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April 21, 2009

VIA FEDERAL EXPRESS

Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

**Re: *Quarry v. Roman Catholic Bishop of Oakland*
Case No. S171382**

Dear Honorable Ronald M. George, Chief Justice, and the Associate Justices:

The Roman Catholic Archbishop of Los Angeles, a corporation sole, supports the Petition for Review of *Quarry v. Roman Catholic Bishop of Oakland* (2009) 170 Cal.App.4th 1574, on the grounds that *Quarry* is inconsistent with *Shirk v. Vista Uni. Sch. Dist.* (2007) 42 Cal.4th 201, and *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759, has created and will continue to create confusion and disharmony in the lower Courts and upset reasonable settled expectations based on *Shirk* and *Hightower*.

I. INTEREST OF APPLICANT -- WHY REVIEW SHOULD BE GRANTED

This is a case where “interest of applicant” and “why review should be granted” have a large measure of commonality. In 2002, a scandal broke out in the Roman Catholic Archdiocese of Boston regarding the handling of charges of childhood sexual abuse against a Priest named John Geoghan. Additional charges of mishandling of such claims by other Dioceses became the subject of massive nation-wide publicity. In California “sworn enemies of the Catholic Church” helped draft and secure passage of legislation to revive otherwise time-barred claims against employers of abusers. Although the statute was worded in neutral terms, the target of the legislation in floor debates and committee reports was always the Catholic Church. Among Catholic entities, the Roman Catholic Archbishop of Los Angeles was a focus of particular attention.

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With extraordinary swiftness, a pre-existing Bill, SB1779, was turned into an amendment of CCP §340.1 on May 2, 2002 and passed in June 2002. A 1999 Amendment of CCP §340.1 had included the *proviso* that “no action” for childhood sexual abuse against a non-perpetrator could be commenced on or after the Plaintiff’s 26th birthday. CCP §340.1(b). The 2002 Amendments removed the 26th birthday cutoff to allow suits against certain non-perpetrator Defendants within three years of the date a Plaintiff reasonably should have discovered that psychological injury was caused by abuse. The Amendments also added CCP §340.1(c) which provides: “Notwithstanding any other provision of law, any claim for damages [against a third party] that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003.” There was no provision for retroactive application of delayed discovery.

Following enactment of the 2002 Amendments of Section 340.1, nearly a thousand cases were filed against Roman Catholic institutions in California and coordinated under the rubric, “Clergy Cases.” Although numbers are difficult to come by, the Los Angeles Daily Journal reported that there were only a “smattering” of claims against non-Catholic entities. Each of the coordinated proceedings was subject to the appellate jurisdiction of the Second District. Applicant’s attorneys, Hennigan, Bennett & Dorman, are Defense Liaison Counsel in the coordinated Clergy I and Clergy II proceedings, authorized to serve as representative and spokesperson for all Defendants. The Court of Appeal granted Applicant’s request for publication of *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, which was subsequently affirmed by this Court. This Court granted its application to appear as *Amicus Curiae* in *Doe* and in *Shirk*, which also involved the 2002 amendments of CCP §340.1 and accrual of claims under those amendments.

The avalanche of cases against Catholic entities included nearly 600 cases against the Archbishop of Los Angeles. The unbounded look-back effect of the revival allowed claims to be filed alleging misconduct all the way back to the 1930’s. In many cases, everyone connected to

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a case, except the Plaintiff, was dead, unreachable, incompetent or unascertainable. Insurance coverage was meager and was disputed by the insurers.

In *Shirk*, 42 Cal.4th at 201, a teacher had sex with the Plaintiff from 1977 to 1979 when she was 15 to 17 years old. She said that her government claim and Complaint were timely filed in September 2003, when a mental health practitioner concluded that she was suffering psychological injury from the abuse, at which time “she discovered the cause of her adult psychological injuries.” This Court rejected that contention. “Accrual of the cause of action for purposes of the government claims statute is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants.” *Shirk*, 42 Cal. 4th at 208-209. Plaintiff’s claim accrued when the abuse occurred. It did not re-accrue, “when she discovered that her present psychological injury was caused by teacher Jones’s sexual abuse of her some 25 years earlier.” *Id.* at 214.

