary in California, consider the legal consequences of passing a bill that would constitute an unprecedented attack on a central aspect of a sacrament in the Catholic faith.

The certainty of litigation and the likelihood that Washington would lose a constitutional challenge should also be reflected in SHB 1098’s Fiscal Note. The report prepared in early January suggests that the only foreseeable fiscal impact of passing this bill would be the costs of handling additional

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<sup>62</sup> LOCALIZE IT: 33 states exempt clergy from reporting abuse, Associated Press, Sept. 28, 2022, <https://www.independent.co.uk/news/associated-press-ap-catholic-church-alaska-alabama-b2176917.html>.

<sup>63</sup> California Legislative Information, SB-360 Mandatory Reporters: Clergy (2019-2020): Votes, [https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201920200SB360](https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201920200SB360).

<sup>64</sup> California Legislative Information, SB-360 Mandatory Reporters: Clergy (2019-2020): Bill Analysis, July 9, 2019, [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB360#](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB360#).

<sup>65</sup> Jason Dearen and Michael Rezendess, *Clergy defend clergy loophole in child sex abuse reporting*, Associated Press, Sept. 28, 2022, <https://apnews.com/article/sex-abuse-catholic-church-mormon-5d78129a2fe666159a22ce71323f6da3>.

child abuse reports.<sup>66</sup> A more complete fiscal forecast would take into account the *much greater and much more certain cost* of defending this law in court. The State should also account that, under 42 U.S.C. § 1988(b), Washington State would also have to pay the prevailing plaintiff's reasonable attorneys' fees.

For the reasons set out below, together with the comparative analysis in Section IV above, there are strong arguments that Washington's SHB 1098 is not only constitutionally infirm, it is uniquely infirm compared to those few state laws, discussed above, that have abrogated the penitential privilege for purposes of a mandatory reporting law. First, SBH 1098 offends the Free Exercise Clause, even under *Employment Division v. Smith*. Second, there is a strong argument that the bill infringes on a fundamental liberty in violation of the Fourteenth Amendment's substantive due process protections.

#### **A. SBH 1098 violates the First Amendment's Free Exercise Clause.**

The strongest constitutional argument against SBH 1098 as written is that enforcing SBH 1098 would violate the rights of a Washington State Catholic under the First Amendment to the United States Constitution to freely practice his or her faith. A Catholic priest or Catholic diocese would have similar arguments that the law puts pressure on them to violate their religious obligations under canon law.

##### **1. SHB 1098 is neither neutral nor generally applicable.**

The starting point for analyzing whether SHB 1098 violates the Free Exercise Clause is *Employment Division v. Smith*, 494 U.S. 872 (1990), which held "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 979.

Since the Supreme Court decided *Smith* in 1990, federal and state courts have continued to strike down laws under the Free Exercise Clause that fall outside *Smith's* general rule because they are *not* neutral and generally applicable. Such laws are still subject to strict scrutiny, the most stringent standard of judicial review used by United States courts.

For example, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court struck down three ordinances banning animal sacrifice, unanimously concluding that the ordinances fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. 520, 543 (1993). The ordinances were not "neutral" or "generally applicable" because they burdened "Santeria adherents but almost no others"; they "proscribe[d] more religious conduct than [wa]s necessary to achieve their stated ends"; and they exempted other "animal deaths or kills" that

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<sup>66</sup> Department of Commerce, Local Government Fiscal Note: 1098 HB, <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=65449>.

undermined the government's interests "in a similar or greater degree than Santeria sacrifice does." *Id.* at 536-38, 543.

Following *Lukumi*, the Third,<sup>67</sup> Sixth,<sup>68</sup> and Eleventh<sup>69</sup> Circuits and the Iowa Supreme Court<sup>70</sup> have held that a law is not generally applicable when it exempts nonreligious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." 508 U.S. at 543-44.

Under the rule established by these courts, it is not difficult to see why SHB 1098 would likewise be subject to strict scrutiny. First, the Supreme Court has said that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. SHB 1098 is the rare piece of legislation that discriminates on its face against religiously motivated conduct. The sole purpose of the substitute version of the bill would be to overrule Washington State's clergy penitent privilege while leaving the attorney client privilege untouched. This is a clearer case of facial discrimination than even *Lukumi* itself.

But even if SHB 1098 were facially neutral, the Supreme Court has held that the Free Exercise Clause also "'forbids subtle departures from neutrality,'" and "covert suppression of particular religious beliefs." *Id.* at 534 (citations omitted). "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.*

HB 1098 is a "religious gerrymander," as it makes it illegal for priests to maintain the confidentiality required in their profession while authorizing lawyers to maintain the confidentiality required in their profession. As shown above, no other mandatory reporting law so clearly favors secular confidential communications over religious confidential communications as does SHB 1098. Just as with other laws that courts have found unconstitutional under the Free Exercise Clause, SHB 1098 favors secular conduct over comparable religious conduct.

