STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Court File No: 62-CR-15-4175
C. A. File No. 2139124

State of Minnesota,

Plaintiff,

v.

The Archdiocese of Saint Paul and Minneapolis,
a Minnesota corporation,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

More than sufficient evidence and precedent support that this case should go forward. The Archdiocese of St. Paul and Minneapolis is culpable under two theories of corporate criminal liability, the Doctrine of *Respondeat Superior* and the Collective Knowledge Doctrine. No valid constitutional impediment stands in the way of this case. And the case was timely brought.

The Archdiocese motion to dismiss should be denied.

SUPPLEMENTAL STATEMENT OF FACTS

Ongoing investigation revealed additional facts and information relevant to this prosecution, and which are necessary to the State's response to the pending motion. As more fully discussed below, some of this information reflects a social relationship between Curtis Wehmeyer and his archbishop that likely influenced Archdiocese decision making about Wehmeyer.

Concurrent with this memorandum, the State is separately providing notice of its intent to amend the Complaint.

Corporate form of the Archdiocese vis-à-vis its parish corporations; the authority of the Archbishop.

The Archdiocese memorandum portrays the Archdiocese as a separate, almost insular corporation from its 187 Catholic parish corporations. The Archdiocese, however, is more correctly viewed as a parent corporation to 187 subsidiaries; indeed, the organization of the Archdiocese structure ensures Archdiocese control of all parishes through overlapping majority board control of related corporations. Each and every board is headed by the sitting archbishop, and includes his vicar general, and in the case of parishes, the archbishop-appointed pastor. Under canon law, the archbishop enjoys virtually unlimited monarchical authority over and within the Archdiocesan structure.[1] Indeed, the intent and purpose of Archdiocese control over parishes is expressly stated and accomplished in the Archdiocese's Articles of Incorporation:

> The general purpose of this corporation is to take charge of, and manage, all temporal affairs of the Roman Catholic Church to the said Archdiocese belonging or in any wise appertaining, to promote the spiritual, educational and other interests of the Roman Catholic Church in said Archdiocese, including all the charitable, benevolent, eleemosynary and missionary work of said church in said Archdiocese and to establish and maintain Churches and Cemeteries therein and also to establish and conduct schools, seminaries, colleges and any benevolent, charitable, religious or missionary work or society of the said Roman Catholic Church within said Archdiocese, to take charge of, hold and manage, all property, personal and real, that may at any time or in any manner come to, or visit in, this corporation for any purpose whatever for the use and benefit of said Archdiocese and for the use and benefit of the Roman Catholic Church therein, whether by purchase, gift, grant, devise or otherwise, and to mortgage the same, sell or otherwise dispose of it as the necessities or best interests of said corporation in the opinion of the members thereof may require.

Restated Articles of Incorporation, Archdiocese of St. Paul and Minneapolis (Art. 2), Corporate Resolution, June 12, 2003 (underscoring added) [provided as Exhibit 1 to the supporting Affidavit of Thomas E. Ring].

---

[1] *See, e.g.*, 1983 Code c. 381, § 1: "A diocesan bishop in the diocese entrusted to him has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function except for cases which the law or a decrees of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority."

See also 1983 Code c. 391, § 1: "It is for the diocesan bishop to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law."

Each parish corporation, in turn, through its own bylaws is bound by statutes and rules set – not by itself – but by the Archdiocese. In fact, those bylaws expressly provide that any parish corporation action not in compliance with Archdiocese statutes and rules is "null and void":

> I. The Board of Directors of The Church of ______________, a Minnesota Religious Parish Corporation organized and existing pursuant to Minnesota Statutes, Sec. 315.15, shall consist of the five members of the Corporation, three of whom enter into office ex officio – viz: the Archbishop of the Archdiocese of Saint Paul and Minneapolis, the Vicar General of said Archdiocese, and the canonically appointed Pastor of the Parish of The Church of ______________. The other two Directors shall be lay members belonging to the Parish as above described, duly chosen by the above mentioned Archbishop of the Archdiocese of Saint Paul and Minneapolis, the Vicar General of said Archdiocese and the Pastor of the said above described Parish to be lay members of the Corporation.
>
> XVII. All action, of whatever nature, of the Corporation shall be null and void, which is not in conformity with its own Certificate of Incorporation, with the statutes and rules of The Archdiocese of Saint Paul and Minneapolis, and with the generally recognized discipline of the Roman Catholic Church.

See Bylaws for a Parish Corporation of the Archdiocese of St. Paul and Minneapolis, Template ¶¶ I., XVII. (blanks in original). [Ring Aff. Exh. 2.]

By very intentional design, such organizational structuring accomplishes a core purpose of canon law – that diocesan power and authority reside with one man: the "Ordinary," that one particular bishop assigned responsibility by the Pope for a particular geographical territory of the Catholic Church.

This conclusion is supported in the Preliminary Expert Report of Thomas P. Doyle, M.A., M.Ch.A., J.C.D., C.A.D.C., which is provided separately. With respect to the authority of the bishop of a diocese, and the severity of the crime of sexual abuse of minors, Fr. Doyle opines and instructs:

> 1. The governmental structure of a diocese is hierarchical by definition and monarchical in practice. All ordinary power is vested in a person, the bishop, and not in any corporate or collegiate body such as the senate of priests. . . . The bishop of the diocese holds all power in the diocese subject only to any limitations contained in the general law of the Church and to the authority of the pope. (Doyle Report ¶ 18.)
>
> 2. The bishop of a diocese possesses all authority in the diocese. . . . [T]he final authority

in all matters except those reserved to the Holy See or to other offices by reason of Church law, is the archbishop. (Doyle Report ¶ 27.)

3. The bishop is assisted by the priests of the diocese as his primary collaborators. He alone has the authority to approve a man for ordination to the diaconate or the priesthood and he alone has the authority to assign, transfer, remove or retire priests of his diocese. (Doyle Report ¶ 29.)

4. The bishop has a particular obligation with regard to priests of the diocese. Among other things he is to "*see that they [the priests] correctly fulfill the obligations proper to their state.*" (Doyle Report ¶ 30; italics in original.)

5. Sexual abuse of minors and of vulnerable adults is a specific crime in the Church's law (Canon 1395). This crime is considered to be so grave that the canon itself specifies that if the case warrants it, the cleric is to be dismissed from the clerical state (Canon 1395). (Doyle Report ¶ 33.)

Wehmeyer functioned as a priest with at least one victim taken camping.

Witness C.S. reported that one of Wehmeyer's victims "was particularly upbeat one day" and said, "Father Wehmeyer took me camping, and he even hears my confession." At the time, C.S. did not "put two and two together" that Wehmeyer was camping alone with the victim. [Ring Aff. Exh. 3.]

The sequence leading to Wehmeyer's arrest for DWI started with a 911 call in which the caller expressly stated his concern for "making sure the kids stay safe." (Reference: Complaint at 18, ¶ R.)

The Fillmore County Sheriff's Department arrested Wehmeyer for DWI on September 29, 2009. The complainant reported his specific concern for the safety of "kids" during a 911 call. The transcript of that call follows:

Sheriff's Office: Fillmore County Sheriff's Office. This is Bob.

Caller: Hi, Bob, could you do me a favor? I don't know if Tim's still on duty -- . Could you send him to the Kwik Trip over here? I got a guy out here who's asking a lot of strange questions to the kids here.

Sheriff's Office: Okay. Any description of the vehicle or person or?

Caller: Uh, he's gra--, uh, salt and pepper hair, he's probably in his 40's to 50's, uhhh. . . light jacket type shirt.

Sheriff's Office:	Okay.
Caller:	Um, he's standing out there right now and I'm just – he – he just asked a couple questions that were not really –
Sheriff's Office:	Okay.
Caller:	— uh, you know . . .
Sheriff's Office:	Alright, I'll send him over there; he's just out of town a little bit, but it shouldn't take him too long to get there.
Caller:	Alright.
Sheriff's Office:	Okay.
Caller:	I don't, I don't know what he's up to. I'm just making sure the kids stay safe.
Sheriff's Office:	Sure. You bet.
Caller:	Alright.
Sheriff's Office:	Thank you.
Caller:	Thank you.

END

[Ring Aff. Exh. 4.]

