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Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN DOE 140, an individual proceeding under a pseudonym,

Plaintiff,

v.

THE ARCHDIOCESE OF PORTLAND IN OREGON, an Oregon Corporation; THE ROMAN CATHOLIC ARCHBISHOP OF PORTLAND IN OREGON and successors, a corporation sole d.b.a. THE ARCHDIOCESE OF PORTLAND IN OREGON,

Defendants.

Case No. 3:07-CV-1733-PK

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES

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INTRODUCTION

Plaintiff was sexually abused when he was a child by Father Thomas Laughlin. Defendant The Archdiocese of Portland in Oregon ("Defendant") has alleged 17 "affirmative defenses" in its Answer to Plaintiff's First Amended Complaint ("Answer"). Fifteen[1] of these "affirmative defenses" should be dismissed on summary judgment as being legally insufficient or stricken for being redundant, immaterial, impertinent, and/or scandalous.

Plaintiff moves for summary judgment on all but Defendant's First and Second Affirmative Defenses. Specifically, Plaintiff moves for summary judgment on the following of Defendant's affirmative defenses: (Third) the non-economic damages limit of ORS 31.710 applies based on the doctrine of charitable immunity; (Fourth)[2] "Notice" that Fr. Laughlin's acts were outside the course and scope of employment; (Fifth) Plaintiff's claims are barred by the First Amendment; (Sixth) applying ORS 12.117 would violate Defendant's due process rights; (Seventh) the bankruptcy plan limits recovery; (Eighth)[3] punitive damages are not available for negligence; (Ninth) punitive damages would violate constitutional "religious freedom" clauses; (Tenth) punitive damages are not available under a *respondeat superior* theory; (11th) punitive damages would be an "unconstitutional entanglement" of church and state; (12th) punitive damages would violate religious freedom clauses of the Oregon Constitution; (13th) punitive

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[1] Defendant's First and Second affirmative defenses concern the timeliness of this action. The First is based on Plaintiff's alleged failure to bring his claim prior to the Bankruptcy claim bar date; the Second on plaintiff's alleged failure to bring the claim within the applicable statute of limitations. Such timeliness issues are appropriately raised as affirmative defenses. *See*, FRCP 8(c)(1). Issues of disputed fact bar summary judgment on these defense, as discussed in full in Plaintiff's Response to Defendant's Motion for Summary Judgment, supporting pleadings, and exhibits, which are incorporated by reference.

[2] Defendant Archdiocese does not contest dismissal of the Fourth, Eighth, and Fifteenth Affirmative Defenses, and under the agreement between the parties, this concession is without prejudice to the Archdiocese's ability to present facts and make legal arguments consistent with the defenses.

[3] *See* Note 2, *supra.*

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damages are barred because there are "more effective and less intrusive means of deterrence"; (14th) punitive damages are not appropriate because misconduct occurred 40 years ago; (15th)[4] the Due Process clause of the U.S. Constitution limits the amount of punitive damages; (16th) punitive damages are not necessary because Defendant has changed, has settled other cases, and has suffered "non-monetary punishment"; and (17th) punitive damages violate *ex post facto* laws.

Summary judgment should be granted in Plaintiff's favor on the listed "affirmative defenses" because they have are legally insufficient and no issues of fact remain to be decided at trial.

BACKGROUND FACTS

Plaintiff's motion is based on the legal insufficiency of 15 out of 17 of Defendant's affirmative defenses. Because these are "affirmative defenses," the underlying facts are not relevant to these motions. To the extent that background fact provide context or are otherwise helpful to the Court, Plaintiff incorporates by this reference the statement of facts in his Response to Defendant's Motion for Summary Judgment, along with the Response to Defendant's Concise Statement of Material Facts, supporting declarations, and exhibits filed therewith.

POINTS AND AUTHORITIES

I. STANDARD OF REVIEW

Under FRCP 56(c), summary judgment is appropriate if there are no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Here, Plaintiff moves for summary judgment against Defendants' asserted affirmative defenses. An affirmative defense, by definition, is a contention "asserted by the defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY at 60 (Sixth ed. 1990).

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[4] *See* Note 2, *supra.*

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See also State Farm Fire and Cas. Co. v. Reuter, 299 Or. 155, 160, 700 P.2d 236 (1985) ("An affirmative defense is one that admits the doing of the act charged, but seeks to excuse, justify or mitigate it"). Assuming the facts alleged in the complaint to be true for purposes of framing the legal analyses, all of these affirmative defenses present only questions of law, and thus do not involve any material factual disputes. As set out below, Plaintiff demonstrates that each of the contested affirmative defenses are deficient under any argument or construction applicable to the facts of this case.

II. ARGUMENT CONCERNING DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiff moves for summary judgment in his favor on all but Defendant's First and Second Affirmative Defenses. The rest lack legal merit and should be dismissed.

A. DEFENDANT'S THIRD AFFIRMATIVE DEFENSE

Defendants allege in its Third Affirmative Defense that, because of "[t]he doctrine charitable immunity," the statutory damages cap found in ORS 31.710(1) limits Plaintiff's non-economic damages claim to $500,000. Answer at ¶ 7. This defense fails as a matter of law because the doctrine of charitable immunity was not part of Oregon law in 1857, nor was it part of English common law in 1776—the key factors to applying the damages cap in ORS 31.710.

The non-economic damages cap found in ORS 31.710 is unconstitutional if applied to tort actions (or those "of like nature" to) that existed as common law causes of action in 1857, when Oregon became a state and adopted its Constitution. *Lakin v. Senco Prods., Inc.*, 329 Or. 62, 78, 987 P.2d 463 (1999). Defendant's Third Affirmative Defense is an attempt to get around the constitutional prohibition against capping Plaintiff's non-economic damages by alleging that, back in 1857, plaintiffs had no common law right of action against charitable organizations because the doctrine of charitable immunity protected organizations such as Defendant from liability. However, in 1857, charitable immunity did not exist at "common law" in Oregon or

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anywhere else in the United States. Even in England the only type of "charitable immunity" that existed at all in 1857 was very limited, did not apply to tort cases, and did not exempt charities from suit.

1. THE UNCONSTITUTIONALITY OF THE DAMAGES CAP.

Under Oregon constitutional doctrine, the Legislature cannot limit a jury's right to determine the measure of damages for any cause of action that existed (in fact or by analogy) at the time the Oregon Constitution was ratified in 1857. *Lakin v. Senco Prods., Inc.*, *supra*, 329 Or. at 78 ("Article I, section 17, prohibits the legislature from interfering with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, ***or in cases of like nature***") (emphasis added); *State v. 1920 Studebaker Touring Car*, 120 Or. 254, 263, 251 P. 701 (1927) ("the constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of like nature as they may hereafter arise"). *See also, Molodyh v. Truck Ins. Exchange*, 304 Or. 290, 297-8, 744 P.2d 992 (1987) (the right to jury trial "includes having a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process").

In 1857, the provisional Oregon legislature ratified the new State's constitution, including Article XVIII, Section 7, which provides, "All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." At the time of statehood, the territorial law of Oregon, passed June 27, 1844, contained the following provision:

> The common law of England and principles of equity, not modified by the statutes of Iowa or of this government, not incompatible with its principles, shall constitute a part of the law of this land. Laws of Oregon, 1843-49, p. 100.