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<sup>67</sup> *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (Striking down police department grooming policy that made an exception for beards grown for medical reasons, but not for religious reasons. Court found that the policy expressed "a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome [the government's] general interest in uniformity but that religious motivations are not."). See also *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans).

<sup>68</sup> *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (Striking down state university policy that permitted graduate counselling students to make client referrals for secular reasons but not for religious reasons. Court held that this "exemption-ridden policy" was "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.").

<sup>69</sup> *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004) (Striking down zoning ordinance that contained an exemption for nonprofit clubs and lodges, but not for houses of worship. Court held that the ordinance "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues.").

<sup>70</sup> *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (Striking down ordinance against tires with steel protrusions because it made exceptions for school busses and tire chains but not for local Mennonites, who were required by their faith to use only steel wheels.).

Under Supreme Court precedent, SHB 1098 is not neutral and generally applicable because it would allow someone to seek confidential legal advice related to child abuse, but deny them the opportunity to does not allow them to seek confidential spiritual counsel about the same issue. As such, SHB 1098 reflects “a value judgment that secular [] motivations for [maintaining a professional vow of confidentiality] are important enough to overcome [the government’s] general interest in [stopping child abuse] but that religious motivations are not.” *Fraternal Order of Police*, 170 F.3d at 366. SB. By placing a higher value on secular confidential communications than religious confidential communications, SHB 1098 places itself outside the general rule established by *Employment Division v. Smith* and would be subject to strict scrutiny under the Free Exercise Clause.

**2. SHB 1098 does not advance Washington State’s interests through the least restrictive means.**

Once a plaintiff demonstrates that a law is not neutral or generally applicable, he must show that the law substantially burdens his religious exercise. There is no doubt that a law that requires a Catholic priest to choose between criminal penalties and excommunication meets this threshold.

At this point, the burden would shift back to Washington State, which would have to show that SHB 1098 passes strict scrutiny, the most difficult test available in constitutional jurisprudence. This test would require requires Washington State to first show that the law advances a compelling governmental interest, and second that it could not advance this interest through any means that are less restrictive of religious exercise.

Washington would have little trouble establishing that preventing and punishing child sexual abuse is a compelling government interest. However, as the Supreme Court has said repeatedly, it is not enough for a state to raise an interest that is compelling in the abstract; it must explain how it has a compelling interest in advancing that interest in the specific context raised by religious plaintiffs. For example, in *Fulton v. City of Philadelphia*, the Court held that the key question “is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [Catholic Social Services].”<sup>71</sup> As Justice Neil Gorsuch wrote in another case, *Fulton* explains that “strict scrutiny demands ‘a more precise analysis’”: a government’s “general interest” is not compelling “without reference to the specific application of those rules to [the specific party].”<sup>72</sup>

Even if Washington State could establish a compelling government interest, it would still have to satisfy the “exceptionally demanding” least-restrictive-means test. *Holt v. Hobbs*, 135 S. Ct. 853, 858 (2015) (citation omitted). SHB 1098 likely fails this test in two separate ways.

One way to show that a policy is not the least restrictive means of pursuing a government interest is to show that the challenged policy is underinclusive because “[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct.” *Holt*, 135 S. Ct. at 866 (quoting *Lukumi*, 508 U.S. at 546). In *Lukumi*, the City of Hialeah claimed that it had forbidden animal sacrifice out of

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<sup>71</sup> 141 S. Ct. 1868, 1871 (2021).

<sup>72</sup> *Mast v. Fillmore Cty., Minn.*, 594 U.S. \_\_\_, \_\_\_ (2021) (Gorsuch, J., concurring in the decision to grant, vacate and remand).

public sanitation concerns. The Supreme Court said this argument failed strict scrutiny because the city was not vigorously pursuing that interest in comparable secular situations—such as hunters dressing game in their yards. Likewise, in *Holt v. Hobbs*, the Arkansas Department of Corrections claimed its ban on religious beards was necessary to maintain prison security, but the Court found the policy underinclusive because Arkansas allowed beards for medical reasons. In the same way, SHB 1098 is underinclusive because though it forbids priests from maintaining confidences, it allows lawyers to do the same.

A second way to show that a policy is not the least restrictive means of pursuing a government policy is to show that a vast majority of states have advanced the same compelling interest without infringing on religious exercise. In *Holt v. Hobbes*, the Supreme Court found that Arkansas' prison grooming policy failed strict scrutiny because the state "failed to show . . . why the vast majority of States and the Federal Government permit inmates to grow ½ inch beards, either for any reason or for religious reasons, but it cannot." *Holt*, 135 S. Ct. at 866. "That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the [religious] exemption he seeks." *Id.* Here, if Washington passes SHB 1098, it would be in the same position as Arkansas was in *Holt v. Hobbs*: Washington would be pressed to explain why over forty states have concluded that they can balance fighting child abuse with respect for religious exercise, but it cannot.