No person affiliated with the Archdiocese requested any documents or information from authorities relating to Wehmeyer's arrest; yet, this 911 call and the relating police reports, which also indicate a concern for younger persons, were available at the point Wehmeyer's DWI case closed. But the Archdiocese simply chose to accept Wehmeyer's version of what had happened.

A marked similarity exists between some of Wehmeyer's misconduct and misconduct attributed to Archbishop Nienstedt.

In late 2013, talk of Archbishop Nienstedt having engaged in inappropriate conduct circulated within the Archdiocese, particularly among priests. On December 28, 2013, at approximately 1:15 p.m., named witness R.T. called named witness F.W. R.T. had been one of several priests who had met with Archbishop Nienstedt and his vicar general in November 2012

concerning the Wehmeyer case. As noted in the Complaint, R.T. then served on the Clergy Review Board and attended meetings at the Chancery. In the call, R.T. informed F.W. that Nienstedt was gay, but said that nothing was illegal because it involved consensual sex with seminarians and priests. F.W. asked R.T. whether D.G., a priest and the then Delegate for Safe Environments, knew, and R.T. said, "Yes." F.W. asked if Rome knew, and R.T. said, "Yes." [Ring Aff. Exh. 5.]

At about this same time, Archbishop Nienstedt was advised that the Archdiocese had received allegations of misconduct about him. These were presented to him in a written memorandum. All those made aware of the allegations, as well as the archbishop, agreed that he should hold himself to the same standard that any similarly accused priest would face. He agreed to an Archdiocese investigation to be conducted by outside lawyers. The Archdiocese retained the Greene-Espel law firm in early-2014.[2] [Ring Aff. Exh. 6: 7, 9, 10.][3]

In the course of its investigation Greene-Espel investigators gathered, among other things, up to ten or eleven affidavits concerning Archbishop Nienstedt. Several affiants portrayed conduct markedly similar to misconduct of Wehmeyer of which the Archdiocese was aware:

1. **Cruising parks**

Wehmeyer (Reference: Complaint at 6, ¶ C; at 16, ¶ K.)

On January 9, 2004, Wehmeyer was cited for loitering in Crosby Park by St. Paul Police. Crosby Park was a location known to police as a meeting place for men seeking sexual encounters with men. As evidenced by an internal memorandum, the Archdiocese knew of a citation Wehmeyer had received in a park by no later than February 2005.

---

[2] After months of investigation, Greene-Espel withdrew from the engagement on July 3, 2014 after the Archdiocese abruptly truncated the scope of the investigation it had previously authorized. At the point it disengaged, Greene-Espel had gathered evidence concerning the following types of misconduct: sexual misconduct, sexual harassment, reprisal for non-reciprocated interest, and excessive alcohol consumption. [Ring Aff. Exh. 6: 18, 22.]

[3] Referenced page numbers to the supporting affidavit appear at the top, right corner of each page, which also include the exhibit number. Hence, as an example, the seventh page Exhibit 6 is numbered, 6: 7.

Over two consecutive days in July 2006, a Ramsey County deputy sheriff saw Wehmeyer in another park known to be a place where men sought sexual encounters with men. The deputy stopped and identified Wehmeyer, and reported this contact to Kevin McDonough, then vicar general.

Archbishop Nienstedt

W.S. provided Greene-Espel investigators an affidavit in which he states that in approximately December 1981 or 1982, he was in Palmer Park in Detroit, Michigan. Palmer Park was known to be a meeting spot for men seeking sexual encounters with men. W.S. met Nienstedt there around 11:00 p.m. Nienstedt, driving a green Cadillac, stopped W.S. and asked whether W.S. had any "poppers." W.S. stated that he did, so Nienstedt parked and W.S. got in the Cadillac. At this point Nienstedt recognized W.S. Nienstedt looked shocked and awkward, and asked whether W.S. still served at a particular church. The encounter ended at that point. [Ring Aff. Exh. 7.]

2. Unwelcome touch/advance

Wehmeyer (Reference: Complaint at 17, ¶ Q)

Around September 29, 2009, Wehmeyer was camping in Fillmore County with another priest, M.M. Wehmeyer told M.M. that he had taken boys camping alone. Around a campfire, Wehmeyer put his hand on M.M.'s thigh. This touch made M.M. very uncomfortable. Wehmeyer apologized the next evening, telling M.M. he had "been a little horny."

Archbishop Nienstedt

J.C. provided Greene-Espel an affidavit in which he states he first met Nienstedt in July 2002 at World Youth Day in Toronto, Canada. J.C. was then a thirty-five year old priest of the Archdiocese and Nienstedt was bishop of New Ulm. The two began to do things together. Nienstedt also spent time with J.C.'s family.

In July 2004, Nienstedt invited J.C. to spend part of that month with him at his home in

Michigan. J.C. did not want to go; however, he agreed after Nienstedt became insistent. The two drove to Michigan.

On his last night in Michigan, J.C. and Nienstedt went to an event held at the Detroit home of a family that owned Chicken Shack restaurants in the Detroit area. At the end of the evening, J.C. suggested he drive the two back to Nienstedt's home because he thought Nienstedt had had too much to drink. On the drive back, Nienstedt told J.C. both how thankful he was that J.C. had spent time with him in Michigan, and that he was then driving them back to Nienstedt's house. Nienstedt put his hand on J.C.'s neck and began massaging J.C.'s neck. J.C. leaned forward to break the physical contact. Nienstedt then withdrew his hand. The balance of the drive was uncomfortable and silent.

J.C., who is not same-sex attracted, considered the physical contact a sexual advance and began to think about how this might impact his career. J.C. chose to fly home the next day rather than stay longer. Upon returning home, J.C. shared what had happened with his brother.

J.C. has witnessed Nienstedt intoxicated on other occasions, as has at least one other priest, T.K. Alcohol use is a concern raised in the Archdiocese investigation by Greene-Espel.

J.C. indicated that Nienstedt retaliated against him after Nienstedt had been appointed to the Archdiocese, again a concern raised by Greene-Espel investigators.

[Ring Aff. Exh. 8.]

3. Interest in younger-looking males

Wehmeyer (Reference: Complaint at 18, ¶ R; at 7, ¶E.)

On May 13, 2004, Wehmeyer approached two younger looking males about sex at the Barnes and Noble bookstore at Har Mar Mall in Roseville, at one point asking one of the males, "Are you fucking horny right now?"

And as noted above, Wehmeyer was arrested for DWI in Fillmore County. The 911 caller

referenced his concern to keep kids safe. In the relating police reports, the deputy variously described those that Wehmeyer approached as being "18-year olds," "high-school-aged kids," and "young people."

Archbishop Nienstedt

World Youth Day, Germany, 2005

Named witness P.B. reported that he attended World Youth Day in Ulm and Cologne, Germany, in 2005 with a group led by then Bishop Nienstedt of New Ulm. P.B. and another boy were the only two males in the New Ulm group. Each was fifteen or sixteen years old at the time.

In Cologne, Nienstedt gave each boy an admission ticket for the Papal Mass, a mass where the intended attendees were priests and seminarians. After Nienstedt gave each boy a ticket, he did not have one for himself. After Mass, P.B. and the other boy met up with Nienstedt outside, during a heavy rain. The three ran to a nearby pub for lunch, but each had gotten quite wet.

After lunch, Nienstedt suggested the three go back to his hotel. (The two boys were not staying in the same hotel.) Each of the three was still soaked. In his hotel room, Nienstedt took off his wet clothes in front of the boys and changed. Nienstedt had the two boys undress as well (neither being sent to the bathroom) and gave each a hotel-provided robe. He then sent the boys' clothes out to be dried. These were returned by hotel staff after several hours.

All that happened in the hotel room made P.B. quite uncomfortable. He told his mother about the incident. Once home, Nienstedt commented to P.B.'s mother about having to wear tennis shoes at one point in Germany, apparently with clerical clothing, because his dress shoes had gotten so wet.

[Ring Aff. Exh. 9.]

