

S 178748

IN THE SUPREME COURT OF CALIFORNIA

JOHN DOE, et al.,
Plaintiffs and Appellants,

v.

DEFENDANT DOE 1, et al.,
Defendants and Respondents.

SUPREME COURT
FILED

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After the Decision of the Court of Appeal
Second Appellate District, Division Eight
Case No. B209557

Deputy

Los Angeles Superior Court
Coordinated Proceeding Special Title (Rule 1550(b))
Judicial Council Coordination Proceedings, Nos. 4286 & 4297
THE CLERGY CASES I
THE CLERGY CASES II

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND
ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 8.500(a)(1) of the California Rules of Court,
Plaintiffs and Appellants (“Plaintiffs”) in the consolidated appeal captioned
Doe, et al v. Roman Catholic Bishop of San Diego, et al (2009) 178
Cal.App.4th 1382 (Case No. B209557),¹ respectfully Petition this Court for
Review following the decision filed by the Court of Appeal of the State of
California, Second Appellate District, Division Eight, filed on November 6,
2009, and modified on November 17, 2009, and November 30, 2009
 (“Opinion” or “RCBSD”), upholding the trial court’s decision to sustain the
demurrers to the plaintiffs’ complaint without leave to amend.

Attached as Exhibit “A” is a true and correct copy of the November

¹
On November 15, 2008, the Court of Appeal issued an order consolidating
these fifteen actions for purposes of appeal. The Plaintiffs / Appellants in
this consolidated action are Jonathan Hoy (Trial Court Case No.
BC325552), Jason T. (Trial Court Case No. SCVSS118371), John Roe 36
(Trial Court Case No. GIC880139), John Roe 37 (Trial Court Case No.
GIC880136), John Roe 47 (Trial Court Case No. GIC879618), John Roe 48
(Trial Court Case No. GIC879618), John Roe 50 (Trial Court Case No.
GIC880135), John Roe 51 (Trial Court Case No. GIC880131), John Roe 52
(Trial Court Case No. GIC880125), Jane Roe 16 (Trial Court Case No.
GIC880127), John Doe (Court of Appeal No. B209557 / Trial Court Case
No. GIC834827), Gabriel F. (Court of Appeal No. B209557 / Trial Court
Case No. 37-2007-00082612-CU-PO-CTL), John JW Doe (Trial Court
Case No. 37-2007-0083770-CU-PO-CTL), John Doe 1 (Trial Court Case
No. INC051594) and John Doe 2 (Trial Court Case No. INC051595).

6, 2009, published Opinion. Attached as Exhibit "B" is a true and correct copy of the November 17, 2009, Order modifying the Opinion. Attached as Exhibit "C" is a true and correct copy of the November 30, 2009, Order modifying the Opinion.

I. QUESTIONS PRESENTED

1. Did the Court of Appeal err when it deviated from the rule established by *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 607, and *Armijo v. Miles* (2005) 127 Cal.App.4th 1472, by finding that the 2002 amendment to California Code of Civil Procedure section 340.1 did not reflect clear legislative intent to apply the delayed discovery rule contained in subdivision (a) of that statute retrospectively despite the Legislature's retention of retroactive language from a previous amendment applying the delayed discovery rule to any action commenced on or after January 1, 1999, even those "actions or causes of action which would have been barred by the laws in effect prior to January 1, 1999?"

2. Did the Legislature intend, through the 1994 amendment to section 340.1, to silently abrogate the judicially-crafted equitable delayed discovery rule, as applied against non-perpetrator defendants, when it removed statutory language that had become surplusage, even though claims against such defendants were not within the scope of the statute until

January 1, 1999?

II. WHY REVIEW IS NECESSARY

RCBSD involves claims by fifteen adult victims of childhood sexual abuse against institutions who employed their respective abusers and could have prevented the abuse. This case requires interpretation of the most recent amendment to California Code of Civil Procedure section 340.1, the statute of limitations applicable to Plaintiffs' actions.²

The most recent amendment, which became effective on January 1, 2003, had two components. First, the amendment extended the delayed discovery provisions of section 340.1, subdivision (a), by allowing victims of childhood sexual abuse to commence actions against their abuser's employer after the victim's twenty-sixth birthday, which had provided an outer limit under a prior amendment. Cal. Code Civ. Proc. § 340.1, subd. (b)(2). Second, for victims who were over the age of twenty-six and who had discovered the cause of their injuries prior to the 2002 amendment and therefore could not avail themselves of the delayed discovery rule, the Legislature created a one year filing window open to all victims, no matter when the abuse took place, or when the victim discovered the cause of his

²

All further "section" references are to the Code of Civil Procedure, unless otherwise specified.

or her injuries. Cal. Code Civ. Proc. § 340.1, subd. (c).

Although Plaintiffs were each over the age of twenty-six when the most recent amendment to section 340.1 became effective, and no Plaintiff commenced his or her action prior to December 31, 2003, Plaintiffs allege that prior to January 1, 2003, they had not discovered that the molestation they experienced as children had caused them to experience adulthood psychological injuries.

The Court of Appeal was asked to determine whether these allegations of delayed discovery caused Plaintiffs' actions to be timely filed in reliance on the expanded delayed discovery rule of section 340.1, or alternatively under the judicially-developed equitable delayed discovery rule.

In deciding these issues, the Court of Appeal ruled upon a question of law that this Court has expressed a desire to address by granting review of *Quarry v. Doe 1* (Case No. S171382), *K.J. v. Roman Catholic Bishop of Stockton* (Case No. S173042), *D.D. v. Roman Catholic Bishop of Stockton* (Case No. S176451), and *L.A. v. Roman Catholic Bishop of Stockton* (Case No. S176483). The principal issues presented by *RCBSD* are also the decisive issues in *Quarry*, *K.J.*, *D.D.* and *L.A.*

RCBSD therefore creates the possibility that Plaintiffs' actions could

be finally adjudicate by the Court of Appeal for failing to comply with the statute of limitations, only to have this Court's decision in *Quarry* ultimately show that Plaintiffs' actions were, in fact, timely. By granting review of the *RCBSD* Opinion, this Court would avert the possibility of such a miscarriage of justice.

Notwithstanding the similar cases pending before this Court, *RCBSD* creates conflict with two lines of cases that have developed in the courts of appeal, and therefore presents two strong and independent grounds for review.

First, the Court of Appeal departed from established authority that by preserving retroactive language from the earlier version of the statute and into the amended version, the Legislature demonstrates its clear intend that the amended version of the statute will also have retrospective effect. As a result, *RCBSD* conflicts with the decisions of the Second District Court of Appeal in *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 607, and *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1412-13.

Second, by finding that the Legislature intended to abolish common law delayed discovery principals when it removed surplus language from the 1994 version of section 340.1, the *RCBSD* Court declined to apply the

established rule that when the Legislature intends to alter, abrogate or abolish common law principals it must do so expressly and unequivocally. By doing so, the Court of Appeal departed from a long line of cases, including *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676.

RCBSD runs contrary to the Legislature's broad intent to provide victims of childhood sexual abuse access to the courts. The Court of Appeal's restrictive reading of section 340.1 excludes a distinct class of victims of childhood sexual abuse while providing a remedy to all others. Molestation victims who were over the age of 26, but had not yet discovered the cause of their injuries when the 2002 amendment to the statute became effective are left with no recourse under the Opinion, while every other victim has the opportunity to hold responsible third parties accountable for their actions.

Ultimately, the Court of Appeal's Opinion frustrates the stated intent of the California Legislature by making it much more difficult for victims of sexual abuse to hold wrong-doers responsible for their actions. Review by this Court is therefore necessary not only to ensure uniformity of decision-making in this important area but to achieve the expressed intent of the California Legislature to make it easier for victims of childhood sexual abuse to have their day in Court.

III. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs were sexually abused as children by clerics or other lay employees of various Roman Catholic Dioceses and Archdioceses throughout the State (“Defendants”). As a result of the trauma caused by the molestation, and the latent nature of the effects caused by childhood sexual abuse, Plaintiffs did not discover that their respective childhood sexual abuse caused them to suffer adulthood psychological injuries until on or after the effective date of the 2002 amendment to section 340.1.³

Plaintiffs filed their actions over a period of time beginning in 2004 and ending in 2007, and each action was coordinated into either The Clergy Cases I (Case No. JCCP 4286), or The Clergy Cases II (Case NO. JCCP 4297). These cases were venued in the Los Angeles County Superior Court, before the Honorable Emilie H. Elias.

The trial court entertained an Omnibus Demurrer, in which the court heard statute of limitations challenges to each Plaintiff’s claim. Rather than hearing fifteen separate demurrers, the briefing was handled globally with

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Plaintiffs John Doe, John Doe 1 and John Doe 2 alleged discovery of their adulthood psychological injuries within three years of the filing of their complaints in August of 2004, and July of 2005, respectively. From these allegations it is possible these Plaintiffs made their respective discoveries prior to January 1, 2003, ut leave to amend was not granted to clear up this point. Opinion at 4, fn. 3.

each side being permitted an oversized brief, and the Defendants being entitled to file an oversized reply. The trial court entertained a hearing on the Omnibus Demurrer, and determined that the Plaintiffs actions were barred by the statute of limitations. The trial court entered judgment in favor of the Defendants.

Timely notices of appeal were filed, and the Court of Appeal ordered the fifteen cases consolidated for purposes of appeal. Oral argument was heard on August 26, 2009, and the Court of Appeal published its written Opinion affirming the decision of the trial court on November 6, 2009. The Opinion was modified, without change in outcome, on November 16, 2009, and November 30, 2009.

No petition for rehearing was filed in the Court of Appeal.

IV. ARGUMENT

A. The Legislature Expressly Provided for the Delayed Discovery Rule of Section 340.1, Subdivision (a), to Apply Retroactively

In 1998, the Legislature amended section 340.1, subdivision (a), to extend the statute's reach to non-perpetrator defendants whose negligent or intentionally tortious conduct was a legal cause of the sexual abuse of the plaintiff. Stats. 1998, c. 1032 (AB1651), § 1. In 1999, the Legislature made clear that the changes to subdivision (a) enacted the previous year

applied to any case filed on or after January 1, 1999, even those “actions or causes of action which would have been barred by the laws in effect prior to January 1, 1999.”⁴ Stats. 1999, c. 120 (SB674), § 1. This language of retroactivity was retained when the statute was amended in 2002. Cal. Code Civ. Proc. § 340.1, subd. (u).

