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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR MULTNOMAH COUNTY

D.A., ) Case No. 0107-07465  
)  
Plaintiff, )  
)  
v. ) PLAINTIFF’S RESPONSE TO  
) ARCHDIOCESE’S CROSS-MOTION  
) FOR SUMMARY JUDGMENT AND  
) REPLY IN SUPPORT OF PLAINTIFF’S  
THE ARCHDIOCESE OF PORTLAND IN ) MOTION FOR PARTIAL SUMMARY  
OREGON, an Oregon corporation; ) JUDGMENT  
THE ROMAN CATHOLIC ARCHBISHOP )  
OF PORTLAND IN OREGON; and )  
successors, a corporation solo d.b.a. THE )  
ARCHDIOCESE OF PORTLAND IN )  
OREGON, )  
)  
Defendants. )

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1 **INTRODUCTION**

2 In their Response to Plaintiff’s Motion for Partial Summary Judgment and Cross-Motion  
3 for Summary Judgment, Defendants Archdiocese of Portland in Oregon and the Roman Catholic  
4 Archbishop of Portland in Oregon (collectively “Defendant Archdiocese,” “Archdiocese,” or  
5 “Defendants”) concede their Second and Eighth affirmative defenses entirely, and their First and  
6 Sixth affirmative defenses in part. The Archdiocese then moves for summary judgment on the  
7 remaining affirmative defenses, as well as on two new grounds, the first being that Plaintiff’s  
8 claim is not “based on conduct that constitutes child abuse” under ORS 12.117: since, according  
9 to the Archdiocese, Fr. William McLeod’s actions toward the Plaintiff—french kissing, groping,  
10 and sexually gyrating against Plaintiff while embracing him—were not “child abuse.” This type  
11 of Clintonesque denial is an insult to Plaintiff, to this Court, and to the Archdiocese itself.

12 The other additional basis for Defendant Archdiocese’s request for summary judgment is  
13 based on when Plaintiff “discovered” the injury that flowed from the child abuse. This basis is  
14 inappropriate because it misconstrues the nature of the injury, and also presents a question of fact  
15 properly decided by a jury. The underlying supposition of these and several other arguments  
16 advanced by the Archdiocese is that Plaintiff knew of his injury and deliberately waited 60 years  
17 to bring suit; this is plainly wrong. The failure of this underlying assumption destroys the  
18 Archdiocese’s defenses of statute of limitations under ORS 12.117, laches, and Article I, Section  
19 10 of the Oregon Constitution. Finally, the Archdiocese’s rebuttals to Plaintiff’s arguments for  
20 summary judgment are ultimately not convincing or legally justified.

21 **POINTS AND AUTHORITIES**

22 **I. PLAINTIFF’S RESPONSE TO ARCHDIOCESE’S CROSS-MOTION FOR**  
23 **SUMMARY JUDGMENT**

24 **A. FR. MCLEOD’S ACTIONS TOWARD PLAINTIFF WERE CHILD ABUSE.**

25 “French kissing”—that is, the placing of the tongue into the mouth of another (in this  
26 case forcibly) during an mouth-to-mouth kiss—is not a normal, reasonable, or expected method

1 of greeting amongst non-romantically involved people, and certainly not between adult and  
2 minor child, anywhere in Western society. Nor is gyrating the hips to simulate the sex act while  
3 embracing. These were some of the actions that Fr. McLeod performed on Plaintiff on numerous  
4 occasions. *Deposition of Plaintiff D.A.*, Exhibit 1, at 109–10. Such behavior is sexual, intimate,  
5 and outrageous. These acts, when performed on a child, amount to “child abuse” under ORS  
6 12.117. But Defendant Archdiocese asks this Court to believe that such behaviors, when  
7 performed by a priest on a child, were not “child abuse.”

8 Please.

9 As a matter of law, “child abuse” under ORS 12.117 includes any “[i]ntentional conduct  
10 by an adult that results in . . . [a] physical injury to a child[,] or [a]ny mental injury to a child  
11 which results in observable and substantial impairment of the child's mental or psychological  
12 ability to function caused by cruelty to the child, with due regard to the culture of the child.”  
13 ORS 12.117(2)(a)(A), (B). Child abuse also encompasses “[s]exual abuse, as defined in ORS  
14 chapter 163, when the victim is a child.” ORS 12.117(2)(c).

15 According to Plaintiff’s deposition testimony, Fr. McLeod would frequently engage in  
16 inappropriate physical acts with Plaintiff that contained an undeniable sexual component:

17 [Fr. McLeod] would put both arms around me and he would kiss me. He would  
18 put his tongue in my mouth and undulate his hips . . . he would go through the  
19 motions of intercourse . . . [like] a man having intercourse with a woman standing  
20 up . . . .

21 *Deposition of Plaintiff D.A.*, Exhibit 1, at 109–10. Fr. McLeod performed this type of activity on  
22 Plaintiff “[m]ore than 50 [times].” *Id.* at 110. This behavior began shortly after Fr. McLeod’s  
23 arrival at All Saints Parish, around D.A.’s 5th or 6th grade school years, and lasted until he  
24 stopped serving as an alterboy, some time in his 9th or 10th grade school years. *Id.* at 90–2,  
25 96–7. Furthermore, while Plaintiff truthfully answered under direct questioning that he did not  
26 ***recall specific instances*** of Fr. McLeod ever touching his genitals, he did testify to having a  
strong memory of such activity happening. *Id.* at 114–6. Indeed, under either the

1 physical/mental injury standard or the definition of sexual abuse under Oregon Laws  
2 Chapter 163, Fr. McLeod's actions toward Plaintiff constitute "child abuse" as understood in  
3 ORS 12.117.

4 Under the resulting emotional injury standard, Fr. McLeod's abuse had a great impact on  
5 Plaintiff's life and many of the problems in it. Plaintiff has retained an expert witness whose  
6 testimony will create a question of fact on the "emotional injury" issue. *See ORCP 47E Affidavit*  
7 *of Plaintiff's Counsel Kelly Clark*, at 2. Also, D.A. testified that he blames many difficulties in  
8 his life on his loss of faith in the Church, resulting from Fr. McLeod's abuse. *See Deposition of*  
9 *Plaintiff D.A.*, Exhibit 1, at 135–42.

10 Next, as Plaintiff pointed out in his original motion for summary judgment and as  
11 Defendant Archdiocese correctly noted, ORS 163.415—the crime of Sexual Abuse in the Third  
12 Degree—involves "sexual contact" with an intimate part of another's body as defined in ORS  
13 163.305(6). "[G]enitalia and breasts are intimate parts as a matter of law under ORS  
14 163.305(6)," State v. Turner, 33 Or App 157, 159, 575 P2d 1007 (1978), and remaining areas of  
15 the body are evaluated for intimacy under a two pronged *factual* test set out in State v. Woodley,  
16 306 Or 458, 760 P2d 884 (1988). *It is a question of fact for a jury:*

17 In protecting "intimate areas" of the human body, the statute invokes individual  
18 and cultural standards, and perhaps also the social psychology of group decision  
19 by a jury asked to agree on what is "intimate" while reacting to the circumstances  
of one case. . . . The question is whose sense of intimacy matters.

20 \*\*\*

21 First, because the object of the statute is to protect persons from unwanted  
22 intimacies, the part must be regarded as "intimate" by the person touched. This is  
a subjective test.

23 Second, if an accused touched this part knowing that the touched person regarded  
24 it as intimate and did not consent, the accused violates the statute if the requisite  
25 sexual purpose is proved. ***If the accused, regardless of his or her private  
purpose, did not know that the part was "intimate" to the person touched, the  
state must prove beyond a reasonable doubt that the accused should have  
recognized it to be an "intimate part." The latter is an objective test.***

26 Id. at 460–1, 463 (emphasis added). The Archdiocese reads Plaintiff's deposition testimony to

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1 say that Fr. McLeod “touched [Plaintiff] on the waist, face, and lips.” “[T]ouched,” indeed!  
2 How Plaintiff even realized that Fr. McLeod was gyrating his hips while embracing and french  
3 kissing D.A. unless he felt it remains a mystery under the Archdiocese’s reading. *See Deposition*  
4 *of Plaintiff D.A.*, Exhibit 1, at 109–10.

5 But, to be blunt, uninvited humping is more than touching. Ask any dog (it will bite you).  
6 It is also *per se* sexual contact under ORS 163.305(6). Also, Defendant Archdiocese  
7 asserts—fantastically—that while Plaintiff’s discomfort with the embracing and french kissing  
8 satisfies the first Woodley prong, there is no way to *objectively* determine whether Fr. McLeod  
9 knew that Plaintiff regarded it as such. This is simply galling. Touching of the inside of  
10 another’s mouth with one’s tongue is absolutely, objectively the “touching of an intimate part.”  
11 Even if Fr. McLeod, in a perverted haze, did not realize the inside of a child’s mouth is intimate,  
12 a reasonable person certainly does. The abuse suffered by Plaintiff fully satisfies both the  
13 statutory definition of “sexual contact” and the two prongs of the Woodley intimacy test.

14 In essence, Defendant Archdiocese in its summary judgment motion is asking the court to  
15 hold—as a matter of law—that a priest who french kisses a child and sexually gyrates on the  
16 child is not engaged in child abuse. The motion should be rejected out of hand.