In re Hood River, 114 Or. 112, 166, 227 P. 1065 (1924); *see also, Accord Hale v. Port of Portland*, 308 Or. 508, 514 (1989) ("The effect of [Article XVIII, section 7] was to incorporate

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the territory's pre-existing law which, as we have shown, incorporated the English common law.").

However, the only part of English common law that was part of Oregon's territorial laws and therefore incorporated into the new state constitution was English common law from before the American Revolution. *Hughes v. Peacehealth*, 344 Or. 142, 149, 178 P3d 225 (2008). In *Hughes*, the Oregon Supreme Court clarified the scope of the common law in 1857 and concluded that the English common law that is looked to in determining whether there is a remedy under Article I, Section 10 (or likewise for purposes of the damages cap under Article I, Section 17) is the common law of England at the time of the American Revolution. Once America was its own country, it developed its own common law, looking only to pre-Revolution English authority:

> [T]his court has taken a different view of those enactments with respect to the relationship between this state's common law and the historical organic law of England. The court has stated that, when "our territorial legislature and the framers of our Constitution and our courts recognized the existence [in Oregon] of the common law, they must have had reference to that law as it existed, ***modified and amended by the English statutes passed prior to the [American] Revolution***." *Peery v. Fletcher*, 93 Or. 43, 53, 182 P. 143 (1919) (emphasis added [by *Hughes* court]). *See also In re Estate of Moore*, 190 Or. 63, 70, 223 P.2d 393 (1950) (citing *Peery* for same proposition); *United States F. & G. Co. v. Bramwell*, 108 Or. 261, 264, 217 P. 332 (1923) (same). And ***it necessarily follows that English statutes enacted after the American Revolution*** (as was Lord Campbell's Act), ***were not in 1857 and are not now part of Oregon's common law***.

Id. at 149 (second emphasis added).

Under this constitutional analysis, the damages cap of ORS 31,710 is unconstitutional when it would limit the jury's role in determining the measure of damages for any cause of action that existed, or is "of like nature" to a cause of action that existed, in 1857.

a. Plaintiff's Causes of Action

Plaintiff has common law tort claims for battery, intentional infliction of emotional distress, fraud, and negligence. All of these claims were available, or are akin to claims that were

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available, at common law in 1857. Battery was a common law tort in 1857 for which a right of compensation existed (*see*, *e.g., The State v. William Hill*, 29 SCL 150 (SC App. Law 1843) *and McKinney v. The Western Stage Co.,* 4 Clarke 420 (Iowa 1857)). "Battery" is a volitional act, intended to result in a harmful or offensive contact. *Bakker v. Baza'r, Inc.*, 275 Or. 245, 249, 551 P.2d 1269 (1976). "Sexual battery of a child" is still battery and would have been a recognized subset of general civil law battery. *See Smothers v. Gresham Transfer, Inc*., 332 Or. 83, 116, 23 P3d 333 (2001).

The specific claim of intentional infliction of emotional distress developed over the years, but is based on a "familiar and traditional basis of liability" and grew out of the common law of assault, battery, false imprisonment, nuisance, negligence, and other tort theories that were all recognized in 1857. *See* William L. Prosser, *Insult and Outrage*, 44 Cal. L. Rev. 40, 40-43 (1956) (discussing evolution of the claim). Claims for negligence and fraud existed at common law in 1857. *See*, *e.g.*, *Tourtellot v. Rosebrook*, 11 Metcalf 460, 1846 WL 4040 (Mass. 1846) (recognizing cause of action of negligence); *Brown v. Kendall*, 60 Mass. 292, 1850 WL 4572 (1850) (recognizing cause of action of negligence); *State Bank v. Hamilton*, 2 Ind. 457, 1851 WL 2965 (1851) (common law fraud case); *Swazey v. Herr*, 11 Pa. 278, 1849 WL 5696 (1849) (same); *Collins v. Denison*, 53 Mass. 549, 1847 WL 3983 (1847) (same).

b. *Respondeat Superior* Theory

The fact that Plaintiff seeks to hold Defendant directly liable for its own negligence and fraud, but vicariously liable for sexual battery and intentional infliction of emotional distress under the doctrine of *respondeat superior* does not alter the constitutional analysis. There is no historical justification for concluding that Plaintiff's *respondeat superior* claims did not exist or were not "of like nature" to actions that could be brought in 1857. A brief overview of the doctrine demonstrates that *respondeat superior* actions most certainly existed in 1857.

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Respondeat superior doctrine for the torts of agents has its roots in ancient Roman law.[5] *Gossett v. Simonson*, 243 Or. 16, 21–22, 411 P.2d 277 (1966) ("Legal theorists suggest many reasons for permitting tort victims to recover against nonnegligent masters for the negligence of their servants. The idea that a certain degree of risk distribution, or enterprise liability, works justice has been, since the days of slavery under Roman law, the principal reason for the doctrine of *respondeat superior*. This policy, imbued with a related notion that vicarious liability encourages accident prevention, has justified liability without fault on the master's part for the servant's negligent acts, if the servant was acting within the scope of his employment. *See* 2 Harper & James, TORTS 1366, § 26.3 (1956)."). *See also, Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 208, 814 P.2d 1341, 1343 (Cal. 1991) ("The origins of *respondeat superior* have been traced to ancient Roman law. 5 Harper et al., THE LAW OF TORTS § 26.2, pp. 8-10 (2d ed. 1986)); Holmes, *Agency (Part 1)*[footnote omitted], 4 HARV L REV 345 (1891). However, this thesis is not universally accepted. *See* Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV L REV 315, 383 (1894) [stating the doctrine has Germanic, not Latin, origins]."). In any event, the doctrine is undoubtedly of ancient origins, certainly predating the 1857 ratification of the Oregon Constitution.

The doctrine of *respondeat superior* existed in England at least by the mid-1600s. In reviewing the history of *respondeat superior* in the common law of England, the West Virginia Supreme Court noted Professor Wigmore's 1894 response to Justice Holmes's article of 1891:

> Prof. Wigmore takes a different view, attributing the rule [of *respondeat superior*] to a gradual development of English thought commencing about the year 1300, and not based on or influenced by the Roman law. He traces it through three phases: (1) When the act of the servant was directly commanded by the master (about 1300); (2) when the act was impliedly so commanded (about 1700); (3) when the act was within the scope of authority or course of employment (about 1800). *See* article on *Responsibility for Tortious Acts*, 7 HARV L REV 381, 382. Pollock and Maitland in their History of the English Law, 2 vol 528, etc., find no definite trace of our present

[5] For example, in his sixth-century A.D. *Institutes*, Justinian explains the direct liability of the ancient Roman who instructs and encourages another's servant to steal on his behalf. *See* Justinian, *Institutes* Book IV, § 8 (535).

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doctrine prior to 1688. . . .

Cochran v. Michaels, 157 SE 173, 173–74 (W.Va. 1931) (emphasis added). Thus, *respondeat superior* in the form used by Plaintiff here existed not later that "about 1800," nearly 60 years

More specifically, *respondeat superior* existed in the United States between 1846 and 1861, and in such cases, charities were certainly subjected to suit for the torts of their agents. Two cases serve as examples. First, in the case of *Wesley Church v. Moore*, 10 Pa 273 (1849), a church was sued by a decedent's heirs for the sale of decedent's property. The heirs were awarded judgment at the trial court level, and their judgment was affirmed on appeal. This case is instructive because the church was sued directly, and the case was framed as a tort (fraud) by the Pennsylvania Supreme Court for jurisdictional purposes.