Notwithstanding this plain declaration of retroactive legislative intent, the *RCBSD* Court found that the Legislature did not intend section 340.1, subdivision (a), to apply retroactively. Opinion at 11-12. In doing so, the Court misinterpreted section 340.1, subdivisions (a) and (u); failed to effectuate the intent of the Legislature in enacting and retaining language of retroactivity, and; created conflict with published authorities finding that retention of retroactive language from one amendment to the next demonstrates “unmistakable” legislative intent that the newly-amended statute apply retrospectively.

1. The Court of Appeal’s decision conflicts with cases interpreting the legal effect of retroactive language preserved from one amendment to the next

Claims against third party defendants are authorized by subdivisions (a)(2) and (a)(3) of § 340.1, which permit a plaintiff to commence an action

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All further “subdivision” references are to subdivisions of section 340.1 unless otherwise specified.

prior to the age of 26, or within three years of discovering that the molestation caused adulthood injuries, “whichever period expires later.” Subdivisions (a)(2) and (a)(3) were added to section 340.1 “at the 1998 portion of the 1997-98 Regular Session.”

Subdivision (u) provides that:

The amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session, shall apply to any action filed on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999. Nothing in this subdivision is intended to revive actions or causes of action as to which there has been a final adjudication prior to January 1, 1999.

This subdivision was originally enacted in 1999 as subdivision (s). It was re-designated as subdivision (u) and reenacted in 2002. Multiple published authorities hold that when retroactive language is preserved from one amendment to the next, changes made at the time of the subsequent amendment will have retroactive effect.

In *Bouley v. Long Beach Memorial Medical Center*, the court reasoned:

“Here, the Legislative intent is unmistakable. In subdivision (d), section 377.60 provides that ‘This section applies to any cause of action arising on or after January 1, 1993.’ With that language, the Legislature unambiguously provided that the 2002 amendments must be applied to this lawsuit. . . . [¶] . . . It is true that subdivision (d) was not added to the statute to address the 2002 amendments. Instead, it was added in 1997 as urgency legislation in order to undo

the unintended consequences of the 1996 amendments, in which the Legislature had inadvertently deprived certain parents of the right to sue. . . . [¶] . . . That bit of history is not determinative. The Legislature is presumed to be aware of the existing law and may certainly be presumed to know the full text of the laws it is amending. The Legislature was free to remove subdivision (d) from the statute once it served its original purpose, or to amend it to specify that it did not apply to the 2002 amendments. The fact that the Legislature chose not to do so can only lead us to conclude that the Legislature intended that subdivision (d) would apply to the 2002 amendments, making those amendments retroactive.”

(2005) 127 Cal.App.4th 601, 607 (internal citations omitted). Thus, by retaining retroactive language from a prior amendment to the statute, the Legislature demonstrated its “unmistakable” retroactive intent.

In *Armijo v. Miles*, the court similarly reasoned that:

“Subdivision (d) of section 377.60 which prior to the 2002 amendment provided that the wrongful death statute ‘applies to any cause of action arising on or after January 1, 1993,’ was reenacted without change, thereby reflecting the Legislature’s clear intent that the 2002 amendment have retroactive application.”

(2005) 127 Cal.App.4th 1405, 1412-13.

The Court of Appeal declined to hold with *Armijo* and *Bouley*, choosing instead to find that the Legislature’s retention of subdivision (u) did not demonstrate retroactive intent. The *RCBSD* Court characterized the reasoning of *Bouley* as dicta, and declined to discuss *Armijo* at all. Opinion at 14. In doing so, the Court of Appeal created irreconcilable conflict between the *RCBSD* on one hand, and *Bouley* and *Armijo* on the other.

2. Subdivision (u) applies the delayed discovery provision of subdivision (a) retroactively to all claims filed after January 1, 1999

The Court of Appeal limited the retroactive effect of subdivision (u) by applying the provision only to cases filed “prior to January 1, 1999, and still pending on that date, including any actions or causes of action which would have been barred by the laws in effect prior to January 1, 1999.” RCBSD held that, as to all other claims, the delayed discovery provision applies prospectively only. Opinion at 11.

Essentially, the Court of Appeal read subdivision (u) to breath life into a claim by a twenty-five-year-old victim of abuse who had commenced his action prior to January 1, 1999 knowing that his claim was time-barred, while denying any remedy to a nineteen year old victim who had prudently declined to file a premature lawsuit. It is unlikely the Legislature intended such a result, and indeed, the legislative history relating to the 1999 amendment conclusively demonstrates that the Legislature did not intend this anomaly.

In considering the 1999 amendments to section 340.1, the Legislature reflected on the 1998 amendment. It noted that in 1998, an attempt had been made to have the amendment apply retroactively to any action commenced on or after January 1, 1991, or pending on that date.

“Apparently, the 1991 date was used to provide consistency with the retroactive provision applied against perpetrators and arguably to suggest the Legislature had always intended to apply the extended statute of limitations to third parties as well as perpetrators.” Senate Committee on Judiciary Analysis of Senate Bill 674 (May 11, 1999), at page 5. This inference was not supported by the legislative history, so the retroactivity provision of the 1998 amendment was abandoned.

The Legislature recognized that the 1999 retroactivity provision was more narrow. Rather than dating back to 1991 and providing for unlimited retroactive effect, the new provision applied retroactively to claims filed on or after January 1, 1999, or pending on that date.

The Senate Judiciary Committee noted:

“The retroactive provision of SB 674 [the 1999 amendment] is more narrow, and would apply only to any action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999 . . . [¶] . . . In other words, this bill would allow those victims that are currently between the ages of 19 and 26 to bring a case against third parties that otherwise would be time-barred.

The Legislature expressly recognized that the amendment was retroactive, and that the retroactivity created by subdivision (u) would apply to “any action” filed after January 1, 1999, as well as to those that were pending on that date. The Legislature declined to clarify the retroactive

application of the statute was limited to actions already filed. Moreover, the Legislature's use of the future tense "bring a case", instead of the past tense "brought a case" shows the Legislature did not intend the limited interpretation of subdivision (u) embraced by the Court of Appeal.

3. Subdivision (u) applies the delayed discovery rule of subdivision (a) broadly to all actions filed after January 1, 1999, and to filed actions pending on that date

The Court of Appeal found that "subdivision (u) is, by its own terms, expressly limited to the 1998 amendments" to section 340.1, and that "subdivision (u) of section 340.1 applies solely to the 1998 amendment." Opinion at 12, 14. The Court of Appeal is mistaken. Subdivision (u)'s reference to "[t]he amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session" does not create a limitation. It provides a definition.

Prior to 1998, section 340.1, subdivision (a), only applied against the perpetrator of abuse. Opinion at 2. The 1998 amendment changed subdivision (a) by bringing non-perpetrator defendants within the statute's reach, and subjecting non-perpetrators to the delayed discovery period of subdivision (a).⁵ This was the effect of the amendments to subdivision (a)

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Subdivision (b) was also enacted, which limited actions against non-perpetrator defendants to the victim's twenty-sixth birthday. However,

enacted in 1998.

In 1999, the Legislature provided that those amendments apply broadly to “any action filed on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999.” Thus, whether an action was commenced on January 1, 1999, or December 15, 2009, the express terms of subdivision (u) extend the delayed discovery provision of subdivision (a) to all claims.

Subdivision (u)’s reference to the 1998 changes to subdivision (a) simply defines what provisions must be applied to “any action” filed after January 1, 1999, or pending on that date. Plaintiffs’ actions meet the criteria described in subdivision (u), and therefore are entitled to utilize the delayed discovery provision of section 340.1(a) against the non-perpetrator defendants herein.

4. The Court of Appeal created the risk of substantial confusion among the lower courts when it mis-stated the effect of subdivision (a)

The Court of Appeal repeatedly stated that claims by victims who were under the age of twenty-six prior to January 1, 2003, could

since this limitation was in subdivision (b), it was not implicated by subdivision (u).

nonetheless be barred by the statute of limitations if they had discovered the cause of their injuries more than three years before their twenty-sixth birthday. *See* Opinion at 2-3, 6, 9, 10 fn. 11, 10-11. The Court of Appeal's reading of section 340.1, subdivision (a), is not supported by the plain language of the statute.

Since January 1, 1999, section 340.1(a) has allowed an action to be commenced against a non-perpetrator defendant within three years of the date the plaintiff discovered, or reasonably should have discovered, that the childhood sexual abuse had caused adulthood psychological injury, or prior to the plaintiff's twenty-sixth birthday "whichever period expires later." There is no language in subdivision (a) requiring the plaintiff to commence an action within the earlier of the two alternative periods.

Between January 1, 1999, and December 31, 2002, subdivision (b) prevented actions from being filed in reliance on section 340.1 after the victim's twenty-sixth birthday. However, this simply established an outside limit for claims commenced under section 340.1, it did not shorten the period of time for a victim under the age of twenty-six to bring an action.

Under section 340.1(a), there is no set of circumstances under which a victim's claim could become time-barred prior to his or her twenty-sixth birthday. Nonetheless, the Court of Appeal describes just that. In doing so,

the *RCBSD* Court deviated from the actual language of the statute and created a significant risk that section 340.1 could be misinterpreted by trial courts interpreting the statute.

B. The Equitable Doctrine of Delayed Discovery was Not Abrogated

“A plaintiff must bring a claim within the limitations period after the accrual of the cause of action . . . [I]n other words, statutes of limitation do not begin to run until a cause of action accrues.” *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806. A cause of action generally accrues when each element of the cause of action is present. *Norgart v. Upjohn, Co.* (1999) 21 Cal.4th 383, 398. “An important exception to the general rule of accrual is the ‘discovery rule,’ which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” *Fox*, 35 Cal.4th at 807. The discovery rule may be “expressed by the Legislature or implied by the courts.” *Norgart*, 21 Cal.4th at 397.