17

18 **B. THE COURT OF APPEALS HAS CLEARLY STATED THAT CHILD ABUSE ITSELF IS NOT THE**  
19 **“INJURY” TO WHICH ORS 12.117 REFERS. FURTHERMORE, PLAINTIFF’S KNOWLEDGE OF**  
20 **THE ACTUAL “INJURY” AS UNDERSTOOD BY THE STATUTE DOES NOT TRIGGER THE**  
21 **RUNNING OF THE STATUTE OF LIMITATIONS UNDER ORS 12.117; KNOWLEDGE OF THE**  
22 **CONNECTION BETWEEN INJURY AND ABUSE IS NEEDED.**

23 In its motion, Defendant Archdiocese completely ignores the holding of the Oregon  
24 Court of Appeals in Jasmin v. Ross, 177 Or App 210, 33 P3d 725 (2001). Jasmin, not Gaston v.  
25 Parsons, 318 Or 247, 864 P2d 1319 (1994), is the only Oregon case interpreting the meaning of  
26 the term “injury” under ORS 12.117.<sup>1</sup> Jasmin held that an adult’s discovery of the “connection”

25

26 <sup>1</sup> The Jasmin panel specifically refused to decide whether to apply the injury definition  
under Gaston v. Parsons to cases asserting the extended statute of limitations of ORS 12.117.

1 between child abuse and injury manifesting itself in adulthood satisfied the statute of limitations  
2 set out in ORS 12.117. The awareness of the *connection*, not awareness of the abuse or the  
3 injury, is what triggers ORS 12.117.

4 “A definition equating the ‘injury’ with the abusive conduct itself makes the statute  
5 unintelligible: [ORS 12.117] treats the abuse and the injury as logically and temporally distinct  
6 concepts, in that the ‘abuse’ is said to cause the ‘injury,’ and a thing cannot cause itself.”

7 Jasmin, 177 Or App at 215 n3. The factual background of the abuse/injury nexus in the Jasmin  
8 case parallels the facts in this case. In Jasmin, a woman became romantically involved with her  
9 step-uncle when she was a minor child, and as an adult suffered from:

10 a variety of psychological problems: inability to maintain relationships, drug and  
11 alcohol abuse, self-mutilation, explosive anger, and violence toward others. Her  
12 marriage ended after five years, and, at the time, she attributed its demise to her  
13 lingering love for defendant. She has repeatedly sought counseling in an attempt to  
14 deal with her problems. Although she would disclose the sexual aspect of the  
15 relationship on medical and mental health intake forms, she continued to deny that  
16 the relationship was abusive or exploitative.

17 That situation changed, however, in July 1997, when she renewed her acquaintance  
18 with the high school friend in whom she had confided while young. A conversation  
19 with him regarding their teenage years triggered plaintiff's realization that the  
20 relationship with her stepuncle [*sic*] was abusive rather than romantic. A mental  
21 health counselor . . . treated plaintiff shortly after this realization and diagnosed her  
22 as suffering from Post Traumatic Stress Disorder . . . . [P]laintiff had only recently  
23 begun to identify the sexual abuse in her past as the cause of her current mental  
24 health problems. Plaintiff filed her complaint shortly thereafter . . . .

25 Jasmin, 177 Or App at 212–3. In holding that plaintiff’s complaint was timely under either an  
26 expansive view of the term “injury” in ORS 12.117 or under the three-part Gaston definition of  
the term, the court noted “there . . . is ample evidence that she did not discover that those  
symptoms were *caused by* sexual abuse until almost a decade later, and within three years of  
filing her claim.” 177 Or App at 216 (emphasis added). Therefore, the Court of Appeals  
recognized that in an action brought pursuant to ORS 12.117, the only key fact is when the

Instead, Jasmin held that making the connection between mental illness and the abusive conduct  
satisfies *either* a broad reading of “injury” in ORS 12.117 *or* the Gaston test.

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1 victim made—or reasonably should have made (a classic jury question)—the **connection**  
2 between the abuse and difficulties caused thereby.

3 In D.A.’s case, an article in the Oregonian about priest sexual abuse of children in the  
4 summer of 2000 triggered the beginnings of his realization that the abuse by Fr. McLeod was at  
5 the root of many of his emotional problems. *Deposition of Plaintiff D.A.*, Exhibit 1, at 120.  
6 Much like the plaintiff in Jasmin, D.A. had of course never forgotten the abuse by Fr. McLeod,  
7 and considered that it had a bearing on the loss of his intellectual belief in the guidelines, rules,  
8 regulations, and structure of the Catholic Church. *Deposition of Plaintiff D.A.*, Exhibit 1, at  
9 135–6.

10 Nonetheless, before Summer 2000, Plaintiff never connected Fr. McLeod’s abuse to the  
11 emotional problems resulting from his loss of faith. In fact, because Plaintiff has only recently  
12 begun therapy, the extent of his injuries *in toto* is still not fully explored. Plaintiff brought suit,  
13 as Defendant has suggested he should, once causation was realized.

14 Given the close factual parallels between D.A. in the present case and the plaintiff in  
15 Jasmin, a jury could find that D.A. reasonably did not discover the connection between the abuse  
16 and the injury before Summer 2000. Certainly, the Archdiocese cannot argue that, in light of  
17 Jasmin, that as a matter of law, D.A. must “discover” the connection before some fixed point.

18 Furthermore, even under a strict Gaston analysis (although theoretically subsumed under  
19 the fact pattern of Jasmin), “the statute of limitations begins to run when the plaintiff knows or in  
20 the exercise of reasonable care should have known facts which would make a reasonable person  
21 aware of a substantial possibility that each of the three elements (harm, causation, and tortious  
22 conduct) exists.” Gaston v. Parsons, 318 Or at 256. Plaintiff here admitted that he had never  
23 forgotten the tortious conduct. Arguably, Plaintiff was also aware of the harm. But most  
24 importantly, the specific causation element of ORS 12.117—the **discovery of the connection**  
25 between abuse and injury—was not apparent until Summer 2000. Plaintiff’s claim, like that in  
26 Jasmin, meets the application of the Gaston injury test. *See Jasmin*, 177 Or App at 215 (“under

1 either [a broad ORS 12.117 or Gaston standard], plaintiff prevails if she presented any evidence  
2 from which a jury could find that she did not discover, nor in the exercise of reasonable care  
3 should she have discovered, facts creating a substantial possibility that her psychological or  
4 emotional injuries.”)

5 This conclusion, of course, echoes the underlying flaw in the Archdiocese’s motion for  
6 summary judgment on this issue: whether Plaintiff’s discovery was reasonable and timely is a  
7 question for the jury. Plaintiff has not moved for summary judgment on Defendant’s affirmative  
8 defense asserting the statute of limitations. This is because Plaintiff understands there are  
9 questions of fact for a jury to determine regarding: (1) when Plaintiff made the connection  
10 between the abuse and the injury, (2) whether that discovery was reasonable, and (3) whether the  
11 abuse reasonably caused the injury. These fact intensive inquiries are not fit for adjudication on  
12 summary judgment.

13 Indeed, questions of “reasonableness” are typically decided by the jury. *See* Christensen  
14 v. Epley, 287 Or 539, 560, 601 P2d 1216 (1979) (Tongue, J., *concurring*) (“A court, in  
15 considering the sufficiency of evidence, must submit the question to the jury unless it can  
16 affirmatively say that ‘reasonable minds could not differ’ on the matter.”). *See, e.g.,* Salem Sand  
17 v. City of Salem, 260 Or 630, 492 P2d 271 (1971) (question of reasonable diligence in  
18 discovering fraud is a question of fact for the jury); Holmes v. Willamette Univ., 157 Or App  
19 703, 709 n 4, 971 P2d 914 (1998), *modified* 158 Or App 485 (1999) (question of reasonable  
20 accommodation in employment is a question of fact for the jury); Jacobberger v. School Dist.  
21 No. 1, 122 Or 124, 256 P 652 (1927) (in contracts, the questions of reasonableness and good  
22 faith are for the jury). More generally, jury questions themselves exist where “more than one  
23 inference could be drawn from the facts adduced at trial.” Ross ex rel. Ross v. City of Eugene,  
24 151 Or App 656, 664, 950 P2d 372; (1997) (in false arrest claim, reasonableness of confinement  
25 is a jury question). In Gaston itself, the reasonableness of plaintiff’s discovery of the “tortious  
26 conduct” element of the injury was a question for the jury. Gaston v. Parsons, 318 Or at 259–60.

1 Summary judgment is simply inappropriate for any statute of limitations issue in this case.

2  
3 **C. LACHES HAS THREE ELEMENTS, NOT JUST SUBSTANTIAL PREJUDICE. IRRESPECTIVE OF**  
4 **PREJUDICE TO DEFENDANT, LACHES CANNOT OPERATE TO BAR PLAINTIFF’S CLAIM**  
5 **UNLESS ALL THREE ELEMENTS ARE MET. PLAINTIFF DID NOT HAVE “FULL KNOWLEDGE**  
6 **OF ALL RELEVANT FACTS,” AND DID NOT DELAY ASSERTING HIS CLAIM FOR AN**  
7 **UNREASONABLE LENGTH OF TIME AFTER HE DID GAIN FULL KNOWLEDGE OF THOSE**  
8 **FACTS.**

9 The importance of proper counting cannot be overestimated.<sup>2</sup> Unfortunately, Defendant  
10 Archdiocese has failed to count and establish the three elements of laches, but instead at best  
11 only establishes one.