Second is *Camp v. Church Wardens of Church of St. Louis,* 7 La Ann 321 (La 1852). In that case, the suit was against the trustees as representatives of the church (the church was sued specifically) seeking damages from church funds, and the court held the church itself liable under *respondeat superior* doctrine. Judge Eustis stated for the equally divided court, "The general rule of law is, that ***a principal is liable to third persons for the torts, neglects and omissions of duty of his agent, in the course of his employment***." *Camp,* 7 La Ann at 3 (emphasis added). While this case is of limited precedential value due to the use of the Code Napoleon, it illustrates that *respondeat superior* cases existed in America generally prior to the adoption of the Oregon Constitution.

Because Plaintiff's *respondeat superior* and negligence claims are the same as, or analogous to, causes of action that existed in 1857, the non-economic damages cap of ORS 31.730 cannot constitutionally apply unless it can be shown that charitable immunity also existed at the time of the Revolution in 1776. It did not.

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2. CHARITABLE IMMUNITY DID NOT EXIST AT COMMON LAW IN 1857, LET ALONE 1776.

Charitable immunity can conceivably apply only if it existed in English common law at the time of the American Revolution, or in American common law prior to 1857. *See Hughes v. Peacehealth*, 344 Or. at 149. This is plainly not the case. Charitable immunity in even a rudimentary form came about in England only in 1846. *See*, *Callopy v. Newark Eye & Ear Infirmary*, 141 A.2d 276, 278 (NJ 1958) (discussing the brief history of English charitable immunity doctrine).[6] The doctrine of charitable immunity was first adopted in America in 1876—19 years after the ratification of Oregon's constitution. *See*, *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876) (first adopting doctrine in the United States). England's law of charitable immunity could not become part of Oregon law by the 1857 ratification of the Oregon Constitution because charitable immunity did not exist in England before the American Revolution. *Hughes v. Peacehealth*, 344 Or. at 149.

Charitable immunity was nowhere part of the common law of England in 1776, or of the United States in 1857. Therefore, as Plaintiff's tort claims were viable and of like nature to those that existed in 1857, the damages cap is unconstitutional in this case. Plaintiff's constitutional right to a remedy and right to a jury finding on all issues of fact under Article I, Section 10 and Article I, Section 17 of the Oregon Constitution, respectively, preclude the application of

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[6] The early form of "charitable immunity" in England prior to the ratification of Oregon's constitution in 1857 did not provide immunity from suit; it only protected segregated funds held in a recognized equitable trust for the organization. *See*, *Feoffees of Heriot's Hosp. V. Ross*, 8 Eng Rep 1508 (1846) (discussed in *Callopy v. Newark Eye & Ear Infirmary*, 141 A.2d at 278). Even the limited charitable immunity available in England prior to 1857 would not protect Defendant here since Defendant has not alleged and cannot prove that their funds are held in a specific trust instrument. In any event, this limited type of immunity did not become part of Oregon law because it did not exist prior to the American Revolution. A blanket waiver from suit for charities did not exist anywhere at common law until it was adopted in England in 1861—a full four years after Oregon's statehood. *See*, *Holliday v. St. Leonard, Shoreditch*, 142 Eng Rep 769 (1861) (discussed in *Callopy*); *see also*, *Mersey Docks Trustees v. Gibbs*, LR 1 HL 93, 11 Eng Rep 1500 (1866) (abolishing charitable immunity in England; discussed in *Callopy)*.

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charitable immunity to the present case. Plaintiff is entitled to summary judgment on Defendants' Third Affirmative Defense.

B. DEFENDANT'S FOURTH AND SEVENTH AFFIRMATIVE DEFENSES

Plaintiff is entitled to summary judgment on Defendant's Fourth and Seventh Affirmative Defenses because they are not, on the face of the pleading, affirmative defenses.

First, as its Fourth Affirmative Defense, Defendant alleges, "Without assuming any burden of pleading and proof, and for purposes of notice only," Fr. Laughlin was outside the course and scope of his employment. Answer at ¶ 8. Defendant Archdiocese concedes that this affirmative defense be stricken.

The Seventh Affirmative Defense does not even repeat a denial. As this "defense," Defendant alleges, "Without assuming any burden of pleading and proof, and for purposes of notice only," Defendant's liability is limited by the Plan entered in Defendant's bankruptcy. This merely describes the law of the case—that this case is governed by the Plan.

Neither of these defenses are proper. An affirmative defense is something that, if proven by a defendant, allows the defendant to avoid liability even if the plaintiff's allegations are true. The Fourth and Seventh Affirmative Defenses are nothing. They do not allege independent grounds for avoiding liability; they expressly renounce the assumption of a burden of proof; and their only stated purpose is to provide "notice" of some kind. Indeed, they raise no additional facts whatsoever, and thus are deficient even under the federal pleading standard. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007) (enough specifics must be pleaded to state all necessary elements of a claim or defense).

Because there is no legal basis for these kind of sham "affirmative defenses,' the Court should dismiss them on summary judgment.[7]

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[7] Of course, the Court has the power to strike the Seventh Affirmative Defense as an "insufficient defense" or because it is "redundant" and "immaterial." FRCP 12(f) (the Court may

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C. DEFENDANT'S "RELIGIOUS FREEDOM" AFFIRMATIVE DEFENSES

Defendant's Fifth, Ninth, Eleventh, and Thirteenth Affirmative Defenses[8] are all based on the "religion" provisions of the U.S. and Oregon Constitutions. These defenses have been rejected time and time again. Specifically, Defendant alleges that prosecution of claims based on "negligent supervision of a clergyman' and "what does or does not constitute proper duties of ordained clergy" would violate the "religion clauses" and "religious freedom provisions" of the U.S. and Oregon Constitutions (Fifth Affirmative Defense; Answer at ¶ 9); punitive damages are barred by the same provisions (Ninth Affirmative Defense; Answer at ¶ 13); splitting punitive damages with the state violates the "establishment clause" of the U.S. Constitution (11th Affirmative Defense; Answer at ¶ 15); and punitive damages are barred because "less intrusive means" exist to deter or punish Defendant (13th Affirmative Defense; Answer at ¶ 17).

There is no legal merit to Defendant's First Amendment defenses. As multiple courts (including this one) have held, claims for childhood sex abuse against religious organizations do not violate Constitutional religious protections because they merely apply generally applicable, facially neutral principles to conduct that is arguably religious. *E.g., M.K v. Archdiocese of Portland*, 228 F. Supp. 2d 1168, 1172 (D. Or. 2002) (adopted in its entirety from magistrate findings); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194 (D. Colo. 2006) (there is "no First Amendment violation where secular courts pass judgment on the question whether church authorities have legally exercised their responsibilities as employers"). *See Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 884 (1990) (generally applicable, facially neutral laws that limit religious practice are presumed constitutional unless a set of

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act "on its own" at any time to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.").

[8] To the extent the application of these "affirmative defenses" are contingent on factual issues, the Archdiocese has then failed in its pleading burden. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1974.

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"hybrid rights' is implicated). Indeed, as the Washington Supreme Court summarized nicely:

> The First Amendment does not provide churches with absolute immunity to engage in tortuous conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles.

C.J.C. v. Corporation of the Catholic Bishop of Yakima, 985 P.2d 262, 277 (Wash. 1999).[9] Even if the conduct against which liability is imposed is religious, *Smith*—as well as such venerable precedent as *Reynolds v. United States*, 98 U.S. 145 (1879) (outlawing the religiously-required practice of polygamy)—holds that such conduct is subject to the laws of the land.