The Court of Appeal determined the judicially developed discovery rule was inapplicable to childhood sexual abuse actions. The Court reasoned that the 1990 version of section 340.1 proclaimed that the statute did not foreclose reliance on the equitable delayed discovery doctrine, but subsequent amendments have not mentioned the availability of the equitable

discovery rule. Opinion at 21-22.

It is established, however, that a statute does not alter, abrogate or depart from a common law rule unless the statutory language evidences the Legislature's clear and unequivocal intent to do so. *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676. The Legislature did not unequivocally signal such an intent when it removed reference to the equitable discovery doctrine from section 340.1 in 1994. At that time, the terms of the statute provided a longer period of time for recovery than the equitable doctrine would have. As such, reference to the equitable doctrine became surplus. Removal of the language did not signify unequivocal intent to vitiate the common law, and could not have so intended as against non-perpetrator defendants who were not within the reach of the statute at that time. The Court of Appeal therefore departed from a long established rule of construction. Review should be granted to rectify this unwarranted departure from established principles.

C. Both the Retroactivity of Section 340.1, Subdivision (a), and the Applicability of the Equitable Doctrine of Delayed Discovery are Pending Before this Court in *Quarry v. Doe 1*

Rule 8.512(d)(2) of the California Rules of Court provides “[O]n or after granting review, the court may order action in the matter deferred until the court disposes of another matter . . .” Such an order is appropriate here

since both primary issues raised by this Appeal are also squarely raised by *Quarry*. Presumably, this Court's decision in *Quarry* will be dispositive of the issues raised by this Appeal.

With respect to *Quarry*, the briefing to this Court by the parties has been completed. Amicus Curiae briefs have been filed by numerous interested organizations, with responsive briefs due to be filed shortly. As such, the case is postured for disposition in the near future. The possibility therefore exists that, absent an order granting review, Plaintiffs' actions could be dismissed as untimely pursuant to the Court of Appeal's Opinion, mere months before *Quarry* is decided in a manner that would render Plaintiffs' actions timely. The grant and hold procedure could not be more appropriate.

There is also a precedent for a grant and hold order relating to the issues raised in the *RCBSD* Opinion. After Review was granted in *K.J.*, *L.A.*, and *D.D.*, this Court ordered those matters deferred until the *Quarry* matter is decided.


An order granting review and deferring future action on this case until resolution of the *Quarry* case, is appropriate.

V. CONCLUSION

This Court should grant review of *Doe v. Roman Catholic Bishop of San Diego* (Case No. B209557.) The Opinion is both inconsistent with established precedent examining legislative intent when retroactive language is preserved from one amendment to the next, and departs from an established rule that common law principles are not abrogated absent an unequivocal showing of legislative intent. Finally, the Opinion presents issues that are already pending in four cases before this Court. For each of these reasons, Plaintiffs respectfully request that this Court grant the Petition for Review.

Respectfully submitted,
ZALKIN & ZIMMER, LLP

Dated: 12-15-09

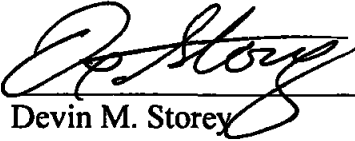

Devin M. Storey,
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

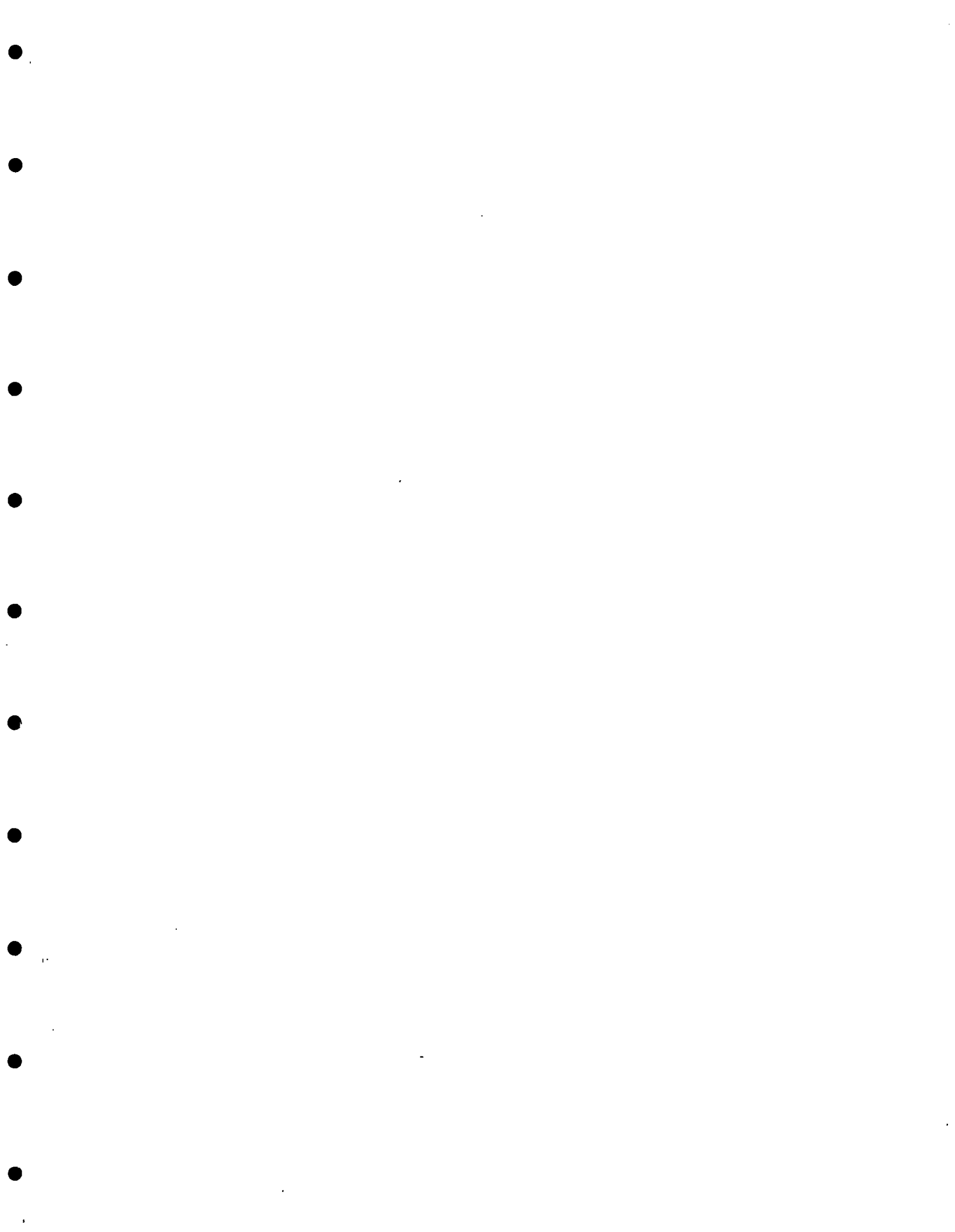
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Respectfully submitted,

Dated: 12-15-09



Devin M. Storey
Attorney for Petitioners



Filed 11/6/09

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

JOHN DOE et al.

Plaintiffs and Appellants,

v.

ROMAN CATHOLIC BISHOP OF SAN
DIEGO et al.,

Defendants and Respondents.

B209557

(Alameda County
Super. Ct. JCCP
Nos. 4286 & 4297)

APPEAL from the judgment of the Superior Court of Alameda County. Emilie H. Elias, Judge. Affirmed.

Zalkin & Zimmer, Irwin M. Zalkin and Devin M. Storey for Plaintiffs and Appellants.

Hennigan, Bennett & Dorman and Lee W. Potts; Shea Stokes Roberts & Wagner, Maria C. Roberts, Shirley Gauvin, and Christina Yates, for Defendant and Respondent Roman Catholic Bishop of San Diego.

Tobin & Tobin and Paul E. Gaspari, for Defendants and Respondents The Roman Catholic Bishop of Monterey in California.

Thompson & Colgate, J.E. Holmes, III, and Susan K. Brennecke, for Defendants and Respondents The Roman Catholic Bishop of San Bernardino, Diocese of San Bernardino Education & Welfare Fund, and certain Does.

Neumiller & Beardslee, Paul N. Balestracci and Lisa Blanco Jimenez, for Amicus Curiae, The Roman Catholic Bishop of Stockton.

Fifteen plaintiffs from the coordinated statewide clergy sex abuse cases appeal from the judgment of dismissal entered after the trial court sustained defendants' demurrers without leave to amend because plaintiffs' did not bring their previously time-barred claims against various Catholic Church entities during the one-year revival window for such claims. (Code Civ. Proc., § 340.1, subd. (c).) We reaffirm our decision in *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759, and conclude again that childhood sexual molestation victims whose claims were time barred before January 1, 2003, had to sue during the ensuing one-year revival period regardless of whether they had yet discovered the link between the earlier abuse and their adult onset of psychological injuries from that abuse.

ISSUE PRESENTED

Until 1998, child molestation victims had until their 19th birthday to sue nonabuser entities or persons for their tortious conduct in connection with the incident.¹ Beginning in 1998, that limitations period was extended to the *earlier* of three years from the time a

¹ By "nonabuser," we mean generally those persons or entities whose alleged liability is based on sex abuse committed by a third person. For example, an employer of the actual child molester is a nonabuser.

plaintiff discovered that adult-onset psychological injury was caused by the molestation, or by his 26th birthday. No such actions were permitted after that time. Effective January 1, 2003, the Legislature scrapped the age 26 cut-off for actions against a limited group of nonabuser defendants – those who negligently failed to safeguard the victim from molesters under their control – extending the limitations period for those cases to the later of age 26 or three years from discovery of the cause of adult-onset emotional harm. For all such claims that were otherwise time barred by January 1, 2003, the Legislature provided a one-year revival window that ended on December 31, 2003. (Code Civ. Proc., § 340.1, subs. (b), (c).)²

At issue here is whether plaintiffs, who were 26 or older as of January 1, 2003, and who did not sue during the revival window, may do so now if they allege they did not discover the causal link between the molestation and their adult-onset emotional harm until after the new limitations period took effect. As we previously held in *Hightower v. Roman Catholic Bishop of Sacramento*, *supra*, 142 Cal.App.4th 759 (*Hightower*), they may not.