12 The three elements of laches are: (1) unreasonable delay by plaintiff in asserting a claim,  
13 (2) full knowledge by plaintiff of all relevant facts “(laches does not start to run without such  
14 knowledge),” and (3) such substantial prejudice to defendant that it is inequitable to allow the  
15 case to proceed. Mattson v. Commercial Credit Business Loans, Inc., 301 Or 407, 419, 723 P2d  
16 996 (1986), *citing* Stephan v. Equitable S & L Ass’n, 268 Or 544, 569, 522 P2d 478 (1974). *See*  
17 *also* Ellis v. Roberts, 302 Or 6, 10, 725 P2d 886 (1986). However, in stressing the substantial  
18 prejudice element, the Archdiocese neglects to present any sort of compelling argument in favor  
19 of the remaining elements.

20 Even assuming the plausibility of the Archdiocese’s contention that Plaintiff’s filing  
21 “delay” has caused greater prejudice to it than to Plaintiff, the Archdiocese points to the wrong

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22 <sup>2</sup> As the Second Brother, when retrieving the Holy Hand Grenade of Antioch, read from  
23 St. Attila’s Book of Armaments, c. 2, v. 9–21:

24 And the Lord spake, saying, “First shalt thou take out the Holy Pin. Then, shalt thou  
25 count to three. No more. No less. Three shalt be the number thou shalt count, and the  
26 number of the counting shall be three. Four shalt thou not count, nor either count  
27 thou two, excepting that thou then proceed to three. Five is right out. Once the  
28 number three, being the third number, be reached, then, lobbest thou thy Holy Hand  
29 Grenade of Antioch towards thy foe, who, being naughty in My sight, shall snuff it.”

30 MONTY PYTHON AND THE HOLY GRAIL, Scene 21 “The Rabbit of Caerbannog,” (Python  
31 (Monty) Pictures, Ltd. 1974).

1 time period for analysis of the “delay.” While the quote that the Archdiocese takes from  
2 Woodruff v. Ashcraft, 263 Or 547, 554, 503 P2d 472 (1972)—that laches can occur when a claim  
3 is within statute of limitations—is obvious (if claim is not within statute of limitations, there is  
4 no claim) and accurate as far as it goes, this statement assumes that the elements of laches are  
5 met within the statute of limitations in the first place. Here, Defendant Archdiocese cannot make  
6 that case.

7 To repeat Mattson, “laches does not start to run without [full] knowledge [of all relevant  
8 facts].” 301 Or at 419. The most relevant fact for a claim seeking to use the extended statute of  
9 limitations of ORS 12.117 is Plaintiff’s connection between the child abuse and the injury—the  
10 knowledge of deep and lifetime injuries what would be considered the basic “injury” analysis  
11 under Gaston v. Parsons, discussed, *supra*. ORS 12.117 does not expand or create any cause of  
12 action, so acts that were not batteries are not now encompassed as such by ORS 12.117. *See*  
13 ORS 12.117(3). However, the element of the “connection” is an integral part of the cause of  
14 action when brought under ORS 12.117, and until it is realized, laches cannot run. How can  
15 Plaintiff bring a cause of action for an “injury” when causation has not been determined?

16 The Archdiocese offers no solution to this question. It simply notes, “[t]here is  
17 essentially no statute of limitation for vicarious liability claims based on child sexual abuse.”  
18 That is, of course, not true—the three- and six-year statutes of limitation in ORS 12.117 operate  
19 in such cases. What is true however, is the fact that there is no statute of ultimate repose for such  
20 claims. That is clearly what the Legislature intended in ORS 12.117. The doctrine of laches  
21 cannot be twisted into a statute of ultimate repose for the Archdiocese’s convenience. Even if it  
22 takes 60 years, a lack of knowledge regarding causation between child abuse and the resulting  
23 injury keeps a cause of action alive under ORS 12.117.

24 Further, laches is an equitable defense and thus requires some element of wrongdoing on  
25 the part of Plaintiff—unreasonable delay with full knowledge of relevant facts. Plaintiff has  
26 engaged in no malfeasance here. Allowing the Archdiocese to assert laches based on an

1 incomplete legal basis exercises a gross unfairness against the Plaintiff, and totally ignores the  
2 clear and considered purpose of ORS 12.117. “Equity would be a misnomer if a court assuming  
3 to exercise equitable powers should allow wrongful conduct to be used as a weapon of defense  
4 against one invoking its aid.” Temple Enterprises, Inc. v. Combs, 164 Or 133, 100 P2d 613  
5 (1940). Here, it is the wrongful conduct by the agent of the Archdiocese that is at issue.  
6 Plaintiff did nothing wrong. Adult manifestations of injury from child abuse are a tragic fact of  
7 life in the twisted and tortuous world of child abuse.

8 No doubt it is in some sense “unfair” to deny a party the right to make an argument based  
9 on the arbitrary passage of time. Yet that is precisely what statutes of limitations do. Civil  
10 plaintiffs as a class have felt the bite of this “unfairness” for the 739 years statutes of limitation  
11 have been part of Anglo-American jurisprudence.<sup>3</sup> See Defendant Archdiocese’s Response at  
12 23. Yet the Archdiocese attempts to rally the court against this perceived “unfairness” by  
13 advancing its laches defense on two main grounds: a) Plaintiff’s claim is unfair because ORS  
14 12.117 allows a 60 year old case to come to trial, and b) Plaintiff’s claim is unfair because it is  
15 old. This “unfairness”—alleged as substantial prejudice—is only one of the three elements  
16 required to assert a defense of laches. The Archdiocese simply fails to make a convincing  
17 argument for the other two elements of laches, specifically, blameworthy conduct on the part of  
18 Plaintiff. Indeed the Archdiocese blames the Plaintiff for the operation of ORS 12.117, when it  
19 should blame—and try to convince—the Legislature. The Archdiocese’s motion for summary  
20 judgment on the basis of laches should therefore be denied.

21 \_\_\_\_\_

22 <sup>3</sup> See also Northrop v. Marquam, 16 Or 173, 189, 18 P 449 (1888) (“[The] effect [of a  
23 statute of limitations] may be to deprive the defenseless and helpless of their property. It must be  
24 conceded that all of this is true; but it is an argument which must be addressed to the legislative  
25 branch of the government, and not to the courts. It is our province to apply the law to the facts of  
26 each particular case as it shall come before us, and beyond this we cannot go.”). See also Dortch  
v. A. H. Robins Co., 59 Or App 310, 321, 650 P2d 1046 (1982) (Rossman, J., dissenting) (“The  
application of statutes of limitation and statutes of ultimate repose often leads to harsh results;  
that is, actions otherwise meritorious, many times must be dismissed because they are not  
commenced within the time provided by law.”).

1  
2 **D. DEFENDANT ARCHDIOCESE *FUNDAMENTALLY* MISREADS ORS 12.190. ORS 12.190 ONLY**  
3 **OPERATES TO EXTEND—NEVER SHORTEN—THE TIME PERIOD PROVIDED TO BRING A**  
4 **CLAIM AGAINST A DECEASED’S ESTATE. FURTHERMORE, BY THE CLEAR LANGUAGE OF**  
5 **THE STATUTE AND THE DICTATES OF LOGIC, ORS 12.190 CANNOT APPLY IN A CLAIM**  
6 **AGAINST A PRINCIPAL FOR THE TORTIOUS CONDUCT OF AN AGENT.**

7 ORS 12.190 *is not a statute of limitations*. It is instead an *extension* of any applicable  
8 statute of limitations. This is borne out by both the plain language of the statute and long-settled  
9 case law. ORS 12.190 states, in pertinent part:

10 If a person against whom an action may be brought dies before the expiration of the  
11 time limited for its commencement, an action may be commenced against the  
12 personal representative of the person *after the expiration of that time, and within*  
13 *one year after the death of the person*.

14 ORS 12.190(2) (emphasis added). As the Archdiocese admits, ORS 12.190 “extends any  
15 underlying statute of limitations for an additional year . . . .” Defendant Archdiocese’s Response  
16 at 14. The statute does *not say* “an action may *only* be brought against a deceased person within  
17 one year of death,” *nor* does it say “an action involving a deceased person in any capacity may  
18 *only* be brought against the personal representative of the estate.”

19 The important caveat to ORS 12.190 is the phrase “after the expiration of that time [the  
20 statute of limitations].” Read rationally, the statute provides that where a statute of limitations  
21 has not yet run at the death of the tortfeasor, but subsequently runs after his death, the victim will  
22 have one year from the date of death to bring suit against the personal representative, irrespective  
23 of the *expiration* of any applicable statute of limitations.

24 Settled case law fully supports this argument. The cases of Blaskower v. Steel,<sup>23</sup> Or  
25 106, 31 P 253 (1892), and Branch v. Lambert, 103 Or 423, 205 P 995 (1922), recognized that  
26 ORS 12.190’s predecessor, worded in nearly identical fashion,<sup>4</sup> only prolonged the statute of

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<sup>4</sup> ORS 12.190’s predecessor statute provided:

[I]f a person against whom an action may be brought die before the expiration of the  
time limited for the commencement thereof, and the cause of action survives, an

1 limitations, never shortened it. Blaskower v. Steel particularly noted:

2 This section may, in cases falling within its terms, prolong the time originally  
3 limited, ***but does not in any case operate to shorten it, or limit the time of bringing  
4 an action against an administrator or executor upon a claim not barred by the  
5 statute of limitation.***

6 23 Or at 109 (emphasis added). Basically under ORS 12.190, when a person dies, any claim in  
7 which the statute of limitations has run during the one-year period after death can be brought up  
8 to the end of that one year period.. This is because “the pendency of the [probate] administration  
9 should not be considered as part of the statutory time for bringing the action.” Clark v. Bundy,  
10 29 Or 190, 192, 44 P 282 (1896).