The Second District held the same in *Hightower*. In that case, the Plaintiff alleged that he was sexually abused from 1970 to 1972. He was over 26 at the end of 2002. He did not file his Complaint against the Bishop of Sacramento until April 2004. He claimed that he could file within three years of discovery without regard to the closing of the revival window.

The Court disagreed. It held that pre-2002 abuse claims were subject to the “outer limit of the plaintiff’s 26th birthday.” The revival provisions mean exactly what they say. Claims against a third-party were barred on the Plaintiff’s 26th birthday, except where conditions allowed filing until December 31, 2003. They were revived only for 2003. They were not subject to delayed discovery. “The Legislature drew a clear distinction between claims that were time-barred and those who were not.” *Hightower*’s interpretation, the one advanced by Plaintiffs in *Quarry*, “would obliterate that distinction.” “The new delayed discovery rule does not revive *Hightower*’s previously lapsed claims.” *Hightower*, 142 Cal.App.4th at 767-68.

The Court of Appeal rejected *Hightower*’s Petition for Rehearing. This Court denied review and denied depublication. A Federal Court not only denied Mandamus to reverse *Hightower*, it found the Petition to be frivolous. *Hightower v. Cal. Supreme Court* (E.D. Cal.) 2007 U.S. Dist. LEXIS 59504 at *6.

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It is a judicially-noticeable fact that the cost of defense in time, money and public opprobrium in cases like childhood sexual abuse places extreme pressure on Defendants to settle cases irrespective of their merits. That pressure is necessarily exacerbated as the number of cases reaches into the hundreds and the Defendants are relentlessly held up to public scorn, ridicule and contempt by the mass media. The only solace for Defendants in the Clergy Cases was that the express terms of the 2002 Amendments of CCP §340.1 required all otherwise time-barred claims to be brought by the end of 2003. This Court and the Panel of the Second District with jurisdiction over the Clergy Cases confirmed the preclusive effect of the one-year revival restriction.

After the Second District decided *Hightower*, the Coordination Trial Judge began dismissing cases that were not filed within the revival window. That sent a signal to Plaintiffs that passion and prejudice against the Catholic Church would not always be sufficient to prosecute claims to successful judgments and placed pressure on Plaintiffs to settle the cases in bulk without incurring costs of law and motion practice, trial preparation and trial.

Shortly after *Shirk* was decided in August 2007, the Archbishop of Los Angeles, in reliance on *Hightower* and *Shirk* entered into what it understood to be a Global Settlement of all cases arising out of the revival legislation. It agreed to settle all the outstanding cases and the cases that had already been dismissed for \$660,000,000.00.

II. QUARRY UPSETS SETTLED EXPECTATIONS AND CREATES CONFUSION AND UNCERTAINTY IN THE LAW

Quarry undermines and potentially destroys the Archbishop's settled expectations reasonably drawn from the terms of the statute, *Shirk* and *Hightower*, that claims of pre-2003 abuse were forever barred. It also creates a muddled state of the law and destroys any expectation that any Statute of Limitations can give any Defendant reasonable repose.

In *Quarry*, six brothers filed a Complaint in 2007 when they ranged in age from 43 to 49. They alleged that they were sexually abused by a Catholic priest in 1972 and 1973, but did not discover the wrongfulness of the abuse until the latter half of 2005 and did not discover that psychological injuries were caused by the molestation until March 2006. *Quarry*, 170

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Cal.App.4th at 1579. At the time of the alleged abuse, the limitation period for such claims was one year from majority.

Quarry acknowledges that prior to 2002 claims against entities “had to be brought before the plaintiff’s 26th birthday.” *Quarry*, 170 Cal.App.4th at 1582. The claimant’s 26th birthday was a “cut off date.” *Id.* “The outside limit was age 26.” *Id.* at 1584. It held, nevertheless, that the 2002 Amendments lifted the age 26 cutoff for any Complaint commenced after its effective date, so long as “discovery of the cause of one’s injuries” was within the limitation period in effect when time the Complaint is filed. *Quarry*, 170 Cal.App.4th at 1584-85.