Nienstedt excessive interest in seminarians

E.T., a priest highly regarded within the Archdiocese, reported that he had been appointed

by Archbishop Nienstedt in 2010 to be the Director of the Office of Priestly Life and Ministry. E.T. worked in the Chancery. Among other assignments he fills and has filled, E.T. has been the Director of Senior Retreats at St. John Vianney Seminary for twenty-five years. [4] In that capacity, he learned that Nienstedt regularly said the "last-chance Mass" on Sunday evenings at the seminary, and would then stay overnight rather than return to the Archbishop's residence a few miles away. E.T. became aware of Nienstedt showing some seminarians particular attention.

E.T. provided Greene-Espel an affidavit in which he testifies to speaking with J.C. in spring 2011 about whether J.C. had concerns about the archbishop's expressed and continuing interest in certain junior and senior seminarians. J.C. stated that he did have concerns, and at one point shared what had happened in Michigan. [Ring Aff. Exh. 10.]

M.B., another priest, provided Greene-Espel an affidavit in which he testifies to having a telephone conversation in 2013 with J.C. during which M.B. learned of J.C.'s experience in Michigan. M.B. avers that he had been asked whether, as rector, he had any discomfort over Nienstedt's interactions with seminarians and young priests. He answered that he did. Although he had not witnessed any clear boundary violations, he had observed the archbishop's affinity for select seminarians and some young priests resulted in the archbishop spending excessive or special time with some into the late hours or early morning. Beyond M.B.'s own concern, he advised Greene-Espel investigators that others had also expressed concern about Nienstedt having unusual interaction with, or attraction to some seminarians or priests. He identified these others to be E.T.

---

[4] E.T. reported that he had raised concerns about Wehmeyer with the then rector of the St. Paul Seminary about six months before Wehmeyer's ordination. E.T. had observed that Wehmeyer was secretive, had anxiety and nervousness, and a past delicate family issue.

Later, as part of his work as Director of the Office of Priestly Life and Ministry, E.T. visited Wehmeyer at Wehmeyer's parish multiple times and, in about the 2010 timeframe, wrote a memorandum of concerns about Wehmeyer to Archbishop Nienstedt. E.T. was also concerned about Wehmeyer having his camper on parish property at Blessed Sacrament.

and a predecessor rector. [Ring Aff. Exh. 11.]

A previous vicar general also expressed his concern to Nienstedt about the archbishop's practice of going on annual camping trips with college seminarians. [Ring Aff. Exh. 6: 12.]

Relationship between Archbishop Nienstedt and Wehmeyer [5]

When interviewed by St. Paul Police, Archbishop Nienstedt's recollection was close to his interview statement to Minnesota Public Radio, footnoted below. He said the two had three dinners and one lunch. Nienstedt reported one dinner occurred after the "blessing of the altar" at Blessed Sacrament. He said the other two were at Chianti Grill and Green Mill restaurants. Nienstedt said both "wore their collars" at dinner. [Ring Aff. Exh. 12.]

When Jennifer Haselberger, the former Chancellor for Canonical Affairs, was interviewed by Greene-Espel investigators, she was advised that an issue under investigation was whether Nienstedt had a "personal and distinctly unprofessional relationship" with Wehmeyer, and that the investigators wanted to determine whether the relationship may have influenced the archbishop's decisions to disregard warnings about Wehmeyer. [Ring Aff. Exh. 13: 7.]

When interviewed in May 2015, named witness D.G. indicated the Archdiocese had found evidence suggesting Nienstedt had an ongoing social relationship with Wehmeyer, which included dining together and drinking alcohol. [Ring Aff. Exh. 6: 13.] This was concerning because the Archdiocese knew Wehmeyer had a substance abuse problem.

Additionally, the investigation documented the archbishop, not in clerical clothing, and

---

[5] In an interview with Minnesota Public Radio, Nienstedt described his relationship with Wehmeyer:

> "Father Wehmeyer had me over for dinner the last night that I went to bless his altar. I had made him pastor and then he had a DWI, I think in the fall of 2009. I called him to find out how he was doing, as I call every other priest. He said he was going stir crazy. I said, "Well, how about I take you out for dinner?" So I did, and then he reciprocated some months later, when he was back driving, at a restaurant owned by a friend of his. So that would have been three meals in three years. I don't know that that's an inappropriate relationship."

Audio at: www.mprnews.org/story/2015/06/19/nienstedt.

Wehmeyer meeting and drinking together, which is not something the archbishop normally did with priests. [Ring Aff. Exh. 6: 4.] Wehmeyer had disclosed to an Archdiocese investigator during a lengthy interview that he felt the archbishop may have been grooming him. [Ring Aff. Exh. 6: 5.]

Beyond the investigation by the Archdiocese, other sources show a more robust relationship than acknowledged by the archbishop:

- Named witness T.W., a staff member at Blessed Sacrament Parish, reported seeing Archbishop Nienstedt at Blessed Sacrament with Wehmeyer approximately fifteen to twenty times between 2009 and 2012. Nienstedt was not wearing clerical clothing at these times. T.W. once saw Nienstedt come out of the Blessed Sacrament rectory and go to his car at 6:30 a.m. when T.W. was arriving at work. He also saw the archbishop with Wehmeyer at lunch times and, at other times, walking around the garden with Wehmeyer during evening hours. T.W. said the times he saw the two men together were above and beyond times when the archbishop was at Blessed Sacrament for official church functions. [Ring Aff. Exh. 14.]

- Named witness R.W., another staff member at Blessed Sacrament, reported that Wehmeyer told him that he (Wehmeyer) was close with Archbishop Nienstedt and that the archbishop was "very fond" of him (Wehmeyer). R.W. saw Nienstedt at Blessed Sacrament at times with only Wehmeyer, and at other times when the archbishop was there for church services or to attend meetings. [Ring Aff. Exh. 15.]

- Named witness, J.H., another staff member at Blessed Sacrament, reported that Nienstedt had dinner with Wehmeyer in the Archbishop's residence, and Nienstedt had dinner at Wehmeyer's rectory. Wehmeyer told J.H. that Archbishop Nienstedt really liked him. Office staff also received multiple calls from the Archbishop's Office to set up dinner plans for the two men. The three office staff members noticed and commented on the attention Wehmeyer was receiving from the archbishop, speculating among themselves that Wehmeyer was possibly being groomed for a position downtown. [Ring Aff. Exh. 16.]

- A chancery official, J.K., indicated that his spouse was a cantor at Blessed Sacrament Parish for several years and on some Sunday mornings Wehmeyer would tell her that Archbishop Nienstedt had come over to the Blessed Sacrament rectory the prior evening to visit Wehmeyer. Additionally, the official reported that this spouse had on more than one occasion heard Wehmeyer comment that he had had dinner with the archbishop the previous evening. [Ring Aff. Exh. 6: 9, 17.]

- When interviewed, Wehmeyer said that he cooked a dinner for Archbishop Nienstedt at Blessed Sacrament, and that he had dinner with Nienstedt at the Archbishop's Residence. He said the two consumed alcohol together. He said that he and Nienstedt went out to restaurants and had dinner and drinks together. Wehmeyer said that Nienstedt had visited Blessed Sacrament not wearing clerical clothing, and that he, in turn, had gone to the Chancery/Residence not wearing clerical clothing.

[Ring Aff. Exh. 17.]

- Wehmeyer provided Greene-Espel investigators a lengthy interview, which included discussion about his relationship with Nienstedt. [Ring Aff. Exh. 6: 13.]

- Named witness M.W. reported that she and another parishioner left the adoration chapel at Blessed Sacrament at about 9:15 p.m., most likely on a Monday, and saw Wehmeyer and Archbishop Nienstedt coming out of the rectory. M.W. recalled the two wearing black clothing. Wehmeyer introduced M.W. to Nienstedt but did not introduce the other woman. Wehmeyer told M.W. that the two (he and Nienstedt) had dinner together. [Ring Aff. Exh. 18.]

- In an April 23, 2009 letter from Wehmeyer to Nienstedt, Wehmeyer thanks the archbishop for joining him at Chianti Grill. In the letter, Wehmeyer states he is looking forward to preparing a meal with Nienstedt for A.N. and A.N.'s family. On information and belief, A.N. is a lay member of the Archdiocese corporate board. [Ring Aff. Exh. 19.]