11 The case cited by Defendant Archdiocese in “support” of its position even states, “**ORS  
12 12.190(2) provides a brief extension** of that period to April 26, 1993, which is one year after the  
13 date of the death of the decedent.” Wheeler v. Williams, 136 Or App 1, 5, 900 P2d 1076 (1995)  
14 (emphasis added). Also, in Mitchell v. Harris, the Court of Appeals noted “ORS 12.190(2) does  
15 not suspend the statute of limitations; ***it allows additional time within which an action may be  
16 brought*** against the personal representative of a decedent’s estate.” 123 Or App 424, 428 n2,  
17 859 P2d 1196 (1993) (emphasis added). The Archdiocese can point to no case that ever used  
18 ORS 12.190 to ***shorten*** the running period of a statute of limitations, because that is not the way  
19 ORS 12.190 works. Thus, it is readily apparent that ORS 12.190 is absolutely not a statute of  
20 limitations, and in no way operates as a bar to Plaintiff’s claim.

21 Furthermore, because ORS 12,190 does not cut short any statute of limitations, it cannot

22 \_\_\_\_\_  
23 action may be commenced against his personal representatives after the expiration  
24 of that time, and within six months after the issuing of letters testamentary or of  
25 administration.

26 Section 18, Hill's Code, *quoted in Blaskower v. Steel* 23 Or at 108. Interpretations of prior versions  
of statutes where no substantive change is made are typically binding on the revised statute. *See*  
Bauder v. Farmers Ins. Co., 301 Or 715, 726, 725 P2d 350 (1986). (court adhered to its previous  
interpretation of a statute because the Legislative Assembly had not changed wording). *C.f.*  
Younger v. Portland, 305 Or 346, 350 n5, 752 P2d 262 (1988).

1 somehow limit suits against principals for the acts of agents who have died in the time following  
2 the tort. Does the Archdiocese contend that a suit against Reddaway Trucking for the negligence  
3 of a driver (vicarious liability applied via *respondeat superior*) would be barred under ORS  
4 12.190 simply because the driver died a year after the accident? Surely not. The current  
5 situation is analytically no different at all. The plain language of the statute applies to claims  
6 against personal representatives of deceased individuals, but not against any other person. Also,  
7 the Archdiocese’s interpretation would serve to *shorten* the time in which the victim of a tort  
8 could bring suit against the employer where the agent died during or immediately after the  
9 tortious incident.

10 Extending the non-existent “protections” of ORS 12.190 to principals for the actions of  
11 deceased agents is more nonsensical than creating them out of whole cloth in the first place.

12  
13 **E. DEFENDANT ARCHDIOCESE’S CONSTITUTIONAL ARGUMENT BASED ON ARTICLE I, SECTION**  
14 **10 OF THE OREGON CONSTITUTION RESTS ON NO LEGAL AUTHORITY SUGGESTING THAT**  
**ORS 12.117 IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.**

15 In over two full pages of argument, the Archdiocese cites no legal authority whatever for  
16 its proposition that Article I, Section 10 should be applied differently in the civil and criminal  
17 contexts. A brand new application of a constitutional provision should be grounded on more  
18 than just the shifting sands of emotion dressed up as legal argument. In articulating its position  
19 that Article I, Section 10 operates as some sort of “legal laches” to prevent ORS 12.117 from  
20 functioning as written, the Archdiocese raises the issues of: (1) the (repeated) assertion that ORS  
21 12.117—plainly a self-contained statute of limitations—contains no statute of limitations (when  
22 the Archdiocese really means “statute of ultimate repose”), (2) ORS 12.117 is “unfair;” (3)  
23 fanciful speculation of what the Legislature *might* do; and (4) a cry for pity.

24 None of the Archdiocese’s arguments amount to a convincing rationale for *why* Article I,  
25 Section 10 should not mean what the Oregon Supreme Court has said it means—namely that  
26 “Section 10 has *not* been interpreted to protect against preindictment delay.” State v. Dike, 91

1 Or App 542, 756 P2d 657 (1988) (emphasis added). Nor does Defendant explain *why* the only  
2 case Article I, Section 10 was even applied in the civil context was where the plaintiff delayed in  
3 acting after filing the case. Hooton v. Jarman Chevrolet Co., 135 Or 269, 270, 293 P 604, 296 P  
4 36 (1931). The Archdiocese’s position simply attempts to create a new rule of law with no  
5 authority for it. Summary judgments are made of sterner stuff.

6  
7 **F. SUBSTANTIVE DUE PROCESS IS NOT AN UNLIMITED DOCTRINE CREATING PROTECTIONS**  
8 **OUT OF VAGUE IDEALS. FOR A “RIGHT” TO BE RECOGNIZED BY THE FOURTEENTH**  
9 **AMENDMENT, THERE MUST BE AN ARBITRARY INTERFERENCE BY GOVERNMENT OF A**  
10 **CONSTITUTIONALLY PROTECTED INTEREST. THE ARCHDIOCESE CANNOT MEET THIS TEST,**  
11 **AND IT IS NOT ENTITLED TO MAKE UP ITS OWN CONSTITUTIONAL TESTS.**

12 Once again attempting to avoid its concession on the statute of ultimate repose issue, and  
13 not raising any incorporation or procedural due process arguments, the Archdiocese moves for  
14 summary judgment on the basis of substantive due process under the Fourteenth Amendment to  
15 the U.S. Constitution. In positing “whether ORS 12.117(1), by essentially eliminating the statute  
16 of limitations for vicarious defendants, violates our traditional conceptions of proper policy and  
17 fundamental fairness[.]” the Archdiocese misstates the law and turns its own argument on its  
18 head.

19 The Supreme Court has *never* found a generic “right to a fair trial” guaranteed by the  
20 Fourteenth Amendment in civil cases. In fact the Supreme Court has “always been reluctant to  
21 expand the concept of substantive due process.” County of Sacramento v. Lewis, 523 U.S. 833,  
22 842 (1998) (quotations, citation omitted). The case cited by Defendant for the “right to a fair  
23 trial” as a matter of “fundamental fairness” has nothing *at all* to do with substantive due process  
24 under the Fourteenth Amendment, but rather a criminal defendant’s rights under the Sixth  
25 Amendment. Strickland v. Washington, 466 U.S. 668, 692 (1984).<sup>5</sup> Such a misstatement of law

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26 <sup>5</sup> The entire passage from Strickland is as follows:

Thus, a fair trial is one in which evidence subject to adversarial testing is presented  
to an impartial tribunal for resolution of issues defined in advance of the proceeding.

1 should not be dignified by argument.

2 The Archdiocese also seeks to create its own constitutional test of how a substantive due  
3 process claim is analyzed. In asking “whether ORS 12.117(1), by essentially eliminating the  
4 statute of limitations for vicarious defendants, violates our traditional conceptions of proper  
5 policy and fundamental fairness[,]” the Archdiocese attempts to turn the words “fundamental  
6 fairness” into a test all its own. See Daniels v. Williams, 474 U.S. 327, 331 (1986). This is  
7 flatly contrary to the established doctrine of substantive due process. While the Archdiocese  
8 may be authoritative in matters spiritual, it cannot of its own accord establish tests for temporal  
9 constitutional rights.

10 In fact, the proper test of a substantive due process violation remains the one expounded  
11 upon in Collins v. Harker Heights, 503 U.S. 115 (1992)—namely, a “deprivation of liberty . . .  
12 that can properly be characterized as arbitrary, or conscience shocking, in a constitutional  
13 sense.” Id., at 128 (and cases cited therein). *C.f.* Troxler v. Granville, 530 U.S. 57, 66-7 (2000)  
14 (state law permitting any person to petition for childhood visitation if in the “best interests of the  
15 child” arbitrarily interfered with parental rights). The Archdiocese in no way sets out either a  
16 liberty interest at issue or the supposed arbitrariness of ORS 12.117. It merely recites the now-  
17 tired refrain of unfairness from the “lack” of a “statute of limitations” in ORS 12.117.

18 Furthermore, if the Archdiocese is seeking to implement the “right to a fair trial,” the  
19 only manner in which to do that is with incorporation of the Sixth Amendment through the  
20 Fourteenth Amendment. The Supreme Court explicitly noted:

21 [W]here a particular amendment [to the United States Constitution] provides an  
22 explicit textual source of constitutional protection against a particular sort of  
government behavior, that Amendment, not the more generalized notion of

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23  
24 The right to counsel plays a crucial role in the adversarial system embodied in the  
25 Sixth Amendment, since access to counsel's skill and knowledge is necessary to  
26 accord defendants the “ample opportunity to meet the case of the prosecution” to  
which they are entitled.

Strickland v. Washington, 466 U.S. at 692 (citation omitted).