In doing so, it ignores “no action may be commenced” in CCP §340.1(b)(1). It ignores “notwithstanding any other provision of law” in CCP §340.1(c). It cites nothing in CCP §340.1 saying that someone discovering that childhood sexual abuse was the cause of their injuries after 2003 could sue without regard to the age 26 cutoff. It barely mentions *Shirk*. It gives short shrift to *Hightower* with little more than an *ipse dixit*-like, “We disagree.” *Quarry*, 170 Cal.App.4th at 1584.

III. **QUARRY IS IN MANIFEST CONFLICT WITH SHIRK AND HIGHTOWER**

In *Shirk*, this Court said that claims against entities “had to be brought before the victim’s 26th birthday.” *Shirk*, 42 Cal.4th. at 208. Even before *Hightower*, the Second District said that such claims had to be filed “no later than the plaintiff’s 26th birthday.” *Perez v. Roe* (2006) 146 Cal.App.4th 171, 175. There was an “absolute age of 26 limitation.” *V.C. v. Los Angeles Un. Sch. Dist.* (2006) 139 Cal.App.4th 499, 513. *Quarry*’s own recognition that “**any** lawsuit against a responsible third-party [was] **absolutely time-barred** after the victim passes his 26th birthday” completely disposes of *Quarry*’s premise that claims were not barred by a Plaintiff’s 26th birthday if it were not discovered until after his 26th birthday.

According to Respondents, *Shirk* “solely addressed” the question of how public entity Defendants must be treated under the 2002 Amendments of Section 340.1. They point out, however, that Plaintiff argued that her claim was “timely filed in accordance with the revival provisions of Section 340.1(c) or alternatively her obligation to file a tort claim did not arise until she discovered the cause for adulthood injuries.” Ans. at 15. They then completely ignore the

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fact that *Shirk* expressly rejected the alternative claim, which was the precise contention that *Quarry* accepts.

Respondents' assertion that there is merely an "illusory conflict" between *Quarry* and *Hightower* is, to say the least, odd. Ans. at 12. Respondents, themselves, say that *Quarry* "opening disagreed with the reasoning of the *Hightower* decision." Opp to De-pub at 3. *Quarry* sets forth the holding and *ratio decidendi* of *Hightower* and then says, "We disagree." There is, therefore, nothing illusory in the conflict between *Quarry* and *Hightower*.

To try to avoid that impediment, Respondents resort to logical slight of hand. They leap over the direct, express conflict, to focus on immaterial distinctions between *Hightower* and *Quarry*. They say that since *Hightower* acknowledged that he attempted to report abuse in 1975, and his knowledge of the abuse was a matter of record by 1982, the *Hightower* Court had no occasion to consider the impact of the 2002 Amendments of Section 340.1 on a Plaintiff who did not discover the cause of his adulthood injuries until after the 2002 Amendments became effective. Ans. at 13-14. That distinction is immaterial. *Hightower* had already decided that the express terms of Section 340.1 barred all claims filed outside the revival window by a Plaintiff who was under the age of 26 at the end of 2002. See, *KJ v. Roman Catholic Bishop of Stockton*, 2009 Cal.App. Lexis 538 *23 n.9 (*Hightower's* conclusion regarding the insufficiency of Plaintiff's allegations of delayed discovery "was *dictum*, since the Court had already ruled that his Complaint was time-barred").

IV. **QUARRY'S CONFLICT WITH SHIRK AND HIGHTOWER HAS CAUSED DISARRAY IN THE LOWER COURTS**

Respondents say that there is no certainty any conflict will develop in the lower Courts as a result of the conflict between *Hightower* and *Quarry*. Ans. at 3. That is incorrect. There is already conflict. The Coordination Trial Judge in the remaining Clergy Cases sustained demurrers without leave to amend based on *Hightower*, but then declined to enter Judgments in those cases based on *Quarry*. In decisions reached only three days apart in cases both named "KJ," Courts of Appeal came to diametrically opposed conclusions regarding the time of accrual of causes of action and time-bars to actions asserting childhood sexual abuse in light of *Quarry*, *Hightower* and *Shirk*.