- After he had been arrested for child sexual abuse, but released pending sentencing, Wehmeyer entered an in-patient sex offender treatment program. Andrew Eisenzimmer, then Chancellor for Civil Affairs, shared with Haselberger in about January 2013 that Nienstedt had asked Eisenzimmer to arrange for Nienstedt to visit Wehmeyer while he was in the treatment program. Eisenzimmer said he was upset about the request because the Archdiocese was in settlement negotiations with the family of Wehmeyer's victims and the archbishop had not met with them. Haselberger could not recall Nienstedt asking to meet with any other priest that had been arrested, and specifically recalled he had not made an effort to visit Fr. Wenthe after Wenthe was convicted and in prison. [Ring Aff. Exh. 13: 8.]

- Contrary to Nienstedt's assertion that his relationship with Wehmeyer was no different than with any other priest, in the course of interviews ten priests stated they did not have personal conversations with or ever go to dinner one-on-one with the archbishop.

<u>Additional indicia of Archdiocese pattern failing to address clergy sexual abuse.</u>

Archbishop Nienstedt admitted he overlooked the problem of child sex abuse.

On December 15, 2013, Archbishop Nienstedt met with broadcast and print media after saying Mass at Our Lady of Grace Church in Edina. The archbishop said:

> I really want to say that, you know, when I arrived here seven years ago, one of the first things I was told, that this whole question of clerical sexual abuse had been taken care of; I didn't have to worry about it. And, uh, unfortunately, I believed that. And so, my biggest apology today, when I, and I did this last week at two other parishes, um, is to say that I overlooked this; I should have investigated it a lot more than I did. When the stories started to break on, um, in the end of September, I was

as surprised as anyone else.[6]

http://www.mprnews.org/story/2013/12/15/news/nienstedt-homily.

The Archdiocese did not discuss clergy sex abuse at a highest level of the corporation.

Former Chancellor for Civil Affairs Eisenzimmer testified at deposition in the *Doe 1* case[7] that Archbishop Nienstedt: (1) never asked to be briefed fully on priests who had been accused of offenses; and (2) never asked shortly after the Archbishop's installation to have identified for him the potential risks in the archdiocese of priests sexually abusing children. Additionally, Mr. Eisenzimmer could not recall any occasion when the Archbishop's Council – the membership of which included officials at the very highest levels of the corporate hierarchy – ever discussed the question of sexual abuse of minors by clerics at any meeting.[8] [Ring Aff. Exh. 20: 2 - 8.]

---

[6] Overlooked despite wide knowledge based on research studies of the John Jay College of Criminal Justice of The City University of New York, and relied upon by the U. S. Conference of Catholic Bishops to implement safe environment practices, which reported little variability in the rates of alleged abuse across regions of the Catholic Church in the United States, with the range being from three percent to six percent of priests (3% to 6%) with an overall rate being four percent (4%). *See* http://www.usccb.org/issues-and-action/child-ang-youth-protection/upload/The-Nature-and-Scope-of-Sexual -Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-1002.pdf at 4; and http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf at 8.

[7] *Doe 1 v. Archdiocese of St. Paul and Minneapolis, Diocese of Winona, and Thomas Adamson*, Ramsey County District Court (May 6, 2014)

[8] Mr. Eisenzimmer testified as follows:

By Mr. Anderson:

Q: Did Archbishop Nienstedt ever ask you, given your history, both as the chancellor and your history with this archdiocese, to brief him fully on who the priests were that had been accused of offenses and who may pose a risk of harm?

A: No. He never asked me for that information.

* * *

Q: My question is this, to your knowledge, has any official of the archdiocese, including yourself, at Archbishop Nienstedt's request or for any reason, ever sat down with him and identified for him who the potential risks are, including those accused of sexual abuse of minors, including those credibly accused of sexual abuse of minors or anything like that, to your knowledge?

Mr. Haws: Object to form, it's multiple, involves all kinds of people, other than Mr. Eisenzimmer. I think he can testify to his knowledge.

A: Let me see if I can respond to it in a responsive manner. I'm not aware of anyone doing that with him and I'm

When examined at his own deposition, Archbishop Nienstedt could not recall that he had ever reviewed a priest's file in its entirety in order to make a fully informed decision about a priest; nor had he requested Fillmore County reports to review relating to Wehmeyer's DWI arrest. He admitted he would have been "alarmed" had he known then of the references to younger persons. [Ring Aff. Exh. 21.]

Archdiocese leadership acted to avoid the problem child sex abuse.

Jennifer Haselberger, as Chancellor for Canonical Affairs, indicates that her civil counterpart, Eisenzimmer, counseled her to "stop looking under rocks" because he knew how upset she became at how the Archdiocese mishandled issues relating to clergy sex abuse of children, and

---

not aware of him ever requesting that somebody do that with him.

Q: And then the next question is, because I think you answered it, but I want to get it in question and answer form, next question is, did Archbishop Nienstedt ever sit down with you shortly after his installation here and ask you to identify for him the potential risks in the archdiocese of priests sexually abusing kids and who had a history or anything like that?

A: No.

* * *

Q: Before I do, there's some reference somewhere to the [A]rchbishop's [C]ouncil and that was not a term that I had seen before. What was the archbishop's council?

A: Well, it's the archbishop and some of his advisors, the chancellors, the vicar general. The council has also included at times the regional vicars, the finance officer, auxiliary bishops, I think that's it.

Q: Is that something that was constituted by Archbishop Nienstedt under his –

A: There was also an archbishop's council under Archbishop Flynn as well.

Q: I just haven't see that term before. Do you know what the council is used for? Are they like consulters or any specific purpose, do you know?

A: Well, we start out with a song and a prayer and then the archbishop normally reports on certain matters. And then anybody else, if they've put something on an agenda, can raise an issue that would be helpful for the council to hear or know about or some it's FYI stuff.

Q: Is there anything in the archbishop's council meeting that have been discussed by those in attendance pertinent to the whole question of sexual abuse of minors by the clerics in or out of ministry and –

A: I don't think so. I don't ever recall a meeting ever discussing the subject.

then tried to raise these issues within the Archdiocese. [Ring Aff. Exh. 13: 2.]

In one instance involving whether disclosure had been made about an offending priest, Haselberger brought that priest up with the vicar general multiple times without being able to meaningfully discuss the priest. She then went so far as to highlight certain documents within the priest's file, particularly a statement in which the priest admitted his attraction to children, so the vicar general might read those excerpts. His response was that he did not have time to review past decisions and had been assured by others that there were no grounds for concern. On one occasion, Haselberger even followed the vicar general out of the Chancery in the evening with the highlighted documents in her hand, asking him to read them. He would not. [Ring Aff. Exh. 13: 3.]

Within its POMS program, the Archdiocese chose not to fund a means to effectively monitor.

In 2008, Haselberger discussed POMS with Tim Rourke, then the program's monitor. The two discussed the inability and lack of means to monitor priest use of the internet when that was a condition of POMS monitoring for certain priests. Rourke told Haselberger that he had already raised the issue with the Archdiocese and had learned the Archdiocese was not willing to provide funding that would allow for realistic monitoring. [Ring Aff. Exh. 13: 4.]

STANDARD OF REVIEW

The Archdiocese contends the Complaint fails to for lack of probable cause and fails to state an offense. "Probable cause" is that reasonable ground for suspicion supported by circumstances sufficiently strong to warrant a cautious person's belief that a crime has been committed and the accused committed the crime. *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978). It deals with probabilities, "something more than mere suspicion and something less than evidence which would sustain a conviction." *State ex rel. Trimble v. Hedman*, 192 N.W.2d 432, 434 (Minn. 1971); Minn R. Crim. P. 2.01, subd. 1.

Due process requires that "an accused . . . be adequately apprised of the charge made against

him in order to prepare his defense, as well as to insure against jurisdictional defects." *State v. Pratt*, 152 N.W.2d 510, 513 (Minn. 1967). A criminal complaint "is sufficient if the language used spells out all essential elements in a manner which has substantially the same meaning as the statutory definition." *Id.* at 512. But "it is unnecessary to identify each specific element of the crime" so long as the offense charged is specified and neither defendant nor his counsel are misled by the wording of the complaint. *State v. Dunson*, 770 N.W.2d 546, 551 (Minn. App. 2009); *see also Pratt*, 152 N.W.2d at 513.