In short, SHB 1098 would put Washington State in the extremely difficult situation where it would be subject to strict scrutiny, forced to explain simultaneously why its child abuse situation is *more dire* than the more than forty states that respect the confessional, *yet not so serious* that it has not followed Oklahoma and Texas in also requiring attorneys to violate their professional vows.

**B. SHB 1098 violates a fundamental right protected by the Fourteenth Amendment's Due Process Clause.**

A religious plaintiff would also have a strong argument that SHB 1098 violates the Fourteenth Amendment's Due Process Clause. The Due Process Clause guarantees more than fair process; it also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted).

The substantive due process analysis has two primary features. First, in order to warrant this heightened protection, a right or interest must be objectively "deeply rooted in this Nation's history and tradition." It must be "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it was] sacrificed." *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Palko v. Connecticut*, 302 U.S. 319 (1937)).

Second, the fundamental liberty interest at stake must also be subject to a "careful description." *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The "crucial guideposts for responsible decision-making" in evaluating the existence of a fundamental right are the nation's "history, legal traditions, and practices." *Id.* (internal quotations and citations omitted). The question is whether the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*



(quoting *Snyder v. Comm.*, 291 U.S. 97, 105 (1934)). If so, the right may not be infringed “at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* (quoting *Flores*, 507 U.S. at 302). In short, if a right is deemed fundamental, any law infringing that right must pass strict scrutiny.

No court to my knowledge has been asked to find that a priest’s right to maintain the seal of the confessional is protected by the Due Process Clause. This is not surprising, however, as I am not aware of any instance where any governmental entity in the United States has dared to punish a Catholic priest for maintaining the confidentiality required by his faith.<sup>73</sup>

Were Washington to pass SHB 1098 into law without amendment and were the State or a private party to attempt to enforce it against a Catholic priest, a court would likely be asked to decide whether the Catholic Church’s right to offer its sacraments, a Catholic priest’s right to maintain a sinner’s privacy as required by canon law, or a Catholic penitent’s right to receive the sacrament of confession is a right “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

Based on the above, there is a strong argument that the clergy penitent privilege is among the fundamental rights and liberties protected by the United States Constitution under the Due Process Clause. It would have been unconstitutional if the United States had banned alcohol without making a provision for communion wine.<sup>74</sup> It would similarly be unconstitutional for Washington to amend its mandatory reporting law by eliminating the law’s provision for the penitential privilege. Whether this right is couched as a right of the Catholic Church, a Catholic priest, or an adherent to the Catholic faith, the right to offer and receive the sacrament of reconciliation without government interference is “objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

This Fourteenth Amendment substantive due process argument gives plaintiffs a second way to get to strict scrutiny against SHB 1098. If a court finds that the right to offer and receive the sacrament of

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<sup>73</sup> There was a Louisiana case where a private litigant tried to force a Catholic priest to testify about what he heard during a confession. In *Parents of Minor Child v. Charlet*, the parents of a child sexual abuse victim alleged that their daughter had told a Catholic priest in the confessional that she had been sexually abused, and that the priest was required to report this information under Louisiana’s mandatory reporter law. 135 So.3d. 1177, 1178-79 (La. 2014). The Louisiana Supreme Court held that the trial court could admit the girl’s testimony about her sacramental confessions with the defendant priest and also instructed the trial court to decide whether the priest was correct that the girl’s statements took place in the context of a true sacramental confession. *Id.* at 1181.

On remand, the trial court held that insofar as Louisiana’s mandatory reporter law required him to testify as to conversations that took place in the confessional, the law was unconstitutional because it violated the priest’s right to free exercise of religion under the Louisiana Constitution. *Mayeux v. Charlet*, 203 So.3d 1030, 1034 (La. 2016) (quoting lower court decision). The Louisiana Supreme Court reversed *because it avoided the constitutional issue by interpreting the underlying statute differently*. As interpreted by the Supreme Court, a priest was not required to report on conversations within the confessional. The court’s interpretation rendered the lower court’s constitutional ruling unnecessary *but did not dispute the court’s finding that it would be unconstitutional to require a priest to violate the seal of the confessional*.

<sup>74</sup> See, e.g., William A. Galston, *Why the Ministerial Exception Is Consistent with Smith-and Why It Makes Sense*, 53 San Diego L. Rev. 147, 149 (2016) (“Suppose the Volstead Act, which implemented the Prohibition amendment, had not contained an exemption for sacramental wine. Would enforcing that act against core rituals of Catholics and Jews have been consistent with the Free Exercise Clause? I think not-- indeed, obviously not.”).

reconciliation passes the *Glucksburg* test, the State would then have to argue that SHB 1098 passes strict scrutiny. For the reasons stated above, there are strong arguments that this bill would fail strict scrutiny because the overwhelming majority of states have concluded that advancing their interest in protecting children from neglect and abuse does not require a state to interfere with a religious sacrament.