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In *KJ v. Roman Catholic Bishop of Stockton*, 2009 Cal.App. Lexis 538, a 48 year old Plaintiff alleged that he was a victim of sexual abuse by a Priest from 1967 to 1971. He claimed that his 2007 Complaint was timely because he “immediately repressed all memories” of the abuse and his claim did not accrue until June 2004, when he “began remembering” it. The Third District held that his argument suffered from the same infirmity as *Hightower*’s. It presupposed an implicit, unexpressed intent to enact a delayed accrual rule retroactively, despite the Legislature’s unambiguous intent to treat lapsed claims and unlapsed claims differently. *KJ/Bishop*, 209 Cal.App. Lexis *23-24. The Court went on to say that *Shirk* “reaffirmed the long-settled rule that a cause of action for sexual abuse accrues at the time of the molestation.” It added that, if the Supreme Court accepted the argument that an action does not accrue until discovery of the psychological abuse, *Shirk*’s claim would have been timely. “The fact that the Court adhered to the general rule that the claim accrued when the molestations occurred constitutes an implied rejection of the notion that lapsed childhood sexual abuse claims can ‘accrue’ a second time under a delayed discovery theory.” *KJ/Bishop*, 209 Cal. App. LEXIS *24-26.

In *KJ v. Arcadia Un. Sch. Dist.* (2009) Cal.App. LEXIS 487, the Plaintiff began having a sexual relationship with a teacher when she was 16. After she graduated, when she was 18, the teacher told her that he could no longer carry on the relationship because his wife had learned of the affair. “Feeling devastated by the end of the relationship,” KJ told her mother, who wanted to make a police report. The girl extracted a promise from her mother not to report the illegal conduct by agreeing to undergo counseling. Her mother, nevertheless, did make a report and the teacher was arrested in October 2006. The girl continued in therapy and in July 2007, she first realized that she had been victimized by the teacher.

Her September 2007 government tort claim was denied as untimely. *Id.* *5-6. Division 3 of the Second District cited *Shirk* for the proposition that the date of accrual of a cause of action under the claims statute is the same as in private litigation. *Id.* *10. It cited *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397, as holding that a cause of action accrues when the wrongful act is done, subject to a discovery rule that postpones accrual until the plaintiff discovers, or has

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reason to discover, the cause of action. *Id.* *17. It also noted that Section 340.1 codifies the delayed discovery doctrine for childhood sexual abuse cases -- accrual is "the date the plaintiff discovers or reasonably should have discovered" that injury after the age of majority was caused by the abuse. *Id.* *21. It then ignored "has reason to discover" or "reasonably should have discovered." It concluded, instead, that because she was 19 and in love and did not believe a 16 year old girl having sex with a married teacher was wrong, her claim did not accrue until she "realized" she was "victimized." The fact that she told her mother about the abuse in July 2006 had "no bearing on the accrual date," and, it could not be said as a matter of law that when the teacher was arrested for criminal wrongdoing, she "should have realized the wrongfulness of his conduct." *Id.* *24-25.

Citing *KJ/Arcadia* as purportedly agreeing with Respondents' view of the scope of *Shirk* does nothing to bolsters Respondents' argument that *Quarry* does not conflict with prior precedent. The *KJ/Arcadia* determination that the Plaintiff's claim accrued when she "discovered" the cause of her adulthood injuries (Ans. at 18) adopted precisely the position that was rejected in *Shirk*.

V. QUARRY IS INCONSISTENT WITH INTERPRETATION OF SIMILAR STATUTES

Quarry is also inconsistent with interpretation of other Statutes of Limitations with structure analogous to Section 340.1 and relating to civil actions for criminal activity, which is the subject matter of Section 340.1.

In *Davaloo v. State Farms Ins. Co.* (2005) 135 Cal.App.4th 409, 420, the Court construed CCP §340.9, the model for CCP §340.1. Section 340.9 revived Northridge Earthquake insurance claims, "provided that the action is commenced within one-year of the effective date of this section." The Court held that provision set "an absolute one-year period in which to properly initiate a lawsuit." *Id.* at 420. CCP §337.15 provides that "no action for latent construction defects may be brought . . . more than ten years after the substantial completion of the development or improvement." That is an "absolute" time limitation "regardless of when the defect was discovered." *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 366, 368. Under CCP §340.5, "In no event shall the time for commencement" of an action for medical malpractice

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exceed three years. That imposes a maximum period of three years as an outside time limit to initiate an action. *Belton v. Bowers Amb. Serv.* (1999) 20 Cal.4th 928, 930-31. All liability terminates after three years, regardless of belated discovery. *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 761. See, also, *Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 456-57, 460, 462 (“In no event shall any such action be brought more than three years after a security was offered to the public” imposes an “absolute” time limit).