"Failure to state an offense" is essentially also an issue of probable cause. The State was not able to find any case interpreting Minn. R. Crim. P. 17.06, subd. 2(2)(6) as it pertains to attacking a complaint on the basis that the facts stated do not "constitute an offense." The defendant in *State v. Eibensteiner*, however, sought to dismiss an indictment on grounds that the evidence presented to a grand jury was not sufficient to establish the offense. 690 N.W.2d 140, 152 (Minn. App. 2004). The court there viewed the issue as whether the indictment failed for lack of probable cause. *Id. citing State v. Flicek*, 657 N.W.2d 592, 597 (Minn. App. 2003). Although noting deference given a grand jury's fact-finding role, the *Eibensteiner* Court concluded that, "it is proper to dismiss the indictment only where there are no issues of fact and defendant's conduct could not [constitute the offense] as a matter of law." *Id.* (brackets in original).[9]

The facts provided in the Complaint amply support the State's theories and the offenses pled such that "reasonable ground for suspicion supported by circumstances sufficiently strong [exist] to warrant a cautious person's belief that a crime has been committed and the [Archdiocese] committed the crime." *Childs, supra.* The Complaint is also technically sufficient in that it spells

---

[9] This formulation in *Eibensteiner* is noted to closely resemble the very familiar standard for testing sufficiency of a complaint under the civil rules for failure to state a claim: "A claim is sufficient against a motion to dismiss for failure to state a claim if it possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U. S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2004).

out the individual counts faced by the Archdiocese and provides the specific elements of each. Probable cause should be found and the case should proceed.

ARGUMENT

I. By act, word, and omission, the Archdiocese is criminally liable for having encouraged, caused or contributed both to the delinquency of the victims and their need for services or protection.

This case is about a religious corporation that failed to protect children from the scourge of clergy sexual abuse. Despite knowledge of the longstanding sexual abuse crisis and repeated warning signs about Wehmeyer, the Archdiocese responded, if at all, in ways alarmingly tepid, highlighting a corporate bias that priests are more important than children.

The Archdiocese argues it cannot be criminally liable because the law requires that its agent have acted in the scope of employment to benefit the corporation, which then authorized, tolerated or ratified the agent's conduct. The Archdiocese then focuses on Wehmeyer.

But focusing on Wehmeyer avoids the core substance of this case. The statute holds those accountable for acts, words, or omissions that encourage, cause or contribute to the delinquency of a minor or the need for that child's protection or services. The culpable actor here is the Archdiocese; Wehmeyer is background. The Archdiocese is culpable on two bases, the Doctrine of *Respondeat Superior* and the "Collective Knowledge" Doctrine.

A. The Archdiocese is criminally culpable under the Doctrine of *Respondeat Superior*.

Well established law holds that the act of a corporate agent exercising authority delegated to him and used by him in the interest of the corporation should "be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting." *New York Cent. & H.R.R. v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909). Pursuant to the doctrine of *respondeat superior*, a corporation is itself responsible for both

the acts and omissions of any one of its employees, whether the acts are intentional, negligent, wanton, or reckless. *Commonwealth v. Angelo Todesca Corp.*, 842 N.E.2d 930, 937- 38 (Mass. 2006) (criminal vehicular homicide). Minnesota courts have previously applied the doctrine in church abuse cases. *See Olson v. First Church of Nazarene,* 661. N.W.2d 254 (Minn. App. 2003); *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 137 (Minn. App. 2007).[10]

Minnesota law holds that a corporation may be guilty of even a specific intent crime, "if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business which was conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management." *State v. Christy Pontiac – GMC, Inc.*, 354 N.W.2d 17, 20 (Minn. 1984). For the corporation to be criminally liable, the crime must not be a "personal aberration" of an employee, but must in some sense reflect corporate policy so that it is fair to say the activity in question was the activity of the corporation. *Id.* (*citing United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1918) (Hand, J.) (there must be a "kinship of the act to the powers of the officials who commit it.")). "What must be shown is that from all of the facts and circumstances, those in position of managerial authority or responsibility acted or failed to act in such a manner that the criminal activity reflects corporate policy." *State v. Wohlsol, Inc.*, 670 N.W.2d 292, 297 (Minn. App. 2003).

While various Archdiocese agents are culpable in what happened to the victims, three individuals at the very highest levels of the Archdiocese acted and failed to act in critical ways at critical junctures that permitted Wehmeyer to be put into and left in a position to sexually abuse

[10] The reviewing court also found the doctrine applicable in *State v. Final Exit*, a case analyzing Minnesota's prohibition against assisting suicide statute, which, as discussed *infra*, the Archdiocese sees as analogous to the contributing statutes. *See* 2013 WL 5418170, at *5 (Minn. App. Sept. 30, 2013) (provided by Defendant).

children. In their respective positions, each set the corporate tone and tepid response that had one consistent theme: to benefit the Archdiocese.

1. Archbishop Nienstedt

As noted above, a bishop who is an "Ordinary" (*i.e.*, that single bishop assigned by the Pope to the responsibility for a geographical area of the Roman Catholic Church) is a person who has near absolute authority over and within his diocese. For virtually all practical purposes relating to his priests, the bishop is the diocese and the diocese is what the bishop decides it to be. This was echoed by Chancellor of Civil Affairs Eisenzimmer at deposition, in describing Archbishop Nienstedt's view of himself: "In his view, he is the archdiocese. . . ." *See* Ring. Aff. Exh. 20: 5 (underscoring added). *See also* Preliminary Expert Report of Thomas Doyle at ¶¶ 18, 27, 29, 30.

As archbishop, Nienstedt was in the critical position to have acted on Wehmeyer. By virtue of his position, he is the one person who made ultimate determination about Wehmeyer's assignments, discipline and retention. Yet, his errors concerning Wehmeyer are most significant and confounded by an other-than-strictly-professional relationship. The Complaint provides ample facts showing Nienstedt's culpability in this matter, for which the Archdiocese is vicariously liable. Some of the most egregious include:

- Nienstedt publicly admitted in December 2013 that he "overlooked" considerations of clergy sex abuse after just one meeting in 2007, where he apparently chose to believe what he claims to have been told, *i.e.*, the Archdiocese no longer had a problem. He appears to have not again seriously considered the issue until the Wehmeyer case exploded.

- In his interactions with the Chancellor for Civil Affairs: (1) Nienstedt never asked that the chancellor brief him fully on accused priests who presented a risk of harm; (2) never asked after being installed as archbishop to have the potential risks in the archdiocese posed by clergy sex abuse identified for him; and (3) the issue was never discussed at meetings of the "Archbishop's Council," a regular meeting of the highest officials of the Archdiocese that this chancellor routinely attended by virtue of his position.

- When questioned at deposition, Nienstedt could not recall whether he had ever reviewed a priest's file in its entirety to be able to make a fully informed decision

about a priest.

- At least two high level officials of the Archdiocese, the then vicar general and chancellor for canonical affairs, counseled Nienstedt not to promote Wehmeyer to pastor. The vicar general characterized Wehmeyer as not only unfit to be a pastor, but unfit for ministry. The chancellor sent Nienstedt a written memorandum of concern, and attached several documents to it, one relating to the Barnes & Noble incident and the other the St. Luke Institute evaluation. Archbishop Nienstedt believes he read these documents before he went ahead and promoted Wehmeyer.

- When Nienstedt discussed the promotion with Wehmeyer himself, Wehmeyer asked, "Are you aware of my past? Are you aware of my record?" Nienstedt replied, "I don't have to look at that stuff."

- When questioned at deposition, Nienstedt believed that he had never asked anyone to get copies of the 2009 reports concerning Wehmeyer approaching teenagers at a convenience store where he was subsequently arrested for DWI. *See* Ring Aff. Exh. 21. He admits that he would have learned this then, he would have been "alarmed" by such information.

- Nienstedt was aware in September 2009 that, at a minimum, Wehmeyer had worked with Fr. McDonough in the past about "sexual boundary issues."

- In 2010, Nienstedt received at least one memorandum from his Director of Priestly Life and Ministry, who had visited Wehmeyer at his parish, in which the director expressed concern about Wehmeyer needing to deal with several personal issues in his background, and describing Wehmeyer as a "weak man."