FACTS AND PROCEDURAL HISTORY

Plaintiffs allege they were sexually molested by priests, employees, or other persons under the control of various archdioceses or other entities affiliated with the Roman Catholic Church. The earliest alleged abuse took place in 1957. The latest occurred in the mid to late 1980s. Most of the plaintiffs alleged they were abused during the 1960s and 1970s. By January 1, 2003, the youngest was in his mid thirties and the oldest was most likely in his mid to late fifties. Plaintiffs sued after January 1, 2004,

² This is only a bare-bones summary of the applicable statute and its various changes through the years. We set forth the statutory history in more detail below. All further undesignated section references are to the Code of Civil Procedure.

alleging they had only recently discovered that psychological injury occurring after turning 18 was caused by the sexual abuse they suffered years before.³

After allowing for an omnibus demurrer, where the plaintiffs and defendants appeared collectively, the trial court ruled that despite plaintiffs' claims of recent discovery of the cause of their adult-onset emotional harm, their actions were time barred because they did not bring them during the 2003 revival period. (§ 340.1, subd. (c).) Defendants' demurrers were sustained without leave to amend, and plaintiffs' actions were dismissed. Plaintiffs then appealed.

STANDARD OF REVIEW

In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we give the complaint a reasonable interpretation, and treat the demurrer as having admitted all material facts that were properly pleaded. Because the only issue raised concerns the interpretation of section 340.1, we exercise our independent judgment and apply the well-known rules of statutory construction. (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 631 (*Shamsian*).)

The fundamental rule of statutory construction is to determine the Legislature's intent in order to carry out the purpose of the statute. We look first to the words of the statute and try to give effect to the usual and ordinary meaning of the language in a way that does not render any language mere surplusage. (*Pasadena Metro Blue Line Const. Authority v. Pacific Bell Telephone Co.* (2006) 140 Cal.App.4th 658, 663-664.)

"Surplusage" means words or phrases that are unnecessary or lack meaning. (*Reno v. Baird* (1998) 18 Cal.4th 640, 657.) The words must be construed in order to achieve a reasonable and commonsense interpretation when viewed in context and in light of the

³ Plaintiff John Doe filed his complaint in August 2004. Plaintiffs John Doe 1 and John Doe 2 filed theirs in July 2005. These three plaintiffs alleged they had discovered the cause of their emotional harm within the last three years, raising the possibility they had made the discovery before the revival period began. The remaining plaintiffs filed their actions in 2007 and alleged discovery dates of no earlier than 2004, after the revival window had closed.

statute's obvious nature and purpose. Statutes must be harmonized both internally and with other related statutes. (*Ibid.*) Use of a statute's legislative history is proper only if the statute is ambiguous. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29-30.) If the language is clear and unambiguous, however, there is no need for construction, and it is not necessary to resort to the legislative history as an interpretive aid. (*Shamsian, supra*, 136 Cal.App.4th at p. 631.)

DISCUSSION

1. *The Statutory Relevant History of Section 340.1*

Until 1986, the statute of limitations for sexual molestation claims was one year. (§ 340.) If the victim was a minor, however, that period was tolled by section 352 until the victim's 19th birthday. In 1986, the Legislature added section 340.1, which increased the limitations period to three years, but only for abuse of a child under age 14 by a household or family member. (*Hightower, supra*, 142 Cal.App.4th at p. 765.) Section 340.1 was amended in 1994 to extend the limitations period to the later of either age 26 or three years from the plaintiff's discovery that psychological injury occurring after adulthood had been caused by the sexual abuse. (Former § 340.1, subd. (a).) The 1994 amendment applied to only the perpetrator, meaning that claims against entities that employed or otherwise exercised control over the perpetrator were still subject to the one-year limitations period and the ultimate age 19 cut-off for victims who were minors when the abuse occurred. (*Hightower*, at p. 765.)

In 1998, the Legislature amended section 340.1 to include causes of action for sex abuse against nonabusers whose negligent or intentional acts were a "legal cause" of a child's sexual abuse. (§ 340.1, subd. (a)(2) & (3), added by Stats. 1998, ch. 1032, § 1.)⁴

⁴ Section 340.1, subdivision (a)(2) applied to actions against persons or entities who owed a duty of care to the plaintiff, where a wrongful or negligent act by that defendant was a legal cause of the childhood sexual abuse. Section 340.1, subdivision (a)(3)

The limitations period for those claims was set at the *earlier* of three years from discovery that the abuse caused adult-onset psychological harm, or the plaintiff's 26th birthday. (*Hightower, supra*, 142 Cal.App.4th at pp. 765-766.) In 1999, the Legislature amended section 340.1 to clarify that the 1998 amendment relating to the liability of nonabuser persons or entities was prospective, and applied only to actions begun on or after January 1, 1999, or, if filed before then, to actions still pending as of that date, "including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999." (§ 340.1, subd. (u), added by Stats. 1999, ch. 120, § 1; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*).)⁵

In short, until January 1, 1999, child molestation victims had until they turned 19 to sue nonabuser persons or entities. As of that date, the limitations period for claims against nonabusers was extended to three years from the discovery that adult-onset psychological injury had been caused by the molestation, with a plaintiff's 26th birthday serving as the absolute cut-off.

The legislative amendment at issue here was passed in 2002 and took effect on January 1, 2003. It retained the limitations period for actions against childhood sex abuse *perpetrators* at the *later* of age 26 or three years from discovery of the causal link between adult-onset psychological injury and the molestation. The age 26 cap from the 1998 amendment was retained against nonabuser entities or persons (§ 340.1, subds. (a)(1)-(3), (b)(1)), with an exception carved out for one category of such defendants. "[I]f the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person . . . ,"

applied to actions against such entities whose intentional act was a legal cause of the abuse.

⁵ Subdivision (u) was originally enacted as subdivision (s) of section 340.1.

cut-off did not apply. (§ 340.1, subd. (b)(2).) In those cases, the statute of limitations became three years from the date of discovery only.⁶

The Legislature also amended section 340.1 to revive for calendar year 2003 all nonabuser claims that fell within the description of section 340.1, subdivision (b)(2) that would otherwise be barred because the limitations period had expired. That provision states: “Notwithstanding any other provision of law, any claim for damages [falling under subdivision (b)(2)] 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. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time barred as of January 1, 2003.” (§ 340.1, subd. (c).)⁷

To sum up, effective 2003, section 340.1 established the limitations period for three groups of defendants: (1) for perpetrators, the later of the plaintiff’s 26th birthday or three years from discovery (subd. (a)(1)); (2) for nonabusers who did not take reasonable steps to safeguard minors from a known or suspected molester, the later of the plaintiff’s 26th birthday or three years from discovery (subd. (b)(2)); and (3) for all other nonabusers whose negligent, wrongful, or intentional conduct was a legal cause of the childhood sexual abuse, the earlier of the plaintiff’s 26th birthday or three years from discovery. (Subds. (a)(2) & (3), (b)(1).)⁸

⁶ For ease of reference, when we refer to discovery or making discovery, we mean discovery that psychological harm occurring during adulthood was caused by an act of childhood molestation.

⁷ We will hereafter refer to the various subdivisions of section 340.1 by subdivision only, without reference to section 340.1 itself. In other words, when we refer to “subdivision (b)(2),” we mean subdivision (b)(2) of section 340.1.

⁸ Subdivisions (a)(2), (a)(3), and (b)(2) all concern nonabusers whose liability rests on either negligent or intentional conduct. Subdivision (b)(2) defines a species of negligent nonabusers that would otherwise fall within subdivision (a)(2). For ease of reference, we will sometimes describe subdivision (a)(2) defendants as negligent nonabusers and subdivision (a)(3) defendants as intentional nonabusers. (See fn. 3, *ante*.)

2. *Plaintiffs' Alleged Recent Discovery That Childhood Molestation Caused Adult-Onset Emotional Harm Did Not Revive Their Claims*

A. *The Hightower Decision*

In *Hightower, supra*, 142 Cal.App.4th 759, the plaintiff alleged he was molested in the early 1970s, meaning his claims became time-barred when he turned 19 in 1977. After making a defective attempt to sue during the 2003 revival period, the plaintiff finally filed a complaint in April 2004. The plaintiff alleged he did not discover the cause of his psychological injuries until 2003, claiming his action was timely under the expanded limitations period approved by the Legislature in 2002. We rejected that contention because the Legislature's one-year revival window for *any* subdivision (b)(2) claims that had already lapsed "drew a clear distinction between claims that were time-barred and those that were not. Hightower's interpretation would obliterate that distinction by allowing his time-barred claim to take advantage of the new limitations period." (*Id.* at pp. 767-768.) Therefore, we held, for subdivision (b)(2) claims like Hightower's that were barred by the pre-2003 statute of limitations, the only available opportunity to sue was during the one-year revival window of 2003.

Plaintiffs contend we were wrong in *Hightower* because: (1) the plain language of the statute shows it was intended to allow claims like theirs; (2) the Legislature's 2002 reenactment of section 340.1, subdivision (u), which clarified the scope of the 1998 amendment that first allowed for actions against nonabuser entities up to a plaintiff's 26th birthday, shows that subdivision (b)(2) was designed to have retroactive effect; and (3) the legislative history, combined with the Legislature's ever-broadening amendments to the limitations period, show that their claims were valid, especially when viewed in light of section 340.1's remedial nature.⁹

⁹ Since our decision in *Hightower*, two of our sister courts have weighed in on its validity, reaching opposite conclusions. Both decisions are currently on review before our Supreme Court. Division 4 of the First District Court of Appeal concluded we were wrong and held that the 2002 amendments to section 340.1 amounted to the establishment of a new, delayed accrual date for childhood molestation claims. (*Quarry*

B. Plaintiffs' Claims Are Barred by the Plain Language of Section 340.1

We begin our analysis with the rule that statutes are presumed to operate prospectively from the date they take effect unless (1) they contain express language of retroactivity, or (2) other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.¹⁰ (§ 3; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 (*McClung*); *People ex rel. City of Bellflower v. Bellflower County Water Dist.* (1966) 247 Cal.App.2d 344, 350 (*City of Bellflower*)). Subdivision (b)(2), which carved out the new exception for negligent nonabuser entities who failed to safeguard children from known or suspected molesters, is silent on the issue. Standing alone, therefore, it does not confer retroactive application. Instead, it is subdivision (c) that expressly provides for and defines the retroactivity of subdivision (b)(2).