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1 substantive due process, must be the guide for analyzing these claims.  
2 Graham v. Connor, 490 U.S. 386, 395 (1989) (internal quotation marks omitted). *C.f.* County of  
3 Sacramento v. Lewis, 523 U.S. at 842. If the Archdiocese is being deprived of a fair trial, the  
4 Amendment guaranteeing protection against abridgement of that right must be the source of law.  
5 However, the Sixth Amendment by its very terms excludes civil actions from its protections.  
6 U.S. Const. amend. XI (“In all *criminal prosecutions*, the accused shall enjoy the right to a  
7 speedy and public trial . . . .”) (emphasis added).

8 Thus, the Archdiocese fails to properly apply the test for substantive due process  
9 violations, and Graham suggests that substantive due process under the Fourteenth Amendment  
10 is not even applicable to this case. It is difficult to envision a substantive due process right to a  
11 statute of ultimate repose. The Archdiocese’s motion for summary judgment on substantive due  
12 process grounds should therefore be denied.

13  
14 **G. THE ARCHDIOCESE IS TREATED NO DIFFERENTLY THAN ANY OTHER EMPLOYER WHOSE**  
15 **EMPLOYEES INTERACT IN WITH THOSE UNDER 18; MORE IMPORTANTLY, ORS 12.117 HAS**  
16 **A RATIONAL BASIS IN SEEKING TO PROVIDE RELIEF FOR VICTIMS OF CHILD ABUSE.**

17 Article I, Section 20 of the Oregon Constitution guarantees to all citizens of Oregon  
18 equal privileges and immunities of the law. Or. Const. Art. I § 20. However, not all distinctions  
19 drawn by the law are unconstitutional. On the contrary, Article I, Section 20 applies where a  
20 party, in this case the Archdiocese, shows:

21 (1) that another group has been granted a “privilege” or “immunity” which their  
22 group has not been granted, (2) that [the statute at issue] discriminates against a “true  
23 class” on the basis of characteristics which they have apart from that statute . . . , and  
24 (3) that the distinction between the classes . . . has no rational foundation in light of  
25 the state’s purpose.

26 Jungen v. State, 94 Or App 101, 105, 764 P2d 938 (1988) (citations omitted). In this case the  
Archdiocese can meet none of these three factors.

First, the “right” which the Archdiocese claims is of dubious existence. All employers  
are liable for torts committed by their employees within the course and scope of employment

1 under Oregon law. See Fearing v. Bucher, 328 Or 367, 977 P2d 1163 (1999) (Archdiocese);  
2 Lourim v. Swensen, 328 Or 380, 977 P2d 1157 (1999) (Boy Scouts); Chesterman v. Barmon,  
3 305 Or 439, 753 P2d 404 (construction company); Stanfield v. Laccoarce, 284 Or 651, 655, 588  
4 P2d 1271 (1978) (grocery store and café); Barrington v. Sandberg, 164 Or App 292, 991 P2d  
5 1071 (1999) (police department). ORS 12.117 does not give one rule for employers who “deal  
6 with” children and another for those who rarely interact with youngsters. In fact, ORS 12.117  
7 says nothing about employers at all. See ORS 12.117.

8 Yet the Archdiocese and other organizations that work with children (Boy Scouts,  
9 schools, and the like) do face *potential* liability from Fearing’s imposition of *respondeat*  
10 *superior* liability on precursor activity. What is specious, however—and what demolishes the  
11 Archdiocese’s Article I, Section 20 argument—is the contention that a gas station cannot be held  
12 liable for an employee’s sexual molestation of a child under a Fearing analysis. The gas station  
13 could be liable if a jury said so! For instance, if a gas station employed a 16 year old, and that  
14 teenager was befriended by her supervisor, seduced, and molested within the context of  
15 “training” or similar employment activities, the jury could find the gas station liable. See  
16 Barrington v. Sandberg, 164 Or App 292 (police department could be liable for molestation of  
17 explorer cadet by cadet instructor).

18 Even if the Archdiocese’s potential liability under *respondeat superior* for child abuse is  
19 *greater* than a gas station’s—which it is not—*the gas station is not immune* from suit under  
20 ORS 12.117. A variation in degree of liability is not a disparate impact for Article I, Section 20  
21 purposes. Indeed, “[l]egislation which affects alike all persons pursuing the same business,  
22 under the same conditions, is not such class legislation as is prohibited by the [C]onstitution of  
23 the United States, or of this state.” In re Oberg, 21 Or 406, 411, 28 P 130 (1891), *cited with*  
24 *approval in State v. Clark*, 291 Or 231, 630 P2d 810 (1981). There is no disparate impact to any  
25 “class” to which the Archdiocese belongs.

26 Assuming for the sake of brevity that businesses that “deal with children” are a

1 discernable “true class”<sup>6</sup> for Article I, Section 20 purposes, it is difficult to see how ORS 12.117  
2 lacks a rational basis. Even if ORS 12.117 creates a true class (which, again, it does not), *any*  
3 rational purpose satisfies Article I, Section 20.

4 Where disparate impacts of a law do not affect a “suspect class” (i.e. race, gender, sexual  
5 orientation, other “immutable” personal characteristics), “[d]isparate treatment of [non-suspect]  
6 classes may be justified on a ‘rational basis’ examination[.]” Tanner v. OHSU, 157 Or App 502,  
7 523, 971 P2d 435 (1998). Under a rational basis examination, “the classification involved must  
8 bear *some rational relationship to some legitimate end.*” Withers v. State, 163 Or App 298,  
9 309, 987 P2d 1247 (1999) (emphasis added). The Archdiocese implicitly acknowledges that  
10 ORS 12.117 operates to “stamp out child abuse and protect innocent victims,” it simply  
11 disagrees as to who should bear the burden of the impact. Archdiocese’s Cross-Motion for  
12 Summary Judgment and Response at 27. But *any* rational basis will make ORS 12.117  
13 constitutional.

14 Nonetheless, if certain businesses “working with children” present a greater risk of  
15 harboring child abusers, it is eminently rational to impose arguably greater burdens upon them to  
16 prevent such abuse. A legislator could easily believe that by singling out the “class” of  
17 businesses that deal with children frequently for liability, the law would lessen the occurrences  
18 of child abuse in those institutions. Since many children spend large amounts of time in  
19 institutional settings in modern America—schools, athletic leagues, religious groups and the  
20 like—holding these organizations to an arguably higher standard is fundamentally logical,  
21 rational, and proper. Therefore, ORS 12.117 presents no constitutional violation of Article I,  
22 Section 20 of the Oregon Constitution.

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23  
24 <sup>6</sup> Virtually every business, as a general rule, has some contact with persons under 18  
25 (with the obvious exceptions of liquor stores and adult entertainment establishments). It is  
26 conceivable that under some set of circumstances, any business might find itself liable for an  
intentional tort based on child abuse where an employee, through performance of his job duties,  
had access to a minor, befriended her, and used that friendship to molest the child. Therefore, no  
meaningful distinction can be made among the 99.9% of such businesses.

1 **H. THERE IS NO CONSTITUTIONAL BAN ON RETROACTIVE LAWS. THE ARCHDIOCESE’S**  
2 **“RIGHT” NOT TO BE SUED BASED ON THE STATUTE OF LIMITATIONS DOES NOT “VEST” FOR**  
3 **SEVERAL MORE YEARS. CASES CITED BY THE ARCHDIOCESE DEAL WITH LAWS WHICH**  
4 **WERE SILENT AS TO RETROACTIVITY.**

5 Once again misapplying caselaw, the Archdiocese asserts that Article I, Section 33  
6 “remains . . . a source for rights vested against retroactivity.” Archdiocese’s Cross-Motion for  
7 Summary Judgment and Response at 27–8. However, what note 11 of Hall v. Northwest  
8 Outward Bound School, Inc., 280 Or 655, 661 n11, 572 P2d 1007 (1977), *actually* states is:

9 All that remains in article I of the Oregon Constitution as a source for rights “vested”  
10 against retroactivity is the reservation of section 33 that “[t]his enumeration of rights,  
11 and privileges shall not be construed to impair or deny others retained by the  
12 people.” *Even on the doubtful assumption that these unarticulated “rights and*  
13 *privileges” lend themselves to judicial rather than political assertion against*  
14 *legislation* (see, e.g., R. Pound, Introduction to B. Patterson, The Forgotten Ninth  
15 Amendment at vi (1955)), a claim of right to be “retained” under such a clause must  
16 be shown to have been recognized at least in general terms to exist and to be of  
17 constitutional magnitude between government and people. *As has been stated, the*  
18 *mid-nineteenth century conception of “vested rights” concerned proprietary*  
19 *interests and the reopening of past or pending cases, not every change in law that*  
20 *attached unanticipated consequences to past events.*

21 280 Or at 661 n11 (emphasis added). The Archdiocese cannot base summary judgment  
22 arguments on selective quotations. Also, the only right the Archdiocese seeks to assert under  
23 Article I, Section 33 is procedural, not proprietary.

24 Further, the Archdiocese neglects to note that *all* of the cases it cites regarding retroactive  
25 application of statutes of limitation deal with laws that made no explicit provision for  
26 retroactivity. See, e.g., Joseph v. Lowery, 261 Or 545, 546, 495 P2d 273 (1972) (“There is no  
provision in the statute which either requires or prohibits its retroactive application.”); Hall v.  
Northwest Outward Bound, 280 Or at 660 (“This court has followed the practice of assuming  
only prospective applicability of statutes that are silent on the point, including the first version of  
the statute involved here.”); Nichols v. Wilbur, 256 Or 418, 473 P2d 1022 (1970) (no mention of  
retroactivity provision in revised statute); Ritcherson v. State, 131 Or App 183, 186, 884 P2d  
554 (1994) (“The text of ORS 138.510(2) does not indicate whether the legislature intended the

1 enlarged two-year limitation to apply to petitions filed by individuals whose convictions or  
2 appeals became final before the effective date of the amendment.”).<sup>7</sup> The remaining cases cited  
3 by the Archdiocese in favor of its position deal explicitly with criminal laws, and thus raise ex  
4 post facto due process concerns.