- Nienstedt had a personal social relationship with Wehmeyer, which included the two men drinking alcohol together. It was not until mid-2012 that Nienstedt thought to ask to review Wehmeyer's court-ordered chemical dependency evaluation that had been done as part of the 2009 DWI proceeding. At a point between Wehmeyer's arrest and sentencing, Nienstedt asked a Chancery official to arrange for Nienstedt to visit Wehmeyer in a sex offender treatment program. Nienstedt is not known to have done this with any other priest in custody.

As archbishop, Nienstedt clearly acted in the course and scope of his employment, and had the full and exclusive authority to act for and as the Archdiocese with respect to clergy; indeed, he alone had the sole, ultimate authority to appoint priests. In making the decisions he did, he was acting to further the Archdiocese's business interests in, among other things, providing pastors to Archdiocesan churches and, at the same time, avoiding the public transparency that would have much earlier called into question Wehmeyer's fitness and likelihood of harm to children. As *the*

effective decision maker and highest officer within the Archdiocese, Nienstedt, at a bare minimum, tolerated the critical decisions made about Wehmeyer at the critical points that led him to be critically dangerous.

Further, Nienstedt as archbishop wielded such expansive and unique authority of the Archdiocese that it would be appropriate to view him analogous to a controlling shareholder in a nonreligious corporation such that, as a matter of law, whatever he did in his corporate capacity, the corporation also did. *See, e.g., Capitol Indemnity Corp. v. Evolution, Inc.*, 293 F.Supp.2d 1067 (D. N.D. 2003) where summary judgment was granted an insurer against a fire claim where the fire had been set by a director who owned sixty-eight percent of the shares of the corporation. The court notes:

> In essence, Maurer [the director] was Evolution and it is impossible to separate his conduct from that of the corporation. Merely because Maurer's actions were illegal does not mean that his actions were not those of the corporation.

Id. at 1072 -73.

The same conclusion should apply here. Nienstedt's actions and omissions within the sphere of clergy sexual abuse are, in fact, impossible to separate from those of the corporation. His failing is its failing. The motion to dismiss should be denied in its entirety.

2. Bishop Piché

Bishop Piché was in a unique position, having extensive knowledge of Wehmeyer's past behaviors and difficulties. He supervised Wehmeyer immediately after Wehmeyer's ordination for several years, and he again became involved with Wehmeyer as auxiliary bishop, a position in which he was the second, or no less than third highest ranking officer of the Archdiocese.

Piché knew Wehmeyer from having supervised him in Wehmeyer's first assignment. At St. Joseph's, Piché learned that Wehmeyer was using the boy's bathrooms in the elementary school during the school day. Concerned, he met with Archbishop Flynn, accompanying school staff to the

Chancery for a meeting. He experienced Wehmeyer's anger and his sometime refusal to do what he was directed to do. He also knew Wehmeyer went out late at night, returning after 1:00 a.m., such that he failed to say mass the following morning for the St. Joseph community.

Most disturbing, Piché was told by a priest on September 12, 2010 that the priest had seen Wehmeyer in bed with a boy no older than ten or eleven years old. Even then, the Archdiocese did nothing.

Piché, like Nienstedt, occupied a position within the Archdiocese with the authority to act for the corporation and significantly influence its policies and practices. Despite all the knowledge he held about Wehmeyer, the Archdiocese did not act. Piché, too, acted to further a policy to give priests "every possible benefit of the doubt":

> I think there is a new reality, too, a new norm, in terms of what is expected for suitability for ministry for our priests. The bar has been raised. And, uh, in the past it may have been the case that, certainly the bishop, but maybe also the Clergy Review Board, gave every possible benefit of the doubt to that priest so as not to shipwreck a vocation, to keep him in ministry.

[Recorded comments of Bishop Piché to gathering of priests in December 2013, provided in State disclosures.]

Because he acted within the scope of his employment to further the Archdiocese's interests, the Archdiocese is vicariously liable for Bishop Piché's words, acts and glaring omissions.

3. Father McDonough

First as vicar general and later as Archbishop Nienstedt's Delegate for Safe Environment, McDonough was the Archdiocese point person on clergy sex abuse. He, too, by what he said, did and omitted to do with Wehmeyer encouraged, caused or contributed to Wehmeyer's sexual abuse of children.

McDonough knew of Wehmeyer misconduct virtually from its start, yet repeatedly minimized its seriousness, dealt with it as a matter of routine to shield the Archdiocese, was not transparent with the parish communities exposed to Wehmeyer, and was repeatedly less than

forthright with those outside the Archdiocese who had reported concerns to him and then reasonably sought follow-up information. Examples include:

- McDonough limited disclosure to the St. Joseph community about Wehmeyer's misconduct, not informing staff who had a need to know the information about restrictions on Wehmeyer's ability to work with youth.

- McDonough was less than forthright with P.M., who had brought forth his concerns about the Barnes & Noble incident.

- McDonough limited the scope of the report he sought from St. Luke's Institute, never seeking an opinion on whether Wehmeyer may pose a risk to children.

- McDonough was responsible for the operation of POMS, a program that was mere "window dressing," underfunded, and only a shell of the program designed by the professional whose expertise the Archdiocese had sought in its design.

- McDonough imposed a condition on Wehmeyer that his computers be monitored; yet the Archdiocese had no real ability to do such monitoring.

- Wehmeyer experienced no consequence of any kind for failures to meet his POMS conditions, except for some additional meetings with the POMS monitor.

- McDonough decided for the Archdiocese that it not to disclose Wehmeyer's history of misconduct to the parish communities he was pastoring. At a minimum, doing so in 2011 when it was being discussed may have permitted Wehmeyer's third victim to avoid being abused and put a stop to the other abuse.

Like Nienstedt and Piché, McDonough's work for the Archdiocese on clergy sex abuse matters was within the scope and course of his specific responsibilities. He had authority to act for the Archdiocese and, indeed, set policy and wielded that authority for a very long time. He could directly authorize acts of, and for, the Archdiocese by virtue of his high-level positions; alternatively, his few Archdiocese superiors never changed or overruled a decision that he did make. McDonough's actions and omissions in the sphere of clergy sex abuse are the responsibility of the Archdiocese.

B. **The Archdiocese is criminally culpable under the Collective Knowledge Doctrine.**

Under the "Collective Knowledge" doctrine, the aggregate knowledge of employees is imputed to the corporation on the logical and unremarkable proposition that "the knowledge of the employees is the knowledge of the corporation." *Apex Oil Co. v. United States*, 530 F.2d 1291, 1295 (8th Cir. 1976) *re'hrg denied* (March 29, 1976). This doctrine specifically provides for corporate accountability where, in an attempt to avoid culpability, a corporation may argue "it did not know." As respected secondary authority comments:

> Corporate crime usually results from the combined actions of many individuals acting within the corporate hierarchy. When an individual member of a corporation, such as a director or an employee, commits a crime, he or she may be charged individually. Sometimes, however, the wrongdoing is traceable to the corporation's own bureaucratic shortcomings, such as flaws in the corporation's formal and informal authority structure, or its information pathways. Public policy in such cases tends to focus sanctions on the corporation itself.

Durham, W. Cole and Smith, Robert, 3 Religious Organizations and the Law, Ch. 11: Modern Liability Claims Facing Religious Organizations § 11:74, last updated December 2013 (West 2016).

Although the doctrine has not been formally adopted in Minnesota, many courts have applied it to hold a corporation accountable, including the District of Minnesota and Eighth Circuit Court of Appeals. *E.g., United States v. Florez*, 368 F.3d 1042 (8th Cir. 2004) (*reviewing* D. Minn.).

The seminal case involving the more recent development of the doctrine is *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987), a case involving violations of the federal Currency Transaction Reporting Act, which requires the reporting of single cash transfers over $10,000. In the case, a bank customer simultaneously presented to a single bank teller multiple checks made payable to "Cash" for varying amounts under $10,000 each. The teller would then "in a single motion" transfer a "wad of cash totaling more than $10,000" to the customer. *Id.* at 848-49. The customer engaged in thirty-one such transactions over time. *Id.* The bank was prosecuted for a felony-level offense on the basis that it acted willfully to avoid reporting under the Act. *Id.* at 850.