Subdivision (c) states that notwithstanding any other provision of law, “*any claim*” covered by subdivision (b)(2) that was otherwise barred as of January 1, 2003, solely because the limitations period had expired was revived and “*in that case, a cause of action may be commenced within one year of January 1, 2003.*” (Italics added.) The limitations period in place through December 31, 2002, for claims against nonabuser entities was three years from discovery, with an absolute cut-off of age 26. Therefore, as of that date, there were three groups of child molestation victims whose claims had expired under the then-applicable limitations period: (1) those under age 26 who had made discovery more than three years earlier; (2) those who had made their discovery less than three years earlier, but had not yet sued by the time they turned 26; and

v. Doe I (2009) 170 Cal.App.4th 1574, review granted June 10, 2009, S171382.) The Third District Court of Appeal agreed with *Hightower*, rejected many of the same arguments advanced by the plaintiffs here, and held that the statute’s language and legislative history showed it had no retroactive effect beyond permitting barred claims during the 2003 revival period. (*K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 Cal.App.4th 1388, review granted June 24, 2009, S173042.)

¹⁰ Plaintiffs acknowledged this rule during oral argument.

(3) those who had turned 26 and had not made discovery at all. We presume the Legislature meant what it said when it provided that “any claim” falling under subdivision (b)(2) was revived by subdivision (c). As a result, it must have included the plaintiffs here, who fall into the third category.¹¹

Plaintiffs do not dispute that their claims were time-barred years before subdivisions (b)(2) and (c) took effect. Under subdivision (c), however, their claims were revived, “and, in that case, a cause of action may be commenced within one year of January 1, 2003.” (§ 340.1, subd. (c).) The plain meaning of this language required plaintiffs to bring their newly-revived claims during the one-year revival period. (*Shirk, supra*, 42 Cal.4th at p. 208 [subdivision (b)(2) claims that were already time barred were revived by subdivision (c) “for the year 2003”].) In short, if a subdivision (b)(2) cause of action was time-barred by January 1, 2003, and was not brought by January 1, 2004, it was thereafter barred again.

C. Reenactment of Subdivision (u) Does Not Restore Plaintiffs’ Claims

Plaintiffs contend the Legislature’s reenactment of subdivision (u) as part of the 2003 amendments shows their claims could still be brought because they were filed after 1999 and because they did not make discovery until after the expanded limitations period took effect in January 2003. In order to understand this argument, we must first recount the applicable statutory history.

As discussed earlier, until 1998, the limitations period for childhood molestation claims against nonabuser entities was one year, extended to the victim’s 19th birthday by section 352. In 1998, the Legislature for the first time provided for an extended limitations period against nonabusers: the *earlier* of three years from discovery, or the plaintiff’s 26th birthday. This limitations period applied in two instances: (1) to negligent nonabusers; and (2) to intentional nonabusers. (§ 340.1, subd. (a)(2), (3).) The

¹¹ The claims of victims who were under age 26 and who had not made discovery, or who had made discovery less than three years earlier, were not yet barred as of January 1, 2003.

longer limitations period of the *later* of age 26 or three years from discovery that applied to those who actually committed the molestation was set forth in subdivision (a)(1).

In 1999, the Legislature enacted subdivision (s) (now subdivision (u)), which clarified that the 1998 amendments “shall apply to any action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999. Nothing in this subdivision is intended to revive actions or causes of action as to which there has been a final adjudication prior to January 1, 1999.”¹²

When the Legislature passed the 2003 amendments at issue here, it did not repeal or delete subdivision (s). Instead, it retained that provision and reenacted it as subdivision (u). Plaintiffs contend that because subdivision (u) conferred retroactive effect on subdivision (a)(2) (negligent nonabuser) and (a)(3) (intentional nonabuser) cases that were then pending, its reenactment in 2003 along with the newly-enacted subdivision (b)(2) (negligent nonabusers who knew of the perpetrator’s potential to molest and failed to take reasonable safeguards) shows that the Legislature intended subdivision (u) to apply to subdivision (b)(2) cases filed after January 1, 1999. Thus, according to plaintiffs, the plain language of the entire statute shows their claims were timely. If not interpreted in this manner, plaintiffs contend, subdivision (u) is surplusage because it serves no other purpose.

Plaintiffs’ contention rests in part on the flawed premise that subdivision (u) had retroactive effect. Instead, as the court in *Shirk, supra*, 42 Cal.4th at page 208, noted, subdivision (u) simply clarified that the 1998 amendments “were prospective – that is, its provisions applied only to actions begun on or after January 1, 1999, or if filed before that time, actions still pending as of that date,” including those which would have been

¹² At least for separation of power purposes, a final adjudication occurs when the last court within a judicial system rules on a case. (*Perez v. Richard Roe 1* (2006) 146 Cal.App.4th 171, 187 [section 340.1, subdivision (c) revival window violated separation of powers doctrine to extent it sought to revive actions that had been concluded by trial or dispositive judicial ruling].)

barred under the earlier limitations period. Plaintiffs also forget that subdivision (u) is, by its own terms, expressly limited to the 1998 amendments, which set an age 26 limit on claims against all nonabusers, without the distinction created by subdivision (b)(2) four years later.

If plaintiffs are correct, then even though the Legislature expressly revived *all* lapsed subdivision (b)(2) claims for one year pursuant to subdivision (c), it also chose to silently revive a limited subcategory of those claims – where plaintiffs were over 26 but had not yet discovered the link between the molestation and their adulthood emotional harm – by way of reenacting a three-year-old provision that was designed to clarify the prospective reach of the 1998 amendments that set an age 26 limit on claims against *all* nonabuser entities. If so, the Legislature chose a circuitous path to achieve that result, requiring a resort to methods of legislative interpretation that are almost cryptographic. Certainly the plain language of these very different subdivisions does not show such intent. Neither does the legislative history.

At oral argument, plaintiffs' counsel recognized that conjoining subdivisions (b)(2) and (u) in this manner required reliance on an opaque expression of legislative intent. Counsel claimed he was aware of no rule of statutory construction that required the Legislature to do things "in the most efficient and clear way possible," but this is not true when determining whether a statute is retroactive. As discussed earlier, statutes are presumed to operate prospectively unless they contain express language of retroactivity, or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application. (*McClung, supra*, 34 Cal.4th at p. 475.) In accord with this rule, the Legislature has demonstrated that when it wants to make amendments to section 340.1 retroactive, it will do so clearly and expressly. In 1994, the Legislature added what is now subdivision (r), which states that the 1990 amendments applied to "any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991." (Stats. 1994, ch. 288, § 1.) Subdivision (c) is just as clear.

Had the Legislature intended to permit plaintiffs' claims, it should have, and we believe it could have, done so in equally clear and unmistakable terms. For instance, the Legislature could have written subdivision (c) to state that any subdivision (b)(2) claims where those plaintiffs 26 or older had not yet made discovery were revived *and* the new limitations period did not begin to run until discovery occurred.

Plaintiffs claim that absent their interpretation of subdivision (u), it is surplusage. We disagree. It is important to remember that when the Legislature passed the 2003 amendments in 2002, only three years had elapsed since the effective date of subdivision (u). Actions under subdivision (a)(2) and (a)(3) that had been pending on January 1, 1999, might have still been unresolved, requiring reenactment of subdivision (u) to eliminate any doubt that those claims remained viable. As for actions filed after January 1, 1999, that did not fall within the subdivision (b)(2) category, it was also important to retain the starting point for the shorter limitations period where the age 26 cut-off still applied. It seems far more likely to us that the Legislature had this in mind when it reenacted subdivision (u) along with its enactment of subdivisions (b)(2) and (c). We therefore reject plaintiffs' contention that absent their interpretation, subdivision (u) is surplusage.

We also reject plaintiffs' reliance on *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601 (*Bouley*) to support their claim that the reenactment of subdivision (u) gave retroactive life to their causes of action. As of 2002, section 377.60 was amended to give domestic partners standing to sue for wrongful death. (§ 377.60, subd. (a); *Bouley*, at p. 606.) After that amendment took effect, plaintiff sued for the 2001 wrongful death of his domestic partner. Defendants' demurrers were sustained, and the action was dismissed, when the trial court ruled the plaintiff lacked standing to sue under the law in effect when his partner died. The *Bouley* court reversed, relying in part on a 1997 amendment to section 377.60 that gave parents standing to sue for the wrongful death of their children, and which stated that section 377.60 applied to any cause of action arising on or after January 1, 1993. (§ 377.60, subd. (d).) When the Legislature reenacted subdivision (d) along with the amendment giving standing to

domestic partners, it must have intended to apply that retroactivity provision to the domestic partner amendment, the *Bouley* court held. (*Bouley*, at p. 607.)

Based on this language from *Bouley*, plaintiffs contend the same should be true for subdivision (u) of section 340.1. We do not find *Bouley* persuasive authority. First, *Bouley* relied on *People v. Bouzas* (1991) 53 Cal.3d 467 (*Bouley, supra*, 127 Cal.App.4th at p. 607), which only noted the well-established rule that legislative reenactment of a statute that has been judicially construed without change is deemed to be legislative adoption of that construction. (*Bouzas*, at p. 475.) That is not the issue raised as to subdivision (u). Second, the *Bouley* court reversed for another reason: a 2005 amendment to section 377.60 that took effect while the case was pending on appeal expressly stated that those who could establish their qualifications as domestic partners could sue for deaths occurring before January 1, 2002. (§ 377.60, subd. (f)(1) & (2); *Bouley*, at pp. 607-608.) Therefore, *Bouley*'s discussion of the 1997 amendment was dicta. Finally, the statutory language involved in *Bouley* is critically different. The 1997 amendment at issue in *Bouley* was a blanket statement that section 377.60 in its entirety applied to any cause of action arising on or after January 1993. (§ 377.60, subd. (d).) As discussed above, subdivision (u) of section 340.1 applies solely to the 1998 amendment that imposed an age 26 cap on all claims against nonabuser entities without the distinction created four years later by subdivision (b)(2). Because subdivision (c) is section 340.1's lone express indicator of retroactive effect, subdivision (u) cannot logically be read as plaintiffs contend.