The First Amendment, which is incorporated by the Fourteenth Amendment,[10] prohibits the states from enacting laws "respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. There is no question that the law of this case (as part of the Archdiocese bankruptcy proceeding) and the law of this Nation is that "[t]he First Amendment Establishment and Free Exercise clauses [prevent] courts from resolving internal church disputes that would require adjudication of questions of religious doctrine." *In re Roman Catholic Archbishop of Portland*, 335 B.R. 815, 824 (2005) ("Bankr. Op. I") (citations and internal quotations omitted).[11] Likewise, "a law targeting religious beliefs as such is never

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[9] Significantly, Oregon's constitutional guarantees of religious freedom have been held to apply in a similar fashion. *Meltebeke v. Bureau of Labor & Indus.*, 322 Or 132, 150, 903 P.2d 351, 361–2 (1995) ("[An agency] rule is constitutional on its face [because it] is a law that is part of a general regulatory scheme, expressly neutral toward religion as such, and neutral among religions."); *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P.2d 588 (1989) (religious organization not exempt from unemployment compensation tax because "[t]he state may justify a limitation on religion by showing that it is [uniform and] essential to accomplish an overriding governmental interest").

[10] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating First Amendment against the States).

[11] *See Watson v. Jones*, 80 U.S. 679 (1871) (court cannot grant control of property to one group after a schism); *Jones v. Wolf*, 443 U.S. 595 (1979) (same); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 429 U.S. 873 (1976) (determination of proper bishop outside constitutional authority of court).

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permissible . . . [nor may a law] infringe upon or restrict practices because of their religious motivation[.]" *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (anti-slaughtering law unconstitutional because passed explicitly to impede Santeria animal sacrifice). Similarly, the Oregon Constitution's provisions on religious freedom also prohibit laws that target religious beliefs and practices. *Cooper v. Eugene Sch. Dist*., 301 Or. 358, 369, 378, 723 P.2d 298 (1986) (law unconstitutional under Oregon Constitution where "the religious significance of the teacher's dress is the specific target of this law" unless it is "limited to actual incompatibility with the teaching function").

But the Supreme Court of the United States in *Smith* established that individual religious beliefs do not excuse compliance with valid, neutral laws of general applicability on the ground that the law proscribes what the religion permits, or vice versa. *Smith*, 494 U.S. at 885-86 (upholding denial of unemployment benefits for drug abuse counselor who took peyote as part of religious beliefs). In *Smith*, the Supreme Court made clear 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 879 (internal citations omitted). Religious beliefs do not excuse "compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id*. at 878-879.

The principle explained in *Smith* was first asserted in *Reynolds v. United States*, 98 U.S. 145, in which the Supreme Court rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," the Supreme Court explained, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166–67. In light of these principles, the Supreme Court in *Smith* rejected the argument that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." 494 U.S. at 882. For example, the

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Court has articulated that "there are neutral principles of law . . . which can be applied" in church property disputes without "resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

Plaintiff's claims, including his claim for punitive damages, brought against the employers of priests that commit sexual abuse do not trigger First Amendment scrutiny because laws governing negligent supervision do not require any inquiry into religious doctrine, practice, or polity. Such claims, including Plaintiff's claims for sexual abuse, can be judged entirely by secular standards. Since the laws governing Plaintiff's claims are religion-neutral and of general applicability, Defendant cannot throw a First Amendment cloak over civil liability in sexual abuse claims simply because it is a religious institution.

Federal caselaw recognizes that tort claims by victims of clergy sexual abuse do not trigger First Amendment scrutiny, and the internal church governance doctrine does not provide the Church immunity, for claims in sexual abuse cases. *See*, *Bankr. Op. I*, 335 B.R. at 824–26. In the bankruptcy case involving this Defendant, of which this proceeding is a part, Defendant raised the same constitutional defenses, arguing that deposition questions inquiring into matters of church government were protected by the First Amendment. *Id.* at 824. The bankruptcy court rejected this argument because "the dispute is not over church doctrine or beliefs, but over liability for [civil] misconduct by those in the church's employ." *Id.* The court continued:

> The court is not called upon to resolve any matters of ecclesiastical or theological doctrine . . . . To the extent the First Amendment protects internal church governance . . . that protection does not apply in these claims for sexual misconduct with minors by priests working in the [Church].

335 B.R. 815, 824-26 (2005). Likewise, in *M.K v. Archdiocese of Portland*, this Court concluded:

> As with any employer-employee relationship, the parameters of a priest's duties can be discerned by reviewing the "job description" of the priest, in addition to communications between the church and the priest. While this will require the court to consider a number of Defendants' canons delineating the duties of a priest, the

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> court will not need to make any judgment on appropriateness, correctness or validity of any of the canons. The canons will merely define the duties of a priest and the court will then consider whether the Priests' acts of "grooming" fall within this definition. The court will not in any matter limit the priests[']duties or the ability of the church to supervise the Priests.

228 F. Supp. 2d at 1172; *see also*, *Doe v. Archdiocese of Denver*, 413 F.Supp.2d at 1193 (holding that "[t]he general duty of care depends in no way upon the religious status of the defendant organizations. Any liability will attach here as a result of the defendants' conduct *qua* employers, not *qua* religious organizations."). Indeed, this Court is not telling the Archdiocese how to hire, assign, or supervise its priests, it is only holding it accountable by secular standards when its conduct causes injury. *Cf. Malicki v. Doe*, 814 So.2d 347, 360 (Fla.,2002) ("just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur").

Oregon law governing Plaintiff's tort claims—both for direct and vicarious liability, and including his punitive damages claim—is neutral and generally applicable. This law is not directed at any doctrine of the Catholic Church and is not limited in application to the Catholic Church. Certainly, Defendant does not and will not argue that its canons allow sexual molestation of children, but even if it did, Defendant would still be subject to criminal and civil liability under neutral laws prohibiting child abuse.

Also, Oregon's punitive damages statute is neutral on its face and requires all plaintiffs to split punitive damages awards with the state. There is no authority for Defendant's allegations that applying this law to Defendant violates the establishment clause. On the contrary, in *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 252-53, 644 P.2d 577, *rev. den.*, 293 Or. 456, 650 P.2d 928 (1982), the court upheld a punitive damages award against a religious organization, finding that the award did not violate religious freedom. The Bankruptcy Court rejected this Defendant's same "entanglement" argument, stating, "presumably state government may enforce its laws against religious institutions, including possibly obtaining

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judgments against such institutions, without necessarily becoming excessively entangled in religion." *In re Roman Catholic Archbishop of Portland*, 339 B.R. 215, 228 (2006) ("*Bankr. Op. II*").

Finally, the "less intrusive means"language found in Defendant's Thirteenth Affirmative Defense does not apply in this case. This language is a mangling of one of the elements of the strict scrutiny test employed prior to *Smith* to weigh government regulation against impeded religious practice. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (compelling state interest required to create a substantial burden on religious practice); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981) (law limiting religious practice must be "the least restrictive means of achieving some compelling state interest"). However, *Smith* sharply curtailed the scope of the *Sherbert-Thomas* "compelling interest-substantial burden-least restrictive means test" to ***only*** those situations involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. The Court termed this a "hybrid situation"—now usually referred to as a "hybrid rights" situation.[12] Thus, the only way to invoke strict scrutiny (*e.g.* the least restrictive means prong of the compelling interest test) is to present a situation in which religious practice is combined with an independent constitutional right.[13]

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[12] *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (a First Amendment challenge to a "law [that] burdens the free exercise of religion and some other constitutionally-protected activity, . . . is sometimes described as a "hybrid rights" claim").