The Appellate court approved the trial court's instructions on the bank's knowledge that transaction reports were needed. With respect to the issue of "collective knowledge":

> [Y]ou have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment.
>
> * * *
>
> The bank is also deemed to know it [the reporting requirement] if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

Id. at 855.

The Second Circuit observed that, "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability"[11] because, "[t]he acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. . .[12] Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation."[13] Further, "[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components, then, constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:

> [A] Corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly."

Id. at 856 (*quoting United States v. T.I.M.E.-D.C., Inc.*, 381 F.Supp. 730, 738 (W.D.W.Va. 1974)).

---

[11] *Citing Riss & Company v. United States*, 262 F.2d 245, 250 (8th Cir. 1958); *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951); *Camacho v. bowling*, 562 F.Supp. 1012, 1025 (N.D. Ill. 1983); *United States v T.I.M.E.-D.C., Inc.* 381 F.Supp. 730, 738-39 (W.D.W.Va. 1974); *United States v. Sawyer Transport, Inc.*, 337 F.Supp. 29 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972).

[12] *Citing United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir.), *cert. denied*, 459 U.S. 991, 103 S.Ct. 347 (1982); *United States v. Richmond*, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983).

[13] *Citing Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1963).

Similarly, in *United States v. Sawyer Transport, Inc.*, the offending corporation was charged with the knowledge of its employees that the company had accepted false driver's logs, which were known to be false or which should have been known to be false. The court found that the corporation violated driver reporting regulations, observing,

> Actual knowledge of falsity in the possession of the defendant corporation to be gleaned from its own records is more than mere inadvertence or negligence and cannot be excused merely by asserting that one employee knew of the logs and another of other facts but that neither knew what the other did. Both were corporate employees and knowledge of each is imputed to the corporation which thus had knowledge.

337 F.Supp. 29, 30-31 (D. Minn. 1971). In consequence, a corporation cannot plead ignorance by asserting that no one agent comprehended the full import of knowledge that multiple employees hold. *T.I.M.E.-D.C., Inc.*, 381 F.Supp. at 739.

Although the agent must have some relationship to the corporation such that the knowledge to be imputed is obtained in the scope of employment, there is no requirement that a person be a "central figure" in the organization before the organization is culpable. *United States v. Joselyn*, 206 F.3d 144, 159 (1st Cir. 2000). And where changes occur in corporate personnel, *e.g.*, the appointment of a new president, a corporation, once charged with knowledge of a particular thing, continues to be charged with that knowledge. *E.g., Microbiological Research Corp. v. Muna*, 625 P.2d 690, 695 (Utah 1981) (employment noncompete).

In this case, the knowledge of individuals learned by them in the scope of their employment with the Archdiocese should be imputed to the Archdiocese in any assessment of its criminal culpability. The Archdiocese failed in the face of red flag after red flag. At various times before the abuse of the victims, Archdiocese corporate employees knew at least all of the following:

- At least one Archdiocese official was concerned about Wehmeyer before he entered seminary, and seminary officials remained concerned that he was not a good candidate right up to and beyond his ordination. These concerns were documented in writing and passed on to the serving archbishop.

- Wehmeyer received a citation for loitering in a park known to police as a place where sexual encounters were sought. This citation was reported to Archdiocese officials.

- Within Wehmeyer's initial assignment multiple concerning behaviors were observed and reported to Archdiocese officials: (1) Wehmeyer utilizing boy's bathrooms in an elementary school (and referred to as "Father Creepy" by students); (2) Wehmeyer's issues with anger; (3) Wehmeyer ignoring Fr. Piché's directions or selectively doing what Fr. Piché asked him to do; (4) Wehmeyer regularly leaving the parish at 10:30 or 11:00 p.m. and not returning until around 1:30 a.m., often then failing to say Mass in the morning; and (5) Wehmeyer bringing a camper on to parish property, which Fr. Piché tolerated.

- Wehmeyer approaching younger-looking males at a Barnes & Noble bookstore, asking one, "Are you fucking horny right now?"

- Wehmeyer being evaluated by St. Luke's Institute, with the examination providing very concerning information about him that even the Archdiocese-limited report showed.

- Wehmeyer's ministry being restricted by Father McDonough to exclude youth ministry during his tenure at Piché's parish.

- The Archdiocese learning of another "bookstore incident" when Wehmeyer studied in Jerusalem.

- Wehmeyer being assigned to an ineffective monitoring program.

- The Archdiocese's failure to fund or otherwise enable effective internet monitoring.

- Wehmeyer being stopped by law enforcement after a deputy sheriff saw Wehmeyer cruising multiple parking lots in another park known to police as a place where men sought sexual encounters.

- A priest reporting to the Chancery, then directly to Bishop Piché, that Wehmeyer had told him he was camping alone with the sons of one of his parish employees.

- Wehmeyer promoted to pastor two parishes by Archbishop Nienstedt, who had been warned by at least two Chancery officials not to make Wehmeyer a pastor.

- Wehmeyer raising his own concerns directly to the Archbishop, asking whether the archbishop knew his prior history or had looked at his file; with Nienstedt responding, "I don't have to look at that stuff."

- The Archdiocese failing to conduct any background check on Wehmeyer until eight years after it ordained him to the priesthood.

- Wehmeyer having unwelcome physical contact with a priest at a campground.

- Wehmeyer being arrested for DWI after he approached youth near the same campground. The call for police services began with the 911 caller saying his concern was "making sure the kids stay safe."

- Wehmeyer admitting by no later than October 2009 to the then vicar general that he had been camping alone with boys.

- The Archdiocese learning that Wehmeyer had offered to give a fourth-grade boy a tour of the rectory.

- The report of a priest to Bishop Piché that the priest had seen Wehmeyer in the same bed with a boy, with Piché responding, "Father Curt Wehmeyer has many skeletons in his closet."

- The Archdiocese receiving multiple reports from VIRTUS-training participants expressing concern about Wehmeyer, particularly with taking children camping or into the rectory. The then chancellor for civil affairs replying to at least one caller that the Archdiocese "already knew" about the camping.

- The Archdiocese knowing that Wehmeyer had not looked at any of sixty-four VIRTUS-related training bulletins that had been sent to him by the Archdiocese.

- The Archdiocese removing the monitoring condition that Wehmeyer's computer needed to be checked, without explanation, despite his computer then containing child pornography.

- The Archdiocese deciding in May 2011 not to make even limited disclosure about Wehmeyer to the parishes he served. Staff at one parish included the mother of Wehmeyer's victims.

- The Archdiocese receiving complaints from at least twelve persons about Wehmeyer as pastor, including his anger, emotional outbursts and verbal abuse of his staff.

- The Archdiocese learning, again via Bishop Piché, that Wehmeyer drank excessively; used marijuana regularly; had gotten a handgun; and had said to a trustee, "I don't know how much more of this I can take."

All this knowledge is imputable to the Archdiocese. Justice requires that it be imputed, especially after considering that so much of it involves those very officials at its highest levels (Archbishop Nienstedt; Archbishop Flynn; Bishop Piché; Vicar General Laird; Vicar General Sirba; Vicar General and Delegate for Safe Environment McDonough; Director of the Office of Priestly

Ministry Tiffany; Chancellor for Civil Affairs Eisenzimmer; and Chancellor for Canonical Affairs Haselberger).

Beyond being consistent with established precedent, holding any corporation accountable under the doctrine is also supported by sound policy considerations. Applying the doctrine appropriately tailors liability to the organizational level, where it belongs, rather than at the level of individual agents. It was not the act of one individual alone that caused these crimes but the acts and omissions of multiple agents to further this corporation's longstanding practice and goals.

Corporate accountability under the doctrine encourages corporate hierarchies to use due care in the future, and provides incentives to improve: (1) it encourages corporations to choose organizational structures and work delegation practices that avoid compartmentalization; (2) it encourages corporations to look for and correct gaps and deficiencies in the handling of significant information; and (3) it encourages corporations to routinely access and assess information held by its individual agents. Gruner, Richard S., *Corporate Criminal Liability and Prosecution, Business Crime Series*, Ch. 4 (Law Journal Press (2005)).

Each policy benefit listed above serves to highlight yet again the very gross deficiencies seen in this Archdiocese for far too long. For these reasons, too, the Archdiocese motion to dismiss should be denied in its entirety.