5 ORS 12.117, on the other hand, came out of the legislature with specific instructions  
6 regarding retroactivity, which were amplified two years later.<sup>8</sup> The ORS 12.117 was far from

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7  
8 <sup>7</sup> The adoption statute not applied retroactively in In re Estate of Nelson (Hughes v.  
9 Aetna), 234 Or 426, 383 P2d 55 (1963), cited as authority for the Archdiocese’s proposition that  
10 “vested” rights bar retroactive application of statute of limitations, must be explained at length.  
However, Hughes hinged on the improperly adopted child’s right to inherit from birth parents  
(since the procedurally flawed adoption did not sever the relationship to the parent), holding:

11 This statute has two aspects—in one it is a curative act, in the other a statute of  
12 limitations. As to the former, the general rule is that it is not competent for the  
13 legislature to validate a judgment void for want of jurisdiction and a statute  
14 purporting to have that effect would be unconstitutional, amounting to a denial of  
15 due process of law. If, however, the defect in the proceedings is the omission of a  
16 requirement that could have validly been dispensed with in the first instance, the  
17 judgment may be validated by a retroactive law, subject to the restriction that it could  
18 not impair the obligation of a contract or a vested right. . . . The requirement of  
19 Oregon Laws 1920, § 9830, that a copy of the order of permanent commitment of a  
child to an institution must be filed in the adoption proceedings is probably one that  
could have been validly omitted, but whether so or not, the statute cannot be applied  
to this case without violating the constitutional rights of the petitioner because in  
1957, upon his mother's death, two years prior to the enactment of ORS 109.381, the  
petitioner's right to inherit his natural mother's estate had vested in him.

20 234 Or 448–9. The case was not decided on Article I, Section 33 grounds, but would meet the Hall  
21 v. Northwest Outward Bound analysis of a right meeting “the mid-nineteenth century conception  
of ‘vested rights’ concern[ing] *proprietary* interests.”

22 <sup>8</sup> Oregon Laws 1991, ch. 932 § 2 provides:

23 Notwithstanding any other provisions of law, ORS 12.117, as amended by section  
24 1 of this Act, applies to all actions commenced on or after October 3, 1989, including  
25 any action that would have been barred by application of any period of limitations  
prior to October 3, 1989. [1991 c.932 § 2]

26 Oregon Laws 1993, ch. 296 § 2 provides:

1 silent on the subject to retroactivity as were the statutes cited to by the Archdiocese in the above  
2 cases. Indeed, nothing—*nothing*—the Archdiocese points to lends support for its contention  
3 that ORS 12.117’s retroactivity is unconstitutional.

4 No Oregon court has ever declared a statute unconstitutional that the Legislature  
5 deliberately and explicitly made retroactive in the civil context,<sup>9</sup> and no retroactive statute of  
6 limitations has ever been invalidated on the basis of Article I, Section 33. The Archdiocese is  
7 simply trying to manufacture law.

8 In summary, the Archdiocese misses the Article I, Section 33 boat completely. As stated  
9 in State v. Williams, 313 Or 19, 828 P2d 1006 (1992):

10 In order to be an Article I, section 33 right, three elements must exist. First, the right  
11 must be one that no other Oregon constitutional provision affirmatively addresses.  
12 Second, the right must be shown to have been recognized at least in general terms  
13 to exist at the time Oregon became a state. Third, the right must be one that the  
14 people of Oregon's founding generation would have considered of constitutional  
15 magnitude between government and people, that is to say, rights specifically against  
16 government and so rooted as to be fundamental.

17 313 Or at 48 (citations and quotation marks omitted). The Archdiocese has not shown the  
18 needed elements to assert a new “right to a statute of limitations.” The motion on Article I,  
19 Section 33 should be denied.  
20

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21 The amendments to ORS 12.117 by section 1 of this Act apply to all causes of action  
22 whether arising before, on or after the effective date of this Act [July 8, 1993], and  
23 shall act to revive any cause of action barred by the operation of ORS 12.117 (1991  
24 Edition). Notwithstanding any other provision of law, any cause of action that was  
25 dismissed or adjudicated before the effective date of this Act based upon that  
26 provision of ORS 12.117 (1991 Edition) requiring that an action be commenced on  
or before the plaintiff attains 40 years of age may be brought within one year after  
the effective date of this Act as though the original proceeding had never been  
commenced.

9 Of course, “[t]he ex post facto clause of the Oregon Constitution, for example, forbids  
the retroactive application of certain types of *criminal* statutes. See generally State v. Fugate,  
332 Or 195, 211, 26 P3d 802 (2001) (discussing doctrine).” State v. Terry, 333 Or 163, 178, 37  
P3d 157 (2001) (emphasis added). The remaining cases cited by the Archdiocese are in the  
*criminal* context, and not even decided on Article I, Section 33 grounds.

1 **I. THE MULTNOMAH COUNTY CIRCUIT COURT HAS ALREADY ONCE RULED AGAINST THE**  
2 **ARCHDIOCESE’S POSITION THAT THE FIRST AMENDMENT BARS *RESPONDEAT SUPERIOR***  
3 **LIABILITY FOR THE ACTS OF A PRIEST. NO DOCTRINAL INQUIRY IS REQUIRED HERE.**

4 The final act in Defendant’s Sturm und Drang drama showcasing the “unfairness” of  
5 ORS 12.117 is a rehash of an argument that has several times failed for the Archdiocese,  
6 including most recently in a virtually identical case.

7 The First Amendment defenses advanced by the Archdiocese are not new, and they have  
8 not gotten any better with age. In the case of Fearing v. Bucher (after the Supreme Court  
9 opinion), the Archdiocese made a virtually identical summary judgment motion based on the  
10 First Amendment. Judge Michael Marcus denied that motion. *See Exhibit 2*, Transcript of Oral  
11 Argument for Summary Judgment Motion in Fearing v. Bucher et al., Multnomah County Case  
12 No. 9412-08665 at 33–5.

13 At least some of that Fearing motion can be seen at page 36 of Defendant Archdiocese’s  
14 Cross-Motion in this case, where the Archdiocese contends that “the court must examine  
15 imposition of vicarious liability for *Bucher’s* non-tortious religious conduct under traditional  
16 Free exercise scrutiny.” Plaintiff is not faulting the Archdiocese for using pertinent material  
17 from prior cases in current pleadings; indeed Plaintiff’s counsel has done the same. However, on  
18 this particular issue, one Multnomah County Circuit Judge already denied this exact argument.

19 In denying the Archdiocese’s motion in Fearing, Judge Marcus noted that:

20 The notion that [religious] practices can’t reduce—can’t—result in liability—is a  
21 fairly extreme notion, and although some of these cases from other jurisdictions  
22 suggest a stronger argument than many of them from other jurisdictions do

23 It seems to me, first of all, that ***the critical factor here is that nothing about***  
24 ***the issues between the parties requires the court to determine the meaning or the***  
25 ***legitimacy of any matter of religious faith or [belief]*** [mis-spelled in transcript].  
26 That is at the core of what is prohibited. There is no immunity from liability because  
it happens to be, for example, the Archdiocese’s car that ran over somebody in a  
crosswalk through the negligence of the driver, even if the driver was on the way to  
perform—well, let’s say an exorcism; it doesn’t make it a matter of immunity and  
it doesn’t require anybody to determine the [bona fides] of exorcisms or the [beliefs]  
that underlie such a procedure.

\* \* \*

1            ***You don't have to go too far and see there's a situation where the practice***  
2            ***itself is arguably clothed with some religious consequence. That is not even***  
3            ***suggested here, and were it suggested, I don't think anybody would have much of***  
4            ***an argument [that] compelling State interests don't authorize liability anyway.***

5 Transcript of Oral Argument in Fearing v. Bucher et al. at 33–4, 35 (emphasis added).

6            On a substantive basis, the arguments advanced by the Archdiocese—(1) that a course  
7            and scope inquiry would necessarily adjudicate church doctrine and (2) that strict scrutiny must  
8            apply to *respondeat superior* liability because precursor activity to which liability is linked is  
9            religious in nature— find little support in case law and reason.

10           First, on the issue of the underlying First Amendment law regarding a potential course  
11           and scope inquiry into ecclesiastical matters, Plaintiff and the Archdiocese for the most part  
12           seem to agree about the state of the law, though not its application. Jurisdictions are indeed split  
13           on whether to permit a variety of inquiries, with the common thread being that courts should not  
14           resolve disputes about religious dogma or custom. *See, e.g., Serbian Eastern Orthodox Diocese*  
15           *v. Milivojevich*, 426 U.S. 696 (1976) (court will not determine who is proper bishop);  
16           *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440  
17           (court will not say which group in split denomination is rightful owner of property).