[13] Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*., in response to the *Smith* ruling. RFRA attempted to re-assert the compelling interest test in free exercise challenges to laws that curtailed religious practice. The Supreme Court subsequently held RFRA unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), as applied to state and local laws. RFRA still applies to federal agency action and statutes. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (exemption from Controlled Substances Act for religious adherents who drink hallucinogenic tea). In any event, neither RFRA nor *Sherbert* apply here.

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There is no recognized constitutional right to employ people (in contrast to the constitutional right not to be discriminated against on the basis of race in employment decisions), and thus the Archdiocese can present no "hybrid rights" situation. Furthermore, the *Smith* analysis also applies fully to cases non-criminal conduct. *See, e.g.*, *Johns v. County of San Diego*, 114 F3d 874, 877 (9th Cir. 1997) (law prohibiting a parent or guardian from bringing an action on behalf of a minor child without retaining a lawyer does not present hybrid rights situation); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir 2003) (zoning ordinance applied to church does not impact hybrid rights). Under a hybrid analysis, there is simply no non-Free Exercise "companion right" to which Defendant can point; and the Archdiocese has alleged no hybrid right in its answer.

Because the law governing Plaintiff's punitive damages claim meets the *Smith* requirements as a neutral and generally applicable law and involves no hybrid rights scenario, the "less intrusive means" test will never come into play. Therefore, there is no legal merit to Defendant's First Amendment and related arguments, and Plaintiff is entitled to summary judgment on Defendant's Fifth, Ninth, Eleventh, and Thirteenth Affirmative Defenses.

D. DEFENDANT'S SIXTH AFFIRMATIVE DEFENSE

As a Sixth Affirmative Defense, Defendant alleges the same Due Process arguments that have been rejected before, as it acknowledges by the statement: "In a good faith attempt to clarify or re-examine certain decisions . . ." Answer at ¶ 10. Defendant alleges that "allowing plaintiff to recover damages for previously time-barred claims" would violate Defendant's due process rights. This defense should be dismissed as a matter of law because neither procedural nor substantive federal due process protections limit the use of a civil statute of limitations to revive a tort cause of action in cases that was formerly time-barred but not accrued or adjudicated.

The Fourteenth Amendment to the U.S. Constitution simply has no bearing on this case. The Fourteenth Amendment impacts state law in only three ways, as discussed in detail below.

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First, through the doctrine of incorporation, the Due Process Clause of the Fourteenth Amendment incorporates selected provisions of the Bill of Rights of the U.S. Constitution applicable to states.[14] Second, due process under the Fourteenth Amendment is applicable to states through requirements of procedural due process for litigants in criminal and civil cases. Finally, very limited "substantive due process" rights articulated by the Supreme Court will bar certain government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). None of these afford a defense against Plaintiff's claims.

The gist of Defendant's Sixth Affirmative defense is that allowing Plaintiff to proceed with his claims this many years after his sexual abuse would violate its due process rights. An examination of any possible due process issues raised by Plaintiff's claims shows that there is no merit to this defense.

1. INCORPORATION OF "RIGHT TO SPEEDY TRIAL" ONLY OPERATES IN THE CRIMINAL CONTEXT.

Under the doctrine of incorporation, the Sixth Amendment right to a speedy trial has been held binding against states, but only in criminal cases. *Klopfer v. North Carolina*, 386 U.S. 213 (1967); U.S. Const. Amend. XI ("In all ***criminal prosecutions***, the accused shall enjoy the right to a speedy and public trial . . . .") (emphasis added)). The roots of this "fundamental" right go back to concerns about pre-trial incarceration, not pre-indictment delay. *Klopfer*, 386 U.S. at 224; *see also, Smothers v. Gresham Transfer, Inc.*, 332 Or. at 92; *see also*, *United States v. Forty Thousand Dollars ($40,000.00) in U.S. Currency*, 763 F. Supp. 1423 (S.D. Ohio 1991) (no right to speedy trial in civil asset forfeiture case).

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[14] With the exception of grand jury indictments, virtually all the provisions of the Bill of Rights relating to rights in judicial proceedings have been incorporated. *See*, *e. g.*, *Mapp v. Ohio*, 367 U.S. 643,(1961); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Benton v. Maryland*, 395 U.S. 784 (1969); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Washington v. Texas*, 388 U.S. 14 (1967); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

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The passage of time between Plaintiff's childhood sexual abuse and this lawsuit does not violate any due process right to a "speedy trial" because this is not a criminal case. Even though the right to a speedy trial under the Sixth Amendment operates within the Oregon courts, that right—by definition—cannot preclude Plaintiff's civil claims against Defendants.

2. PROCEDURAL DUE PROCESS GUARANTEES A "FAIR HEARING."

The right to procedural due process under the Fourteenth Amendment extends to both civil and criminal cases. However, procedural due process merely ensures notice and an opportunity for a hearing in front of a neutral decision maker prior to any deprivation of life, liberty, or property. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). Because a jury or this Court would hear the claims against the Defendant prior to any "deprivation" as a result of an adverse judgment, procedural due process is fully satisfied.

3. SUBSTANTIVE DUE PROCESS DOES NOT INDEPENDENTLY RECOGNIZE A CIVIL DEFENDANT'S RIGHT TO A "SPEEDY TRIAL," AND ORS 12.117 IS NOT "ARBITRARY IN THE CONSTITUTIONAL SENSE."

The third form of due process protection provided by the Fourteenth Amendment is the elusive doctrine of substantive due process. Substantive due process "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), *quoting Daniels v. Williams*, 474 U.S. at 331. A *prima facie* violation of substantive due process must show existence of (1) a constitutionally protected interest in property or liberty, (2) the deprivation of which is "arbitrary in the constitutional sense." *See*, *Collins* 503 U.S. at 129-30. Of course, "only the most egregious [governmental] action can be said to be 'arbitrary' in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). The Supreme Court has "always been reluctant to expand the concept of substantive due process." *County of Sacramento*

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v. Lewis, 523 U.S. at 842 (quotations, citation omitted).

Defendant cannot demonstrate either of the conditions necessary to succeed on any substantive due process attack on the constitutionality of ORS 12.117's tolling of the statute of limitations for victims of child sexual abuse. No property or liberty interest creates a fundamental right to a particular procedure—such as trial within a certain period of time—so any "deprivation" of a particular procedure cannot be "arbitrary in the constitutional sense." First, the application of the procedural ORS 12.117 will not deprive Defendant of property or liberty any more than any statute of limitations can be said to deprive any defendant of such things. Second, the child abuse statute of limitations in ORS 12.117 is not "arbitrary," but rather a deliberate, conscious, well-informed policy choice by the Legislature.

There is no authority for a substantive due process defense in this case. The history of substantive due process "counsels caution and restraint." *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (Powell, J., plurality op.), and such a substantive right should not be extended in this case as a matter of first impression. No reported cases have found a violation of substantive due process rights based on the retroactive application of a civil statute of limitations.