“The phrase ‘notwithstanding any other provision of law’ means what it says.” *People v. Palacios* (2007) 41 Cal.4th 720, 728. It declares legislative intent “to have the specific statute control despite the existence of other law which might otherwise govern.” *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13. The Uniform Fraudulent Transfer Act, Civ. Code §3439.04(c), for example, provides that, “[n]otwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer.” It overrides both the discovery rule in subsection (a) of the same Act and the general discovery rule for fraud claims in CCP §338(d), because “the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer.” *Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051.

Quarry cites only *Nelson v. Flintkote Co.* (1985) 172 Cal.App.3d 727, for the proposition that only an adjudicated Statute of Limitations defense can bar a lapsed claim, but *Nelson* improperly rested, “basically on a desire to avoid time limits at all costs, because the court perceives them as unfair.” *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, 1382.

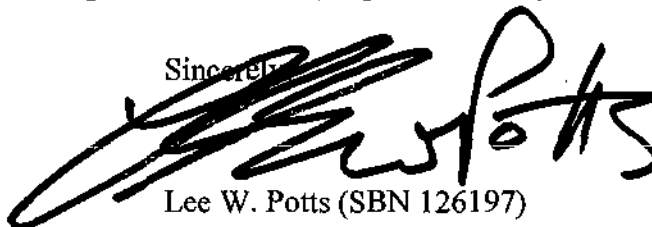
Nelson is also inapplicable because it dealt with the Statute of Limitations for asbestosis and referred to claims “extinguished” by the running of the Statute of Limitations. Section 340.1 refers simply to “expiration of the Statute of Limitations,” not to extinguished claims. It also applies to tort claims for criminal acts. The Legislature established a Restitution Fund based on a declared public interest in providing restitution for criminal acts. The law required an application for assistance to be filed within one year of the crime or the victim’s 18th birthday, but could be extended up to three years. Three years was an outside period beyond which time could not be extended. 2002 amendments removed the time limit on an extension, but had no

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retroactivity provision. Plaintiffs' claimed ignorance of their rights did not allow time-barred claims to be pursued under the law. *Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 378-79. CCP §340.3 allows a suit for damages due to commission of a felony to be filed up to one year after conviction. The Court of Appeal rejected the argument that since the legislative goal in enacting Section 340.3 was to provide maximum restitution to felony victims, retrospectivity must have been intended. *Gallo*, 200 Cal.App.3d at 1383-84.

Quarry's acceptance of Respondents' allegation that they "did not discover" the wrongfulness of the abuse, or that their psychological injuries were caused by abuse, until after 2003 is also inconsistent with *Shirk*, which held that such a claim accrued when the abuse occurred. It did not re-accrue "when she discovered that her present psychological injury was caused by teacher Jones's sexual abuse of her some 25 years earlier." *Shirk*, 42 Cal.4th at 214. *Quarry* is also inconsistent with the discovery rule applied by this Court for more than a century that, "it is not sufficient" for a Plaintiff "merely to plead or prove his ignorance at one time and his discovery or knowledge at another" (*Tarke v. Bingham* (1898) 123 Cal. 163, 165), or assert that he was "ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years." *Lady Washington Consol. Co. v. Wood* (1896) 113 Cal. 482, 486-87. As for understanding "wrongfulness," this Court held in *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 112 n.8, that "ignorance of the legal significance of known facts or the identity of the wrongdoer will not delay the running of the statute." (Emphasis added.)

Sincerely,

A handwritten signature in black ink, appearing to read 'Lee W. Potts', is written over the word 'Sincerely,'. The signature is stylized and somewhat cursive.

Lee W. Potts (SBN 126197)

Cc: See Attached Proof of Service

PROOF OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 865 South Figueroa Street, Los Angeles, California 90017.

On **April 21, 2009**, I served the foregoing document described as **LETTER TO HONORABLE RONALD M. GEORGE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES RE *QUARRY V. ROMAN CATHOLIC BISHOP OF OAKLAND*, CASE NO. S171382, DATED APRIL 21, 2009** on the interested parties in this action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postal meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **April 21, 2009**, at Los Angeles, California.



Sylvia A. Berson

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