18           However, here Plaintiff's claims do not require adjudication of church doctrine since  
19           ***Plaintiff does not ask the Court or jury to decide the proper duties of a priest.*** Instead— to  
20           articulate the precise analytical structure of the *respondeat superior* claim—Plaintiff seeks to  
21           apply the Chesterman course and scope factors to the “precursor” activity to see if a reasonable  
22           jury could find that Fr. McLeod's actions which led up to the molestation were within the  
23           employment umbrella of his job as priest of the Archdiocese. *See Fearing*, 328 Or at 375–6. To  
24           find the Archdiocese liable, the “proper” duties of a priest need not be determined by a court, the  
25           only questions that need to be answered are:

26           (1) whether the act occurred substantially within the time and space limits authorized  
              by the employment;

1 (2) whether the employee was motivated, at least partially, by a purpose to serve the  
2 employer; and

3 (3) whether the act is of a kind which the employee was hired to perform.

4 Chesterman v. Barmon, 305 Or 439, 442, 753 P2d 404 (1988).

5 The facts of this case illustrate how the Archdiocese is missing the forest for the trees on  
6 the course and scope issue. In this case, a priest molested an alter boy at the time the boy was  
7 performing his duties in the church. See Fearing, 328 Or at 375–7. For a jury to determine  
8 whether Fr. McLeod’s grooming activities were “of a kind which the employee was hired to  
9 perform”—the only Chesterman factor to which the Archdiocese would seem to object—will not  
10 evaluate or adjudicate the religious justification for a priest’s duties in the Catholic Church.

11 The only *bona fide* course and scope question created by Plaintiff’s claim is whether “[a]  
12 jury reasonably could infer that [the priest’s] performance of his pastoral duties with respect to  
13 plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus  
14 were a direct outgrowth of and were engendered by conduct that was within the scope of [the  
15 priest’s] employment.” Fearing, 328 Or at 376. Establishing that the Archdiocese has its  
16 parishes use alter boys during mass does not pose a question as to why it does so, nor does it ask  
17 the court to rule whether their use is acceptable church practice. ***Under the facts of this case,***  
18 ***there simply is no and cannot be any prohibited inquiry into religious matters posed by***  
19 ***Plaintiff’s respondeat superior claim.***

20 Furthermore, precedent illustrates the limits of such a First Amendment defense as the  
21 Archdiocese offers. As the Archdiocese itself noted, in Martinelli v. Bridgeport Roman Catholic  
22 Diocesan Corp., 196 F3d 409, 431 (2nd Cir. 1999), the court treated “religious principles as  
23 facts” in trying a fiduciary duty claim. See Defendant Archdiocese’s Cross-Motion and  
24 Response at 34. The same is the case here. It is difficult to imagine the Archdiocese saying that  
25 the duties of a priest do not include the activities described as grooming in Plaintiff’s Complaint.

1 “Looking at” religious duties is not the same as “interfering in,” Swanson v. Roman  
2 Catholic Bishop of Portland, 692 A2d 441, 443 (Me. 1997), or “interpretation of,” Smith v.  
3 O’Connell, 986 F.Supp. 73, 76-77 (D. R.I. 1997), religious belief. And imposing liability  
4 because the sexual conduct resulted from the precursor activity is not imposing liability “for”  
5 that activity.

6 Finally, in its struggle to find anything upon which to hang a First Amendment hook, the  
7 Archdiocese draws another distinction without a legal difference by claiming that the general  
8 prohibition on exempting religious activity from facially neutral laws only applies where  
9 religious acts are proscribed or prescribed. This argument begs the question: if none of the  
10 Archdiocese’s religious activities are proscribed or prescribed by *respondeat superior* liability,  
11 why is it complaining? ***It is not the precursor activity, but rather the sexual misconduct that***  
12 ***causes liability!***

13 Such a point is perhaps not obvious—but if no religious activity directly results in  
14 vicarious liability, there is no burden on religious belief. Throughout the final section of its  
15 Cross-Motion and Response, the Archdiocese makes several conclusory statements to the effect  
16 that *respondeat superior* liability will thwart the Archdiocese’s religious ministry; it never says  
17 ***how***. Failure to show a demonstrable burden on religion destroys the first prong of the Sherbert  
18 compelling interest test upon which the Archdiocese later relies. See Sherbert v. Verner, 374  
19 U.S. 398 (1963). Furthermore, the Archdiocese does not make any case for why the distinction  
20 between proscriptive/prescriptive laws and *respondeat superior* liability matters. Indeed, under  
21 the current doctrine, a law forbidding a religious practice is usually upheld if facially neutral, but  
22 under the Archdiocese’s proposed rule, even ***potential*** imposition of liability should be struck  
23 down as unconstitutional.

24 The Archdiocese must prove why a law that outright stops a religious practice should be  
25 treated more favorably by a reviewing court than a law that merely imposes liability if a jury  
26 finds a causal link between religious activity—such as building a trust relationship with the

1 child—and sexual abuse itself. Defendant Archdiocese only seems to show that it does not like  
2 the “hybrid rights” holding of Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that the  
3 First Amendment does not exempt religious adherents from generally applicable, facially neutral  
4 laws), and City of Boerne v. Flores, 521 U.S. 507 (1997) (upholding Smith).

5 Nonetheless, the “hybrid” rule is the law of the land, dissenting concurrences  
6 notwithstanding, and is applied in the Ninth Circuit.<sup>10</sup> Smith requires a hybrid right situation in  
7 order to apply the Sherbert strict scrutiny test. Smith, 494 U.S. at 881–2. Under a hybrid  
8 analysis, there is simply no non-Free Exercise “companion right” to which the Archdiocese can  
9 point. Furthermore, the Smith analysis clearly applies to cases not involving criminally  
10 prohibited conduct in the Ninth Circuit. *See, e.g.,* Thomas v. Anchorage Equal Rights Comm’n,  
11 165 F3d 692, 700-07 (9th Cir. 1999) (exclusion from apartment rental); Johns v. County of San  
12 Diego, 114 F3d 874, 877 (9th Cir. 1997) (First Amendment does not bar the law prohibiting a  
13 parent or guardian from bringing an action on behalf of a minor child without retaining a  
14 lawyer.). The Archdiocese cannot avoid Smith and cannot make a case for strict scrutiny.

15 Even without this fundamental problem, the Archdiocese’s “compelling interest”  
16 argument falters when one considers the conduct for which liability is actually imposed. The  
17 Archdiocese’s turn of phrase “the tort of ‘getting to know you’ ”—created its alleges, by  
18 Fearing—may be a cute choice of words, but it is outright false as legal terminology.

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19  
20 <sup>10</sup> Just a month ago, the Ninth Circuit reiterated the use of Smith’s “hybrid” analysis in  
21 American Family Ass’n v. City and County of San Francisco, 2002 U.S. App. LEXIS 672 (9th  
22 Cir. January 16, 2002), stating:

23 In Smith, the Supreme Court noted that free exercise claims implicating other  
24 constitutional protections, such as free speech, could qualify for strict scrutiny  
25 review even if the challenged law is neutral and generally applicable. 494 U.S. at  
26 881-82. In this circuit, to make out a hybrid claim, a “free exercise plaintiff must  
make out a colorable claim that a companion right has been violated.” Miller, 176  
F.3d at 1207 (internal quotation and citation omitted).

2002 U.S. App. LEXIS 672 at \*20. *See also* Miller v. Reed, 176 F.3d 1202, 1207 (1999) (and cases  
cited therein).

1           Fearing *did not say* that under ORS 12.117 and Oregon *respondeat superior* law, the  
2 Archdiocese was liable because a priest *befriends* a future victim; the Archdiocese is liable  
3 because its agent *molested* that victim, and was given the ability to do so by the employee  
4 fulfilling his job duties. *See Fearing*, 328 Or at 377 (“A jury reasonably could infer that [the  
5 priest’s] performance of his pastoral duties with respect to plaintiff and his family were a  
6 necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and  
7 were engendered by conduct that was within the scope of [the priest’s] employment.”) From the  
8 Archdiocese’s viewpoint, it probably makes little difference why they are liable; they have to  
9 pay the bill regardless. But for the First Amendment analysis, it matters a great deal.

10           As the Archdiocese repeatedly stresses, it considers Fearing to hold it liable for “non-  
11 defined, non-harmful, legal, religious conduct,” similar to that presented in Paul v. Watchtower  
12 Bible and Track Society, 819 F2d 875 (9th Cir. 1987) (religious institution cannot be liable  
13 under IIED analysis for religious practice of “shunning,” or not communicating with plaintiff). It  
14 also worries that imposing vicarious liability for molestations that occur through the auspices of  
15 “priestly duties” will impose court “oversight” over the role of priests. *See* Archdiocese’s Cross-  
16 Motion for Summary Judgment and Response at 30. Neither allegation bears up under  
17 inspection.

18           In summary, it is not a priest’s ministering that is subject to liability, it is tortious activity  
19 that flows from the ministering. Second, holding the Archdiocese liable under neutral tort  
20 principles of *respondeat superior* liability does not involve a court dictating what job duties are  
21 proper. Under no possible construction of the First Amendment does the Archdiocese make a  
22 case for summary judgment on the theory that Fearing and ORS 12.117 impose an  
23 unconstitutional “burden” on Free Exercise of Religion. The Archdiocese’s cross-motion should  
24 be denied.