In general, there is no substantive due process right against the retroactive application of statutes. An explicitly retroactive statute does not violate substantive due process. *Landgraf v. USI Film Products*, 511 U.S. 244, 265–66 (1994). "[T]here is no constitutional bar to the legislature providing that its laws be applied retroactively." *Whipple v. Howser*, 291 Or. 475, 480, 632 P.2d 782 (1981), *citing Hall v. Northwest Outward Bound School*, 280 Or. 655, 572 P.2d 1007 (1977).

The Oregon Legislature explicitly intended ORS 12.117 to apply retroactively. In enacting this extended child abuse statute of limitations, the Legislature stated:

> The amendments to ORS 12.117 by section 1 of this Act apply to all causes of action whether arising before, on or after the effective date of this Act, and shall act to revive any cause of action barred by the operation of ORS 12.117 (1991 Edition).

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1993 Oregon Laws Ch. 296 (S.B. 234) at § 2 (1993).[15] This statement is more than sufficient to determine that the Legislature intended ORS 12.117 to operate retroactively. *Vloedman v. Cornell*, 161 Or. App. 396, 400, 984 P.2d 906, 908 (1999) (citing *State v. Lanig*, 154 Or. App. 665, 670, 963 P.2d 58 (1998) ("Whether a statute applies retroactively is a matter of legislative intent, determined in the usual manner of construing the intended meaning of statutes. . . . We examine the text, in context, and, if necessary, the legislative history and other aids to construction.").[16] The Legislature explicitly intended ORS 12.117 to operate retroactively, and the fact that it does so does not violate substantive due process rights.

Also, there is no substantive right in an essentially procedural matter, such as a pre-filing delay. *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979). In *Martin*, a tenured teacher was denied a contract renewal for failing to take continuing-education courses, and after a hearing, the school board still refused to renew the teacher's contract. *Id.* at 197-8. Citing its substantive due process cases to that date,[17] the Supreme Court agreed that when procedural due process was satisfied, substantive due process was at issue only if the ***result*** of the complained-of action, ***not the procedure***, impacted a fundamental right. Defendants have no fundamental right to be immune from civil court judgments. This distinction also logically precludes using

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[15] Section 1 of 1993 Oregon Laws Ch. 296 (S.B. 234) amended ORS 12.117 by deleting the statement: "However, in no event may an action based on conduct constituting child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person is entitled to bring the action is within 18 years of age be commenced after that person attains 40 years old."

[16] The method of statutory construction in Oregon is part of this State's substantive law, and should be applied directly. In any event, the Oregon test does not greatly differ from the federal test of statutory construction. *See*, *Smith v. Doe*, 538 U.S. 84, 92-93 (2003) ("We consider the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)").

[17] *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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substantive due process to analyze trial procedures and statutes of limitations.

Several courts have held that there is no ***substantive*** right in a specific judicial procedure—that would seem to be "procedural" due process. The Fifth Circuit explicitly rejected the notion that there is a substantive due process right to a certain procedure. *Holloway v. Walker*, 784 F.2d 1287, 1293 (5th Cir. 1986) ("common sense" dictates that allegations of corrupt judicial conspiracy to deprive plaintiffs of property without due process by thwarting their right to a fair trial is a matter of procedural, not substantive, due process); *see also*, *e.g.*, *Barrett v. United States*, 651 F. Supp. 615, 622 (SDNY 1986) ("claim of unconstitutional property deprivation resulting from the allegedly fraudulent conduct of a litigation would seem on its face to state a violation of ***procedural rather than substantive*** due process.") (emphasis added).[18]

ORS 12.117 deprives Defendant of neither property nor liberty. In any event, application of ORS 12.117 does not trigger a heightened level of scrutiny under ***substantive*** due process because the adoption of this statute was not "arbitrary in the constitutional sense." *Collins v. Harker Heights*, 503 U.S. at 129. Arbitrary actions occur where governmental agents act contrary to basic common sense or established procedures, or impose punishments which are grossly disproportionate to the violations committed. *See, e.g.*, *Martin*, *supra*, 440 US at 198-9 (refusal to renew teacher's contract when contract only denied pay raises for violation was not arbitrary); *Collins*, 503 U.S. at 129 (city's alleged failure to train its employees, or failure to warn

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[18] *But see*, *In re Chevron U.S.A.*, 109 F.3d 1016, 1021-22 (5th Cir. 1998) ("We recognize that our due process concerns seem to blur distinctions between procedural and substantive due process."). *In re Chevron*, is a case of messy facts making messy law. Faced with a grossly unjust result, the court held that allowing issue preclusion by atypical "bellwether" cases to establish liability and causation in multiparty complex litigation violated "fundamental fairness" of substantive, not procedural, due process. However, the facts of *In re Chevron*—namely that civil plaintiffs in subsequent cases against Chevron concerning the same matter would be given a "free pass" on the issues of liability and causation on the basis of a potentially non-analogous case—differ strikingly from allowing a statute of limitations such as ORS 12.117 to operate as intended by the Oregon Legislature.

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about known risks of harm is not arbitrary government action). It defies logic to assert that a court's proper application of a statute constitutes arbitrary government action.

Retroactive extension of the statute of limitations has indeed exposed Defendant to liability, but the underlying liability itself is just and fair because Defendant's agent molested children, using his authority and reputation to gain access, and Defendant's own negligence and fraud injured Plaintiff. Defendant has no constitutional right to walk away from its direct and vicarious responsibility simply because Oregon enacted a longer statute of limitations than it used to have.

Because there is no basis in law to apply the Fourteenth Amendment to Plaintiff's claim under the doctrines of incorporation, procedural due process, or substantive due process, Plaintiff is entitled to summary judgment on Defendant's Sixth Affirmative Defense.

E. DEFENDANT'S EIGHTH AFFIRMATIVE DEFENSE

Defendant alleges as an Eighth Affirmative Defense that it cannot be held liable for punitive damages because punitive damages are not available for negligence. This defense should be dismissed because it is not an affirmative defense. Defendant Archdiocese concedes that this affirmative defense should be stricken.

F. DEFENDANT'S TENTH AFFIRMATIVE DEFENSE

In its Tenth Affirmative Defense, Defendant alleges that punitive damages are not available under the theory of *respondeat superior*. Like Defendant's defense that punitive damages are not available for negligence, this is a statement of law, not an actual affirmative defense. It is also an erroneous statement of law.

The Bankruptcy court has already rejected this "defense," stating:

> Oregon law allows awards of punitive damages against employers held vicariously liable for the intentional torts of their employees if (1) the employee was acting within the scope of employment, *Stroud v. Denny's Restaurant, Inc.*, 271 Or. 430,

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> 437, 532 P.2d 790 (1975), or (2) if the employee was not acting within the scope of employment, the employer "was aware of, approved of, ratified, or countenanced" the employee's misconduct. *Badger v. Paulson Inv. Co., Inc.*, 311 Or. 14, 28, 803 P.2d 1178 (1991).

Bankr. Op. II, 339 B.R. at 229. The Bankruptcy court correctly found that punitive damages are available in *respondeat superior* cases, as the Oregon Supreme Court held in *Stroud*. Even where no *respondeat superior* liability can lie because an employee was not acting within the course and scope of employment, an employer will be liable for punitive damages for torts committed by an employee acting with apparent authority if the employer was complicate in some way. *Badger*, 311 Or. at 28.