D. *Neither Its Remedial Purpose Nor Legislative History Shows That the 2003 Amendments Were Intended to Allow Plaintiffs' Actions*

Because subdivision (b)(2) is a remedial statute (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 536), and because the limitations period has been repeatedly enlarged several times, plaintiffs contend section 340.1 must be liberally construed to permit their actions. We do not doubt the very important remedial purpose of this statute and have no quarrel with the liberal construction rule as a general principle of statutory interpretation

in this field. However, the rules of statutory construction and the language chosen by the Legislature still set the boundaries of the rule of liberal construction. Even here, where the remedial purpose is apparent, we may not read into the statute provisions that were not included, or read out those that were. (*Di Genova v. State Bd. of Ed.* (1962) 57 Cal.2d 167, 173 [express legislative declaration that statute be liberally construed does not confer retroactive effect]; *Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 976-977, & fn. 5; *Davis v. Harris* (1998) 61 Cal.App.4th 507, 512.) We conclude, as set forth above, that the statutory language itself precludes plaintiffs' actions because they did not bring them during the revival period. No construction, liberal or otherwise, is necessary.

Plaintiffs point out three items from the legislative history of the 2002 amendment of section 340.1 that they believe show the Legislature intended to preserve their claims.¹³ The first two are found in several reports, including a bill analysis by the Senate Judiciary Committee: (1) Under the heading "ANALYSIS," the report describes the effect of the proposed amendments, noting it "would provide that the absolute age of 26 limitation for actions against a third party does not apply, and the broader 'within three years of discovery' statute of limitations in subdivision (a) applies, in claims against third parties" who fall within subdivision (b)(2); and (2) Under the heading "ARGUMENTS IN SUPPORT," the report notes that many childhood sex abuse victims do not manifest trauma until well after their 26th birthday. "For example, a 35-year old man with a 13-year old son involved in many community and sporting events, may begin to relive his nightmare of being molested by an older authoritarian figure when he was 13 years old and about to enter puberty. While a lawsuit against the perpetrator is possible, that person may be dead, may have moved away to places unknown, or may be judgment-proof. However, any lawsuit against a responsible third party is absolutely time-barred after the victim passes his 26th birthday. [¶] This arbitrary limitation unfairly deprives a victim from seeking redress, and unfairly and unjustifiably protects

¹³ Plaintiffs asked us to judicially notice the legislative history of the 2002 amendments. We shall do so.

responsible third parties from being held accountable for their actions that caused injury to victims.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1779 (2002-2003 Reg. Sess.) as amended June 17, 2002, pp. 3-4.)

Neither statement supports plaintiffs’ position because both concern the prospective effect of the amendment, not its retroactivity. Instead, retroactivity is discussed immediately following the first example, with the report noting that the bill also provided that “notwithstanding any other provision of law, any action for damages against a third party as provided above which is barred as of January 1, 2003, solely because the applicable statute of limitations has expired, is revived and a cause of action thereupon may be brought if commenced within one year of January 1, 2003. [¶] This bill further would provide that its one-year window period shall not alter the applicable limitations period of an action that is not time-barred as of January 1, 2003, and shall not apply to either” claims made final after litigation on the merits or by settlement. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1779 (2002-2003 Reg. Sess.) as amended June 17, 2002, p. 3.) This tracks our analysis of the statutory language, and shows that the Legislature intended to foreclose any previously time-barred claims that were not brought within the one-year revival period.

The same is true of the other piece of legislative history cited by plaintiffs: An undated analysis that gives no indication by whom or for whom it was prepared, or that otherwise shows it is a proper subject of judicial notice as part of the official legislative history. (*State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10, fn. 3 [no judicial notice of purported legislative history documents without knowing who prepared them and for what purpose].)¹⁴ Plaintiffs cite the following portion of that document: “People who discover their adulthood trauma from the molestation after the effective date of the bill will have three years from the date the victim discovers or reasonably should have discovered that the adulthood trauma was caused by the childhood abuse.”

¹⁴ We assume for discussion’s sake only that this document meets the requirements of judicial notice.

Plaintiffs contend the above-quoted language clarifies the Legislature's intent regarding the retroactive effect of the 2003 amendments to section 340.1. A thorough reading belies plaintiffs' contention. The quoted language is under the subheading "Prospective application," which falls under the general subject heading "WHO CAN SUE AFTER THE BILL PASSES, AND WHEN." As mentioned earlier in DISCUSSION section 2.B., statutes apply prospectively *from the date they take effect*. (*City of Bellflower, supra*, 247 Cal.App.2d at p. 350.) Therefore, the language plaintiffs rely on does not concern the amendment's retroactive effect. Instead, immediately under that general heading, and immediately before the subheading and discussion concerning prospective application, is the subheading "Retroactive application and revival of lawsuits." Within that subheading, the document states: "Like the Northridge Earthquake bill, this bill would create a one-year window for victims to bring a lawsuit *that would otherwise be barred by the age 26 limitation*." (Italics added.) When both subsections are read together and in context, they also show that discovery made after the revival window closed would make timely only those actions that were not time-barred before the 2002 amendments took effect. As to those, if not brought during the revival period, they were thereafter precluded.

One other piece of the legislative history not cited by the parties also confirms our reading – a 12-page analysis by the Assembly Judiciary Committee that describes the one-year window period: "This bill applies retroactively and provides victims of childhood sexual abuse a one-year window to bring an action against a third party when that claim would otherwise be barred solely because the statute of limitations has or had expired and when the third party knew of prior claims of abuse but failed to act to prevent future abuse. [¶] Under the measure, such a claim would be revived and a cause of action may be brought if commenced within one year of January 1, 2003. . . . In other words, this bill would provide those victims who discovered their adulthood trauma after age 26, whose action has been barred by the current statute of limitations, a one-year window to bring a case against a third party that otherwise would be time-barred." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1779 (2002-2003 Reg. Sess.) as

amended June 6, 2002, p. 7 (hereafter June 2002 analysis).) In short, childhood molestation victims who were over 26 when the 2002 amendments took effect had to sue by January 1, 2004.

Plaintiffs question why the Legislature might have chosen such a course, given the remedial nature of the amendment. These cases involve incidents that occurred many years ago. There can be no doubt that the issue of molestation by Catholic priests and the numerous lawsuits resulting from that misconduct have been the subject of much notoriety for several years. As the public's and the Legislature's understanding of the horrific nature of these crimes and their effect on the victims has evolved, the Legislature has seen fit to expand the statute of limitations. However, the Legislature might have felt it necessary to balance the defendants' rights as to this older class of plaintiffs by offering them one final chance to seek redress. Otherwise, it would be possible for a plaintiff to make the requisite discovery very late in life, forcing nonabuser defendants to respond to complaints alleging actions that took place perhaps 70 or 80 years earlier.

The June 2002 analysis shows that such considerations were in the Legislature's mind. After the above-quoted description of the amendment's retroactive effect, the analysis went on to note that even though the Legislature had the power to revive time-barred claims, that power must be exercised in light of the countervailing public policy behind statutes of limitation: "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them. [¶] . . . Thus, the final inquiry should be whether the Legislature believes that there are sufficient public policy reasons to support reviving any otherwise barred claims under this bill, and whether such an extension would maintain the protections afforded by the statute of limitations, i.e., balancing the interests of the victims with the defendants' right to defend." (June 2002 analysis, pp. 7-8.) After further discussion of the Legislature's power to revive time-barred claims, the analysis

returned to the issue “whether the promotion of justice would be served by extending the statute of limitations under the circumstances of these cases.” The analysis then stated the policy reasons advanced by proponents of the amendments – that the claims to be revived involved nonabuser defendants who knew those under their control were likely to molest children, took no reasonable steps to safeguard the victims, and then delayed plaintiffs from suing by withholding information from, or lying to, the plaintiffs. (June 2002 analysis, pp. 8-10.)

We offer no opinion on this possible explanation except to state that it is neither illogical nor irrational.

E. Plaintiffs' Claims Were Not Revived By A Changed Accrual Date

Plaintiffs contend that even if subdivision (b)(2) is prospective, it changed the accrual date for their claims to the time of discovery, making their actions timely. They rely on *Nelson v. Flintkote Co.* (1985) 172 Cal.App.3d 727 (*Nelson*) to support this contention, but *Nelson* is inapplicable. At issue there was the recently-enacted section 340.2, which provided that the one-year limitations period for asbestos-related injuries begins to run only upon the occurrence of both disability from the exposure and discovery that the injuries were due to asbestos exposure. The new statute also provided that it applied to claims that accrued before the new law that were not “otherwise extinguished by operation of law.” The plaintiff sued after the statute took effect, but his action was dismissed because the trial court believed it was subject to the previous one-year limitation period that ran from discovery, without regard to the existence of a disability from the exposure. The *Nelson* court reversed, holding that section 340.2 changed the accrual date for asbestos claims, and that as a result the claim had never been extinguished.

Nelson was criticized in *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, 1380-1382 for its heavy reliance on policy reasons to support its analysis. Assuming *Nelson* is still valid, it is inapplicable here. When a cause of action accrues and when a limitations period expires are very different issues. (*V.C. v. Los Angeles Unified School*

Dist. (2006) 139 Cal.App.4th 499, 508 (*V.C.*.) Accrual equates with the occurrence of the wrongful act and injury, and signals the start of the limitations period. The statute of limitations sets the deadline for bringing an action that has accrued. (*Id.* at pp. 509-510.) Although section 340.1 extends the time for bringing a childhood sexual molestation claim, it does not change the accrual date, which is when the molestation occurred. (*Ibid.*)

Defendants also rely on *Shirk, supra*, 42 Cal.4th at page 635, for the proposition that a child molestation cause of action accrues at the time of molestation. Plaintiffs complain that *Shirk* – and by extension *V.C.* – is not applicable because the defendant was a public entity and the time limit to sue was tied to the six-month deadline for filing a written claim with the public entity defendant pursuant to the Government Claims Act. (Gov. Code, § 900, et seq.) However, the accrual date for purposes of claim filing deadlines under the Claims Act is the same as that for civil causes of action in general (Gov. Code, § 900), a fact noted by both the *Shirk* court (*Shirk*, at pp. 208-209), and the court in *V.C.*, *supra*, 139 Cal.App.4th at page 510. Therefore, when those courts discussed the accrual date for child molestation claims, they necessarily had in mind the accrual date that would apply here.