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1 **II. PLAINTIFF’S REPLY IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY**  
2 **JUDGMENT**

3 **INTRODUCTION TO PLAINTIFF’S REPLY**

4 The consistent theme in the rebutting portions of the Archdiocese’s Cross-Motion for  
5 Summary Judgment and Response to Plaintiff’s Motion for Summary Judgment is that (1) the  
6 Archdiocese has done nothing wrong, and (2) The Archdiocese is entitled to create legal  
7 standards when the existing ones do not supply the desired relief. These themes are no basis for  
8 denying Plaintiff’s Motion for Partial Summary Judgment. The Archdiocese explicitly conceded  
9 its Second and Eighth affirmative defenses entirely, and their First and Sixth affirmative  
10 defenses in part, and its has also implicitly conceded any procedural due process or incorporation  
11 arguments under the Fourteenth Amendment (Fifth Affirmative Defense), as well as its free  
12 exercise of religion defense based on Article I, Sections 2, 3, and 5 of the Oregon Constitution  
13 (Seventh Affirmative Defense). By way of reply to the remainder of the Archdiocese’s  
14 Response, Plaintiff addresses the two above thematic issues in turn.

15 **A. *RESPONDEAT SUPERIOR* LIABILITY HOLDS EMPLOYERS LIABLE WITHOUT FAULT FOR**  
16 **TORTS COMMITTED IN THE COURSE AND SCOPE OF EMPLOYMENT BECAUSE EMPLOYERS**  
17 **BENEFIT FROM THE CONDUCT WHICH GIVES RISE TO THE TORT. THIS IS A FAIR AND JUST**  
**POLICY CHOICE.**

18 It is not just or fair if the Archdiocese is allowed to employ priests and gain the benefit of  
19 their ability, motivation, and diligence without having to answer for the damages some priests  
20 may cause in the completion of those tasks. This is the fundamental justification for all vicarious  
21 liability claims under *respondeat superior* doctrine; it is centuries old in our jurisprudence.

22 The Archdiocese benefitted from Fr. McLeod’s services as priest. Through those  
23 services, Fr. McLeod groomed, seduced, and abused Plaintiff. When a servant commits a tort in  
24 the service of the employer, the employer is justifiably held liable for that tort.

25 *Respondeat superior* (*lat.* – “let the master reply”) is but one of several doctrines of  
26 vicarious liability by which a principal is liable for the tortious conduct of his agent.

1 Specifically, it is a theory by which an employer is held vicariously liable without fault for the  
2 tortious acts of its employee committed in the scope of employment, that is “from activity from  
3 which [principals] were receiving the benefit.” Stanfield v. Laccoarce, 284 Or at 655. The  
4 Restatement (2nd) of Agency, Sec. 229, comment *a* (1958) makes clear that this is a risk-  
5 allocation theory: “The ultimate question is whether or not it is just that the loss resulting from  
6 the servant's acts should be considered as one of the normal risks to be borne by the business in  
7 which the servant is employed.”<sup>11</sup>

8 When one employs a servant or agent to do his work, the employer is, in the eyes of the  
9 law, the actor. The master and servant are legally one. “The damages caused by the activity are  
10 the master's responsibility, so long as it is the master's business that is being done.” Gossett v.  
11 \_\_\_\_\_

12 <sup>11</sup> The exact origins the doctrine of respondeat superior are in dispute. Some  
13 scholars believe the origination of the doctrine to have come from Germanic society over a  
14 millennium ago when it was believed that the master's liability for a servant's mis-deeds stems  
15 solely from the association with the wrong-doer. Christopher E. Krueger, Note, “Mary M. v.  
16 City of Los Angeles: Should the City be Held Liable Under Respondeat Superior for a Rape by a  
17 Police Officer?” 28 U.S.F. L.Rev., 419, 421 (1994). Others, including Justice Oliver Wendell  
18 Holmes, said that respondeat superior could be traced back to early Roman law that held owner  
19 liable for the torts of slaves and innkeepers liable for the torts of their servants. Id.

20 Most early scholars agreed that the master was not liable for the servant's act unless the  
21 act was specifically commanded by the master. Id. at 422. This rule resulted in a very limited  
22 use of the doctrine. Courts began to broaden the doctrine, recognizing that an employee was  
23 under command from the master and that command could be implied from the employment  
24 relationship between the two parties. Id. However, courts still failed to include intentional torts  
25 committed by employees because they could not extend the fiction to imply that the employer  
26 would command such acts.

21 As industrial society became more complex in the 1800's, the implied command standard  
22 gradually evolved into a rule holding an employer liable for his employee's negligent and  
23 intentional acts. Modern respondeat superior doctrine has now evolved into the idea that the  
24 employer should assume the risk of liability by virtue of being in a better position to bear it than  
25 the injured plaintiff. Id. at 424. What has emerged as the modern justification for vicarious  
26 liability is a deliberate allocation of risk. Prosser and Keeton, *The Law of Torts*, Sec. 69, 500  
(5th ed. 1984). The liability is placed upon the employer because the employer is better able to  
bear the costs of the liability through prices, rates, or liability insurance. Henderson et al., *The  
Torts Process*, 172 (4th ed. 1994). Oregon courts have acknowledged this public policy  
consideration. *See Stanfield*, 284 Or at 655.

1 Simonson, 243 Or 16, 24, 411 P2d 277 (1966). The legal unity of principal and agent is both  
2 venerable and well-settled. See Howard v. Foster & Kleiser Co., 217 Or 516, 332 P2d 621  
3 (1958) (an agent “is master’s alter ego, whose negligence is that of the master and for which the  
4 master is answerable where a third person, whether an employee or a stranger, is injured  
5 thereby.”), quoting with approval, Nuckolls v. Great Atlantic & Pacific Tea Co., 5 SE2d 862,  
6 865 (1939). C.f., Sykes v. Sperow, 91 Or 568, 574, 179 P 488 (1919) (regarding a corporation’s  
7 agent, a “general agent is the alter ego of the principal, and can perform any act or do anything  
8 that the principal itself could do or perform.”); First National Bank v. Burns, 103 N.E. 93, 94  
9 (Ohio 1913) (“the agent is the alter ego of the principal, acting for the principal, and knows that  
10 his acts and knowledge ipso facto become the knowledge and acts of the principal.”). Thus the  
11 underlying legal structure of agency law makes the principal and agent one legal entity.

12 Throughout its brief, the Archdiocese claims to have “done nothing wrong,” and that it is  
13 only the torfeasor who is the blameworthy party. Nonetheless, for almost 100 years, starting  
14 with Fetting v. Wirch, 54 Or 600, 104 P2d 722 (1909), the law in Oregon has been that a  
15 principal can be held liable without fault for the wrongful acts, including intentional torts, of its  
16 agents, if a jury determines that those acts were committed in connection with the agent’s duties,  
17 outlined in Chesterman. 305 Or at 442. For the Archdiocese to argue that this victim’s injury is  
18 *damnum absque injuria* because it “only” employed Fr. McLeod is a gross miscarriage of justice.  
19 Sympathy for the Defendant is not sufficient grounds to deny any of Plaintiff’s Motion for  
20 Partial Summary Judgment, and the Archdiocese has raised no legal grounds upon which to deny  
21 the motion. Therefore, Plaintiff’s Motion for Partial Summary Judgment should be granted in its  
22 entirety.

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1 **B. NOT ONE OF THE POINTS IN THE ARCHDIOCESE’S “RESPONSE” ATTEMPTS TO APPLY THE**  
2 **SPECIFIC TESTS SET OUT IN CASE LAW FOR THE LEGAL ISSUES RAISED BY PLAINTIFF’S**  
3 **MOTION. WITHOUT A TRUE REBUTTAL OF PLAINTIFF’S CLAIMS, THERE IS NO REASON TO**  
4 **DENY PLAINTIFF’S MOTION.**

4 Throughout Defendant’s Cross-Motion and Response, the Archdiocese failed to squarely  
5 address several of the well-settled tests for determining whether the legal doctrine at issue  
6 applied in this case. Truly, most of Defendant’s arguments consisted only of digression into the  
7 “fairness” of Plaintiff’s claims. Noticeably, Defendant:

- 8 • failed to substantially apply the test for laches, and failed to seriously rebut Plaintiff’s  
9 application of that test;
- 10 • failed to distinguish meaningfully the Article I, Section 10 precedent cited by Plaintiff;
- 11 • never even attempted to apply the two part substantive due process test;
- 12 • failed to make a case under the three elements of an Article I, Section 33 unenumerated  
13 right;
- 14 • did not apply, but merely alleged the strict scrutiny test under the Free Exercise Clause of  
15 the First Amendment; and
- 16 • never reviewed any Oregon Constitution doctrine on the Free Exercise of Religion under  
17 the Oregon Constitution

16 For these reasons, summary judgment on these issues should be granted in favor of Plaintiff as a  
17 matter of law. If the Archdiocese is not going to actually respond to Plaintiff’s motion, it cannot  
18 hope to prevail against Plaintiff’s motion.

19 **CONCLUSION**

20 For the foregoing reasons, Defendant Archdiocese’s Cross-Motion for Summary

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1 Judgement should be denied altogether, and Plaintiff's Motion for Partial Summary Judgment on  
2 Defendant Archdiocese's Affirmative Defenses should be granted.

3 DATED this \_\_\_\_\_ day of February, 2002.

4 O'DONNELL & CLARK LLP

5 By: \_\_\_\_\_  
6 Kelly Clark, OSB# 83172  
7 Of Attorneys for Plaintiff

8 By: \_\_\_\_\_  
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10 Of Attorneys for Plaintiff

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