At trial, the Court will instruct the jury on Oregon law governing punitive damages in *respondeat superior* cases. Defendant need not allege or prove to the jury what this law is. Accordingly, Defendant's Tenth Affirmative Defense should be stricken because it is an improper affirmative defense. The Court should also grant summary judgment dismissing this defense because it is contrary to Oregon law.

G. DEFENDANT'S TWELFTH AFFIRMATIVE DEFENSE

Defendant's 12th Affirmative Defense is closely related to its other "religious freedom" constitutional defenses, but with an Oregon twist. Essentially, Defendant alleges that Oregon's Constitution protects it from punitive damages based on its religious freedoms the same way that the Oregon Constitution protects certain defendants from punitive damages based on freedom of speech. Answer at ¶ 16. This defense is based on—indeed Defendant cites in its Answer—*Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979), in which the Oregon Supreme Court held that punitive damages were not available in a defamation case because they would violate First Amendment free speech protections.

The *Wheeler* rule has limited application. For one thing, it does not apply in fraud cases. While fraud is based on speech, punitive damages are available in fraud cases. *Smallwood v.*

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Fisk, 146 Or. App. 695, 934 P.2d 557 (1997). The court in *Smallwood* examined Oregon law since *Wheeler* and held that "allowing liability for punitive damages for fraud does amount to punishing the offender for the content of his or her speech, but . . . the constitutional guarantees of free expression were never intended to extend protection to that type of expression."

The *Wheeler* rule does not apply by analogy to religious freedom cases. In *Christofferson*, *supra*, the court refused to extend the free speech rational for the *Wheeler* rule to constitutional religious freedom rights. 57 Or. App. at 252-53. While certain torts such as defamation hold a defendant liable based on the content of speech, Plaintiff here does not seek to hold Defendant liable for its religious beliefs. As discussed above, Plaintiff's claims raise no constitutional issues because they are based on Defendant's secular conduct, secular policies, and fraudulent secular representations. If Plaintiff prevails, the jury will consider whether to punish Defendant, but not for its religious beliefs.

The court in *Christofferson* rejected the same argument Defendant makes in its 12th Affirmative Defense, that punitive damages would have a chilling effect on the free exercise of religion. 57 Or. App. at 252-53. As the court explained, a church can only be held liable for fraud for "non-religious" statements, as the truth of religious beliefs cannot be decided by a secular jury in civil court. *Id.* at 251-52. Therefore, the court concluded:

> The free exercise of religion is sufficiently protected by the broad scope of what is protected as religious belief and practice and the fact that the truth or falsity of such religious beliefs may not be determined in an action for fraud. The trial court properly denied defendants' motion to strike the claim for punitive damages.

Id. at 253.

Because Defendant's 12th Affirmative Defense is contrary to Oregon law, Plaintiff is entitled to summary judgment on the defense.

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H. DEFENDANT'S AFFIRMATIVE DEFENSES ADDRESSING THE MEASURE OF PUNITIVE DAMAGES

Defendant raises three affirmative defenses concerning the measure of punitive damages rather than the availability of such damages. First, Defendant alleges that punitive damages are "not appropriate" because the misconduct occurred 40 years ago, so no "culpable actors are alive to punish" and current people do not need to be deterred (14th Affirmative Defense; Answer at ¶ 18) ; the Due Process clause of the U.S. Constitution limits the amount of punitive damages (15th Affirmative Defense; Answer at ¶ 19);[19] and punitive damages are not necessary because Defendant has changed, has settled other cases, and has suffered "non-monetary punishment" (16th Affirmative Defense; Answer at ¶ 20).

These are improper "affirmative defenses" because they do no more than amplify Defendant's denial of Plaintiff's punitive damages allegations. *See*, Answer at ¶ 4. The 14th and 15th Affirmative Defenses raise arguments that the jury will evaluate when decided whether to award punitive damages and in what amount. To what extend "due process" limits the amount of punitive damages, as alleged in the 16th defense, is for the trial court to decide.

Plaintiff does not here challenge the merits of these arguments, merely the propriety of alleging them as affirmative defenses. None of these is a proper "affirmative" defense, because Defendant does not bear the burden of proof on the measure of punitive damages. The Bankruptcy Court recognized both fact-based arguments as issues for the jury, not defenses, stating: "Those arguments do not provide a legal basis under the Bankruptcy Code for categorical disallowance of punitive damages; they are for the jury that is determining punitive damages." *Bankr. Op. II*, 339 B.R. at 229.

The Court should strike Defendant's 14th, 15th, and 16th Affirmative Defenses or dismiss them on summary judgment.

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[19] The Archdiocese has conceded this affirmative defense.

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I. DEFENDANT'S 17TH AFFIRMATIVE DEFENSE

In its 17th Affirmative Defense, Defendant alleges that imposition of punitive damages would violate the *ex post facto* clauses of the US and Oregon Constitutions by reviving Plaintiff's previously time-barred punitive damages claims. Answer at ¶ 21. Because *ex post facto* limitations apply only to criminal statutes of limitations, not civil, this defense fails as a matter of law.

Defendant recognizes that the doctrine of *ex post facto* does not apply to civil statutes of limitations because Defendant does not raise an *ex post facto* defense against ORS 12.117 in general, but only to the extent that ORS 12.117 allows Plaintiff to bring a punitive damages claim. Presumably, Defendant will argue that punitive damages are akin to criminal punishment, so *ex post facto* limits should be apply to civil statutes of limitations that allowing punitive damages claims.

This argument fails. There is no authority supporting this defense. There is no case from either the US or Oregon Supreme Courts holding that the retroactive application of punitive damages pursuant to a revived common law claim violates the *ex post facto* clause.

Both the federal and Oregon Constitutions prohibit the state from passing *ex post facto* laws. U.S. Const., art. I, § 10, cl. 1; Or. Const, art. I § 21, cl. 1. Oregon's *ex post facto* clause is interpreted consistently with the federal counterpart. *See*, *State v. Fugate*, 332 Or. 195, 210-15, 26 P.3d 802 (2001) (interpreting Oregon's *ex post facto* in relation to federal law). The foundational definition of the *ex post facto* clause was penned by Justice Chase in *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390, 1798 WL 587 (1798), which laid out four different types of *ex post facto* laws as follows:

> 1st. Every law that makes an action, done before the passing of the law, and ***which was innocent when done***, criminal; and punishes such action. 2nd. Every law that aggravates ***a crime***, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to ***the crime***, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence in order to convict the offender.

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Id. (emphasis added).

As part of Justice Chase's preeminent analysis of the *ex post facto* clause in *Calder*, he explicitly noted that the clause was not "inserted to secure the citizen in his private rights, of either property, or contracts." (*Id.* at 390.) ***"In the two centuries since the Court first addressed the* Ex Post Facto *Clause in* [Calder v. Bull] *the Court has consistently held that this Clause applies only to criminal enactments and has no bearing on retroactive civil legislation."*** *Nationsbank of Texas v. United States of America*, citing *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990); *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Bankers' Trust Co. v. Blodgett*, 260 U.S. 647 (1923); *Johannessen v. United States*, 225 U.S. 227, 242 (1912). *See also*, *Kilpatrick v. Snow Mountain Pine Co.*, 105 Or. App. 240, 243, 805 P.2d 137 (1991) ("The Oregon Constitution's prohibition against *ex post facto* laws applies only to criminal statutes. The prohibition against *ex post facto* laws in the United States Constitution is also limited to criminal statutes").