As plaintiffs point out, however, the delayed discovery rule postpones accrual of a cause of action until a plaintiff discovers or should have discovered his cause of action. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*.) Despite the holdings in *Shirk* and *V.C.*, the court in *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229 (*Arcadia Unified School Dist.*), relied on *Norgart* to hold that the delayed discovery rule postpones accrual of a childhood sex abuse claim.¹⁵ (*Arcadia Unified School Dist.*, at pp. 1242-1243.) However, a plaintiff discovers his cause of action when he at least suspects a factual basis for its elements – that someone has done something wrong to him. (*Norgart, supra*, at p. 397.) In childhood sex abuse cases, physical harm occurs, apart from any psychological injury, at the moment of molestation. Discovery under

¹⁵ See fn. 16, *post*, for a further discussion of *Arcadia Unified School Dist.*

section 340.1 is triggered by delayed discovery of adult-onset psychological injuries. A childhood molestation victim might remain aware of the abuse and the concomitant physical harm into adulthood, yet not discover adult-onset psychological harm until many years later. In one sense, therefore, a component of the cause of action – for physical harm – can be said to have accrued by age 19. Did the Legislature intend to create two separate accrual dates, or does delayed discovery under section 340.1 simply delay the running of the limitations period?

Fortunately, we need not resolve this dispute. Even if plaintiffs are correct that their causes of action did not accrue until discovery, they were still time barred by their 26th birthdays, long before the new limitations period took effect in January 2003. As discussed at length above, the newly-extended limitations period applies prospectively only, with retroactivity for all previously time-barred claims limited to the one-year revival period. The plain language of the 2003 amendments to section 340.1 makes clear that plaintiffs had to sue during that window, and their failure to do so barred their actions. As we held in *Hightower, supra*, 142 Cal.App.4th at pages 767-768, the Legislature “drew a clear distinction between claims that were time-barred and those that were not. [Plaintiffs’] interpretation would obliterate that distinction by allowing [their] time-barred claim[s] to take advantage of the new limitations period.”

3. *Common Law Equitable Discovery Does Not Apply*

Plaintiffs contend that common law equitable delayed discovery principles permit them to bring their actions because they only recently came to recognize they were wronged by defendants’ conduct. (See *Norgart, supra*, 21 Cal.4th at pp. 397-398.) Although the 1990 version of section 340.1 expressly permitted application of common law delayed discovery rules (former § 340.1, subd. (d)), that provision was removed from section 340.1 as part of the 1994 amendment. (See Historical and Statutory Notes, 13C West’s Ann. Code Civ. Proc. (2006 ed.) foll. § 340.1, pp. 172-173.) As a result, we presume the Legislature intended to supplant common law delayed discovery with the statutorily-defined discovery rule that it put in place from 1994 on. (*City of Irvine v.*

Southern California Ass'n of Governments (2009) 175 Cal.App.4th 506, 522; *Arcadia Unified School Dist.*, *supra*, 172 Cal.App.4th at p. 1242 [§ 340.1 codified the delayed discovery rule].) We therefore hold that the only applicable discovery rule is the one provided by section 340.1.¹⁶

4. *Plaintiffs' Alternative Theories Lack Merit*

As a final fallback position, plaintiffs contend defendants fall outside subdivision (b)(2) and nonabuser entity liability in general (subd. (a)(2) & (3)), and are instead subject to the broad three years from discovery rule applicable to perpetrators. (§ 340.1, subd. (a)(1).) They rest this contention on two theories: (1) vicarious liability for ratification of the molesters' actions or respondeat superior liability because the molesters' actions fell within the scope of their job duties; and (2) direct perpetrator liability for having procured plaintiffs for the molesters in violation of Penal Code section

¹⁶ Amicus counsel contends that in *Hightower*, *supra*, 142 Cal.App.4th 759, we held that common law delayed discovery had been supplanted by the statutory version in section 340.1. Plaintiffs respond that *Hightower* "recognized that the common law delayed discovery doctrine was available, but found that Hightower could not satisfy its requirements." Neither is correct. The issue of whether common law delayed discovery had been supplanted by the 1994 amendment to section 340.1 was not raised as an issue in *Hightower*. Instead, we rejected Hightower's contention that the delayed discovery rule of subdivisions (a) and (b)(2) applied. (*Hightower*, at pp. 767-768.) In short, we did not decide the issue in *Hightower* because it had not been raised.

Plaintiffs contend that *Arcadia Unified School Dist.*, *supra*, 172 Cal.App.4th 1229, held that common law delayed discovery was still applicable under section 340.1. However, the court in fact held that the codified delayed discovery rule of section 340.1 was not applicable to claims against government entities because of the six-month claim presentation deadline. Even so, the court applied general delayed discovery principles to determine the accrual date of the plaintiff's cause of action for purposes of determining when the claims presentation deadline began to run. (*Id.*, at pp. 1241-1243.) Of course, in this case, the defendants are not government agencies or public entities that may invoke the claims presentation deadline.

266j. (See § 340.1, subd. (e), which defines childhood sexual abuse to include violations of Penal Code section 266j.)¹⁷

As defendants point out, respondeat superior liability is not available because the abuse was committed outside the scope of the molesters' employment. (*Mark K. v. Roman Catholic Archbishop* (1998) 67 Cal.App.4th 603, 609.) The open-ended limitations period against direct perpetrators is expressly limited to actions "against any person for committing an act of childhood sexual abuse." (§ 340.1, subd. (a)(1).) Because entity liability for wrongful or intentional acts is separately provided for by subdivision (a)(2) and (3), we conclude plaintiffs may not take advantage of subdivision (a)(1). Finally, assuming for discussion's sake only that, in the abstract, an entity defendant could be subject to criminal liability for violating Penal Code section 266j, plaintiffs did not allege such a theory in their complaint and have not stated how they might amend their pleadings to allege that such violations occurred here. The issue is therefore waived. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

DISPOSITION

The judgments dismissing plaintiffs' complaints are affirmed. Respondents shall recover their costs on appeal.

RUBIN, ACTING P. J.

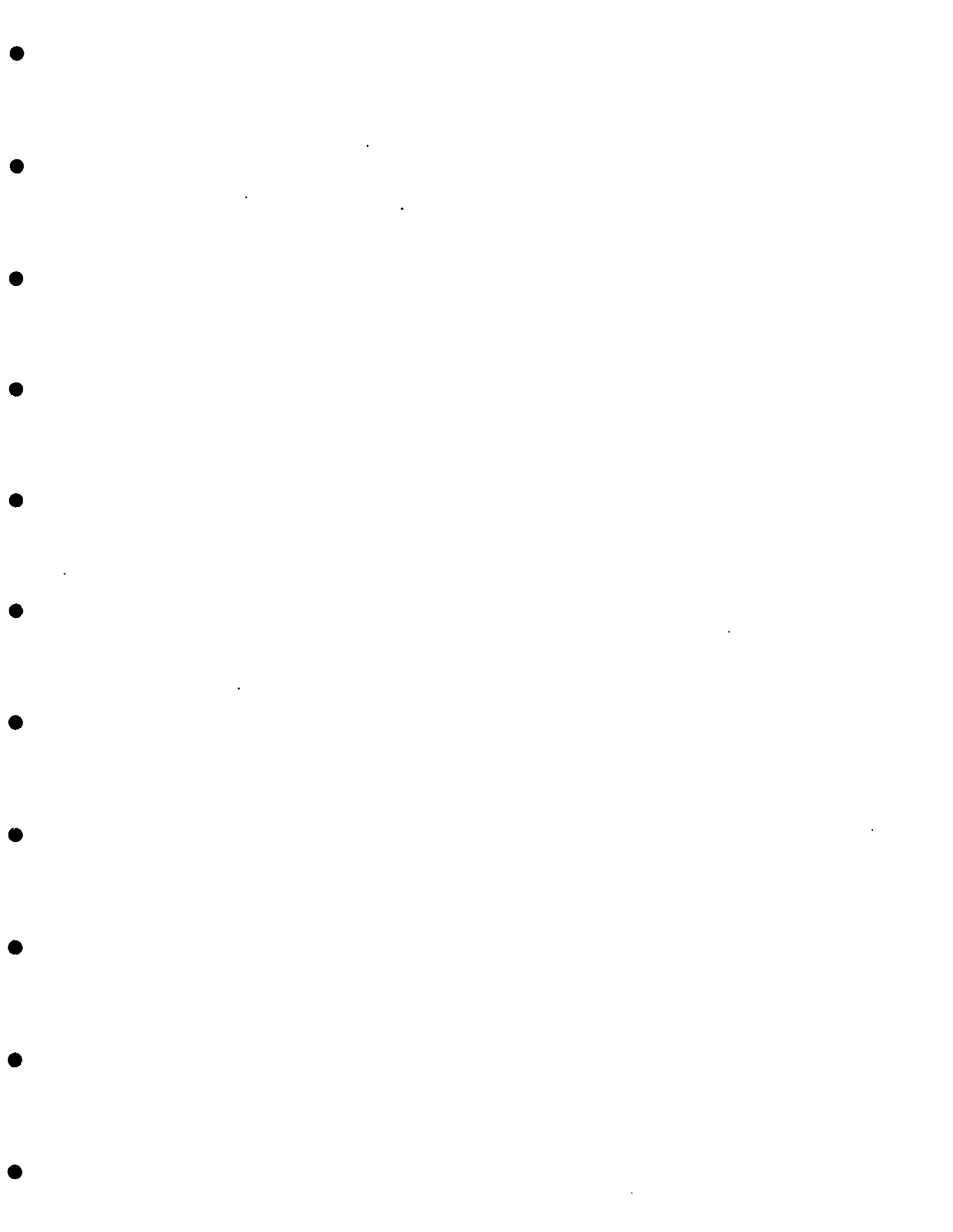
WE CONCUR:

FLIER, J.