While the revival of a lapsed criminal law statute of limitations has been held to violate *ex post facto* principles,[20] it is well settled that legislation reviving the statute of limitations on civil law claims does not violate constitutional principles. In *Chase Securities Corp. v. Donaldson* 325 U.S. 304, 314 (1945), the court held that due process notions were not affected by the revival of a civil law claim due to the unique characteristics of ***civil*** statutes of limitations

> [Civil statutes of limitations] find their justification in necessity and convenience rather than in logic. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. . . . Their shelter has never been regarded as . . . a 'fundamental' right . . . the history of pleas of limitation shows them to be good only by legislative grace and to

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[20] In *Stogner v. California,* 539 U.S. 607 (2003) the Supreme Court confirmed that the revival of a lapsed criminal law statute of limitations violated *ex post facto* principles. The Court reasoned that because a criminal limitations period acts as a type of amnesty that might lead a suspected offender into believing it was no longer necessary to preserve exculpatory evidence, legislation reviving a lapsed criminal charge was "unfair and dishonest." *Id.* at p. 611.

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be subject to a relatively large degree of legislative control.

Id. at 314 (footnotes omitted). In fact, courts in several other jurisdictions have specifically held that the revival of previously lapsed common law claims based on childhood sexual abuse did not violate the *ex post facto* clause. *See, e.g., Liebig v. Superior Court* 209 Cal. App.3d 828, 831-834, 257 Cal.Rptr. 574 (1989) (holding that Legislature had the power to revive lapsed common law civil claims based on childhood sexual abuse); *DeLonga v. Diocese of Sioux Falls*, 329 F. Supp.2d 1092, 1100-1102 (D. SD 2004) (holding that a South Dakota statute reviving lapsed civil actions based on allegations of childhood sexual abuse ***did not*** violate the *ex post facto* doctrine).

In the face of this solid authority, Defendant is left to allege that only punitive damages claims revived by ORS 12.117 implicate the *ex post facto* doctrine. This back-door *ex post facto* argument has been tried and lost in at least one other recent case. In a well reasoned state court opinion in *Roman Catholic Bishop of Oakland v. Superior Court,* 128 Cal. App.4th 1155, 1159, 1159-1160, 28 Cal. Rptr.3d 355, 358 (2005), the California Court of Appeals considered whether a 2002 amendment that revived claims for childhood sexual abuse previously barred by the civil statute of limitations violated the *ex post facto* clause. The court concluded that "despite certain similarities with criminal sanctions, punitive damages arising from common law causes of action possess and retain a quintessentially civil flavor. That flavor keeps them outside the zone of constitutional protections such as . . . the *ex post facto* clause, which [is] intended to protect citizens against government-imposed sanctions." 128 Cal. App.4th at 1168-69.

The similarities between the *Bishop of Oakland* case and this one are striking. In *Bishop of Oakland,* a victim of childhood sexual abuse whose civil claim had previously been barred brought suit against the Roman Catholic Bishop of Oakland, as well as a priest who worked for the Bishop. 128 Cal. App.4th at 1160. The plaintiff's complaint stated causes of action for negligence and intentional torts. Specifically, the plaintiff argued that "the Bishop knew [the priest] was a child molester but took no steps to protect young churchgoers from his advances."

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Id. The plaintiff's complaint sought punitive damages on this basis. *Id.* In return, "[t]he Bishop of Oakland moved to strike the punitive damage claims, contending that because [the 2002 amendment] revived the expired statute of limitations, those claims [supporting punitive damages] violated the constitutional prohibitions against *ex post facto* laws." 128 Cal. App.4th at 1160.

The defendant in *Bishop of Oakland* argued that, because punitive damages serve much the same function as criminal law, a statute that allows a plaintiff to seek punitive damages for conduct that at one time was not actionable because it had been barred by the statute of limitations violates the *ex post facto* clause. The defendant in *Bishop of Oakland* relied on dicta from *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994) as the primary support for its argument. In *Landgraf*, the Supreme Court considered the retroactive application of a new law that gave sexual harassment plaintiffs the right to a jury trial if they sought compensatory and punitive damages, two forms of relief which had not previously been available. As part of its discussion, the court noted that concerns over statutory retroactivity were expressed through different constitutional theories, including the *ex post facto* clause, and others. *Landgraf*, 511 U.S. at 265-266. Although the Court did not reach the issue because it held that the statute at issue did not apply retroactively, it noted in dicta that retroactive application would raise a "serious constitutional question." *Id.* at 281.

The court in *Bishop of Oakland* analyzed the *Landgraf* decision and concluded that the defendant's reliance on the "serious constitutional question" language from *Landgraf* was misplaced. 128 Cal. App.4th at 1164-1165. First, the court explained that the language was dicta. *Id.* at 1164. Second, and key to the court's analysis, the court concluded that *Landgraf* is inapplicable to cases involving statutes of limitations for common law tort claims. Because *Landgraf* "concerned the retroactive application of a new statutory punitive damage remedy to preexisting conduct which occurred at a time when no such damages were recoverable," that case raised "substantially different" *ex post facto* issues that those raised by a common law tort statute

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of limitations. *Id.* at 1164-65. Revival of a lapsed civil limitations period does that merely restored common law remedies that actually existed at the time of the alleged misconduct is an entirely different situation. *Id.* The court noted that "numerous federal and California decisions have held that there is no constitutional impediment to such legislation." *Id.* The court concluded:

> In light of those decisions, and in the absence of any such issues or discussion in *Landgraf*, we do not believe *Landgraf* can be read as having any applicability here. Instead, as we explain below, ***we hold that a statute reviving the limitations period for a common law tort cause of action, thereby allowing the plaintiff to seek punitive damages, does not implicate the* ex post facto *doctrine and therefore does not trigger the intent-effects test at all.***

Id. at 1164-1165 (emphasis added).

The court in *Bishop of Oakland* also noted that, "***[n]o reported decision of any federal or state court has ever held that punitive damages awarded pursuant to a common law tort claim might constitute criminal punishment under the* ex post facto *clause***." *Id.* at 1165. Instead, numerous cases hold just the opposite. *Id. at* 1165-1166 (citing cases from California and other states). All of these cases "quickly disposed of the defendants' *ex post facto* arguments on the ground that the doctrine had no application to civil remedies." *Id.* at 1165-1166.

The conclusion of the court in *Bishop of Oakland* makes sense. The purpose of the *ex post facto* doctrine is to give prior notice of potential punishments so that wrongdoers appreciate what they stand to lose. In the *Landgraf* situation, retroactive application of a punitive damages statute would punish a defendant for acts which were not punishable when they were committed, thus raising *ex post facto* concerns. On the other hand, sexual abuse of children, fraud, and gross negligence amounting to "malice" or "a reckless and outrageous indifference" are acts that have long carried potential liability for punitive damages. That is, at the time of the acts complained of in this case, Defendant was on notice that its conduct (directly and through the acts of its agent) could subject it to punitive damages. Retroactive application of ORS 12.117 merely sets a new deadline for cutting off this liability; it does not, as the statute at issue in *Landgraf* would

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have done, impose new punishment for past acts.

Because there is no authority for Defendant's *ex post facto* defense, the Court should dismiss Defendant's 17th Affirmative Defense as a matter of law.

CONCLUSION

For the reasons discussed above, the Court should grant Plaintiff's motion and dismiss Defendant's Third through 17th Affirmative Defenses as a matter of law.

DATED this 11th day of September, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, upon:

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