BENDIX, J.*

¹⁷ Penal Code section 266j makes it a felony to intentionally give, transport, provide, or make available to another person a child under 16 for the purpose of lewd or lascivious acts.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.



Filed 11/17/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN DOE et al.

Plaintiffs and Appellants,

v.

ROMAN CATHOLIC BISHOP OF SAN
DIEGO et al.,

Defendants and Respondents.

B209557

(Los Angeles Super. Ct.
JCCP Nos. 4286 & 4297)

ORDER MODIFYING OPINION
[No change in judgment]

THE COURT:*

GOOD CAUSE appearing, the opinion filed in the above entitled matter on November 6, 2009, is modified as follows: On the cover page, in the caption and in the first paragraph where it reads:

“Alameda”

is replaced with the following:

“Los Angeles”

On page 3, after the first sentence under the Facts and Procedural History, insert the following footnote, which will be numbered as footnote 3:

“Several church dioceses under the Archdiocese of Los Angeles are the principal defendants in numerous actions brought by plaintiffs alleging they were victims of childhood sexual abuse by certain priests and other persons subject to the control or supervision of the defendant church entities. This case, along with others involving the

Los Angeles Archdiocese and Orange diocese, are known collectively as *Clergy Cases I* (JCCP No. 4286); cases involving the San Diego and San Bernardino dioceses are known collectively as *Clergy Cases II* (JCCP No. 4297); and *Clergy Cases III* (JCCP No. 4359) involves various Northern California dioceses. *Clergy Cases I* and *II* were coordinated with the Los Angeles County Superior Court, and the Second District of the Court of Appeal has been designated as the intermediate appellate court for all of the coordinated cases.”

As a result of this footnote 3, all subsequent footnote numbers are renumbered accordingly, and all affected footnote cross references are similarly renumbered.

On pages 8 and 9, footnote 9 which reads:

“Since our decision in *Hightower*, two of our sister courts have weighed in on its validity, reaching opposite conclusions. Both decisions are currently on review before our Supreme Court. Division 4 of the First District Court of Appeal concluded we were wrong and held that the 2002 amendments to section 340.1 amounted to the establishment of a new, delayed accrual date for childhood molestation claims. (*Quarry v. Doe I* (2009) 170 Cal.App.4th 1574, review granted June 10, 2009, S171382.) The Third District Court of Appeal agreed with *Hightower*, rejected many of the same arguments advanced by the plaintiffs here, and held that the statute’s language and legislative history showed it had no retroactive effect beyond permitting barred claims during the 2003 revival period. (*K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 Cal.App.4th 1388, review granted June 24, 2009, S173042.)”

is replaced with the following:

“Since our decision in *Hightower*, two of our sister courts have weighed in on its validity, reaching opposite conclusions. Both decisions are currently on review before our Supreme Court. (*Quarry v. Doe I* (2009) 170 Cal.App.4th 1574, review granted June 10, 2009, S171382; *K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 Cal.App.4th 1388, review granted June 24, 2009, S173042.)”

On page 7, the last sentence of footnote 8, which reads:

“(See fn. 3, *ante.*)”

is replaced with the following:

“(See fn. 4, *ante.*)”

On page 20, that part of the first full paragraph, on line 1, where it reads:

“at page 635”

is replaced with the following:

“at page 210”

On page 21, the second sentence of Discussion section 3 that begins “Although the 1990 version of section 340.1” is replaced in its entirety with the following:

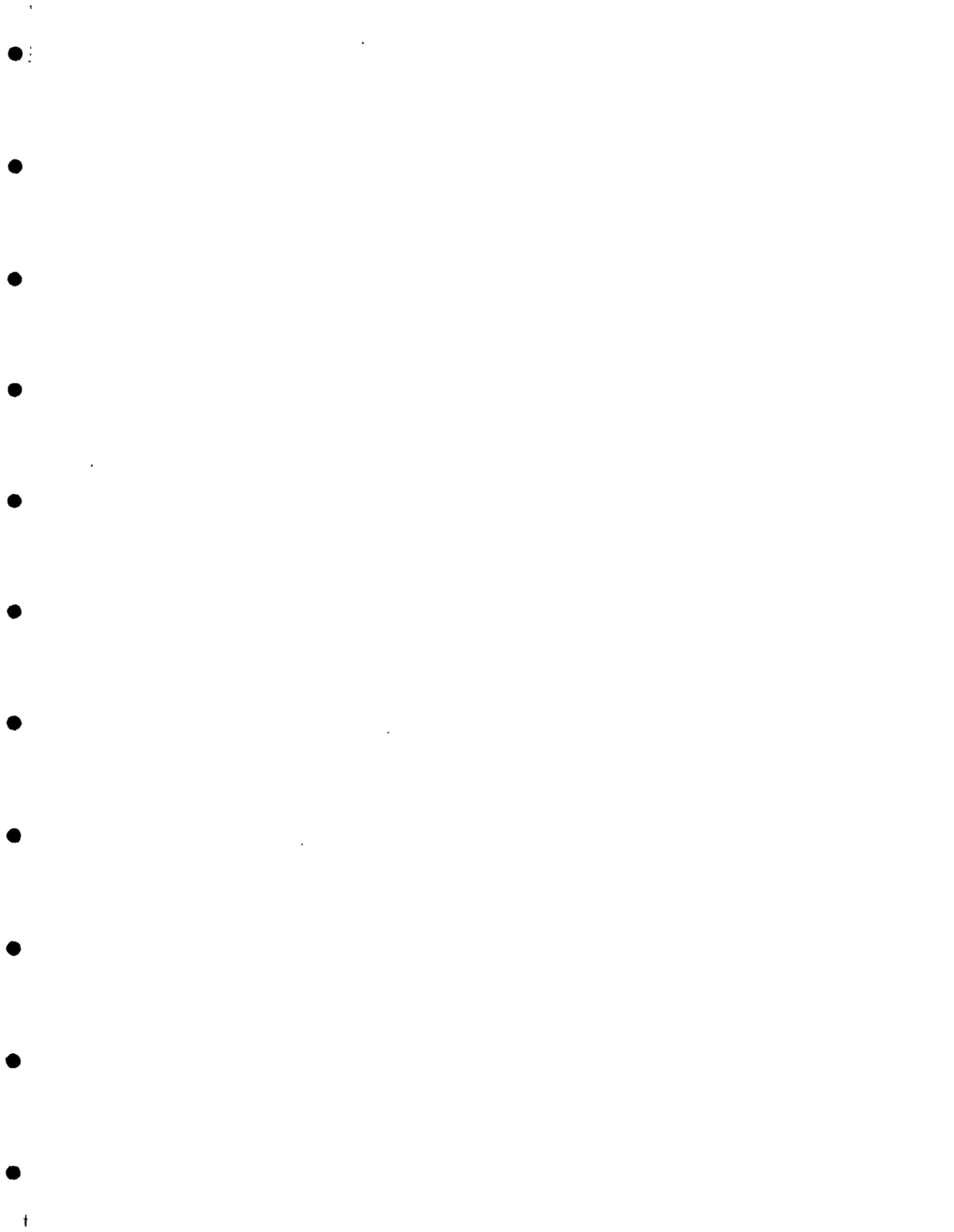
“Although subdivision (d) of the 1986 version of section 340.1 and subdivision (l) of the 1990 version expressly permitted application of delayed discovery exceptions to the running of the limitations period, those provisions were removed from section 340.1 as part of the 1994 amendment.”

[end of modification]

There is no change in judgment.

* RUBIN, ACTING P. J.

FLIER, J.



Filed 11/30/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN DOE et al.

Plaintiffs and Appellants,

v.

ROMAN CATHOLIC BISHOP OF SAN
DIEGO et al.,

Defendants and Respondents.

B209557

(Los Angeles Super. Ct.
JCCP Nos. 4286 & 4297)

ORDER MODIFYING OPINION
[No change in judgment]

THE COURT:*

GOOD CAUSE appearing, the modification order filed in the above entitled matter on November 17, 2009, is modified as follows:

On page 3, footnote 3 should be deleted in its entirety and the following language should be inserted:

“The cases in this appeal are among many from throughout the State against various entities and individuals affiliated with the Catholic Church for childhood sexual abuse. Those cases have been coordinated in the Los Angeles County Superior Court and formerly in the Alameda County Superior Court. Southern California cases are known as *Clergy Cases I* (JCCP No. 4286) and *Clergy Cases II* (JCCP No. 4297). The Bay Area cases are known as *Clergy Cases III* (JCCP No. 4359). The Second District of the Court of Appeal is the intermediate appellate court for all of the coordinated cases.”

[end of modification]

There is no change in judgment.

* RUBIN, ACTING P. J.

FLIER, J.

PROOF OF SERVICE

I, Lisa E. Maynes, am employed in the city and county of San Diego, State of California. I am over the age of 18 and not a party to the action; my business address is 12555 High Bluff Drive, Suite 260, San Diego, CA 92130.

On December 16, 2009, I caused to be served: **PETITION FOR REVIEW**

in this action by placing a true and correct copy of said documents(s) in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

(BY MAIL) 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 at San Diego, California, 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 postage meter date is more than one day after date of deposit for mailing in affidavit.

(BY FAX) I caused to be transmitted to the above-described document by facsimile machine to the fax number(s) as shown. The transmission was reported as complete and without error. (Service by Facsimile Transmission to those parties on the attached List with fax numbers indicated.)

(BY OVERNIGHT DELIVERY) By sending by Federal Express to the addressee(s) as indicated on the attached list.

FEDERAL. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

BY CASEHOMEPAGE. I caused to be served the above-described document by means of uploading directly to www.casehomepage.com To all parties in said action on the date listed below.

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

Dated: 12-16-09



Lisa E. Maynes

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