II. Prosecution of the Archdiocese is not precluded by constitutional concerns.

The Archdiocese alleges that the action of the State through its complaint is unconstitutional under the First Amendment's Free Speech and Religion clauses and challenges the subject matter jurisdiction of the court to preside over this case. The Archdiocese has not advanced a valid argument that the State's charges are precluded by the First Amendment and the motion should therefore be denied on this basis.

A. The Court's analysis in *Melchert-Dinkel* does not apply in this case.

The Archdiocese urges the court to dismiss this case based on the Minnesota Supreme Court's decision in *State v. Melchert-Dinkel.* 844 N.W.2d 13 (Minn.2014). In this case, the Court analyzed the constitutionality of Minn. Stat. §609.215 subd. 1, a statute that criminalizes advising, encouraging, or assisting another in committing suicide. *Id.*[14] Assuming a strict scrutiny analysis applies, the Archdiocese contends that the court must find a direct causal link through causation, intent, and the plain meaning of the words found in the contributing statues. *Melchert-Dinkel* does not stand for the proposition that the speech in the contributing statutes is protected speech or that intent must be found between the actions and the criminal conduct. *Id.* If and when strict scrutiny applies, *Melchert-Dinkel* stands for the proposition that narrow tailoring through a direct, causal link is required between the protected speech and the state's interest in prohibiting the speech. *Id.* The Archdiocese has not advanced a legal argument supporting dismissal.

1. First Amendment protections are not absolute.

The speech at issue in *Melchert*-Dinkel was found to be protected by the First Amendment. *Id.* at 21. Unlike the statute in *Melchert-Dinkel*, the statutes at issue in this case are not entitled to protection under the First Amendment. First Amendment free speech protections are not absolute. *State v. Crawley,* 819 N.W.2d 94 (Minn. 2012). Content-based restrictions are permissible in areas where speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). However, the State cannot restrict Constitutional rights with laws

[14] Beyond asserting that the suicide statute and the statutes at issue in this case share similar wording, the Archdiocese has not advanced an argument as to why Minn. Stats. § § 260B.425 and 260C.425 are unconstitutional. In order to respond, the State will assume the Archdiocese is advancing the same argument found in *Melchert-Dinkel.* The Archdiocese briefly mentions unconstitutionality due to vagueness in its Memorandum, however the paragraph contains one sentence regarding vagueness followed by a string cite. Def. Memo at 10. The Archdiocese also cites to cases in its argument which analyze contributing statutes under a vagueness analysis, however the Archdiocese's use of these cases is not in the context of vagueness. Without the Archdiocese providing more information or argument, the State is unable to properly respond.

that "outlaw only a slight public inconvenience or annoyance." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949). But when public safety and policy demand, exceptions to the protections of the First Amendment are permissible. *United States v. Alvarez*, __ U.S. ___, 132 S. Ct. 2537, 2539 (2012) (plurality) (content-based restrictions on speech permitted for incitement, obscenity, defamation, speech integral to criminal conduct, "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has power to prevent).

a. *The health, safety, and welfare of children justifies government restriction of speech.*

The speech at issue in this case is different than the speech at issue in *Melchert-Dinkel.* As discussed *infra,* the State has a compelling interest in protecting the health, safety, and welfare of the minor victims in this case; and that interest justifies special treatment. *See Globe Newspaper Co. v. Superior Court for Norfolk Cty*, 457 U.S. 596, 607 (1982); *New York v. Ferber*, 458 U.S. 747, 757 (1982) (government's interest in protecting the "well-being of its youth" justified special treatment because the relationship of child pornography to child sexual abuse and exploitation warranted government restriction and is outside the protections of the First Amendment). The stated purpose of Minnesota's juvenile protection laws is consistent: to promote the health, safety, and best interests of the child. *See* Minn. Stat. §260C.001 (2015).

In this case, the State is prosecuting the Archdiocese for contributing to the need for protection or services and the delinquency minor victims, actions which endanger the health, safety, and best interests of the victims. The underlying need for the protection or services comes from the sexual abuse of the victims at the hands of an Archdiocese priest. Through its actions and omissions, the Archdiocese has played a role in jeopardizing the health, safety, and welfare of these victims and, as such, any speech that surrounds the sexual abuse of children cannot be found to have

social value. Therefore, given the State's compelling interest in protecting children, the free speech rights of the Archdiocese are not implicated.

b. *The First Amendment does not extend to speech integral to criminal conduct.*

The protections of the First Amendment also do not extend to "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney,* 336 U.S. at 490. The holding in *Giboney* has been interpreted to limit speech that facilitates illegal conduct. *See Rice v. Paladin Enterprises,* 128 F.3d 233, 243 (4th Cir. 1997) (liability for publishing a book on how to commit contract murders); *United States v. Savoie,* 594 F.Supp. 678, 682, 685-86 (W.D. La. 1984) (injunction upheld against the distribution of any document explaining how taxpayers could commit tax fraud). Minnesota's contributing statues are easily distinguishable from the statute at issue in *Melchert-Dinkel* because the contributing statutes limit speech that facilitates illegal conduct, whereas the suicide statute does not.

The Court in *Melchert-Dinkel* found that because suicide in not illegal, the suicide statute did not criminalize conduct in violation of a valid statute. *Melchert-Dinkel,* 844 N.W.2d at 19. This case is different because there are two valid statutes that both criminalize contributing to illegal juvenile behavior and contributing to the need for protection or services. First, Minn. Stat. § 260B. 425 makes it illegal for "any person who by act, word, or omission encourages, causes, or contributes to delinquency of a child or to a child's status as a juvenile petty offender, is guilty of a gross misdemeanor." Minn. Stat. § 260C. 425, in turn, makes it a crime for "any person who by act, word, or omission to encourage, cause or contribute to the need for protection or services." Minn. Stat. § 260C.007 subd. 6 makes clear that the need for protection or services arises from sexual abuse as codified in Minn. Stat. § 626.556. By definition, the contributing statutes facilitate the underlying criminal conduct these statutes aim to prevent. Therefore, because the State has a

compelling interest in the well-being of its youth, and any speech that is at issue is in violation of a valid criminal statute, First Amendment free speech exceptions do not apply.

2. The *Melchert-Dinkel* strict-scrutiny analysis is not applicable.

Even if the First Amendment did protect the speech at issue in this case, the State has narrowly tailored the laws in question to avoid constitutional problems. In an effort to gain the same analysis, the Archdiocese attempts to equate the similar wording in the suicide statute to the wording in the contributing statutes. Then, merely assuming that a strict scrutiny analysis applies, the Archdiocese asserts there must be a direct, causal link found in Minnesota's contributing statutes. In doing so, the Archdiocese misinterprets the requirements under a strict scrutiny analysis.

Upon finding that the suicide statute did not contain speech that would qualify under a First Amendment Free Speech exemption, the *Melchert-Dinkel* court analyzed the suicide statute under strict scrutiny. *Id.* at 21. Strict scrutiny requires the state to show that a law affecting protected speech is, "1) justified by a compelling government interest; and 2) is narrowly drawn to serve that interest." *Id.* A restriction is narrowly drawn when it is 'actually necessary' to achieve the government's interest." *State v. Final Exit Network, Inc.*, No. A13-0563, 2013 WL 5418170 at *5 (Minn. App. Sept. 30, 2013) (quoting *United States v. Alvarez,* 132 S.Ct. 2537, 2549 (2012)).[15] That is, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented," and the restriction must be "the least restrictive means among available, effective alternatives." *Id.*

Once the Court found the State had a compelling interest in preserving human life, an analysis of each word within the statute was performed to determine if it was narrowly drawn to prevent the injury. *Melchert-Dinkel,* 844 N.W.2d at 22. The word "assisting" was found to be

[15] The Archdiocese does not contend the State does not have a compelling interest in this case.

narrowly drawn because it "cover[ed] a range of conduct and limits only a small amount of speech." *Id.* at 23. Therefore a direct, causal link is present between the speech implicated by the word assist and the state's interest in preserving life. *Id.* The words "advise" and "encourage" could not be found to be narrowly drawn to prevent the injury because they include "speech that is more tangential to the act of suicide." *Id.* Advising or encouraging have the potential to include speech outside of the state's compelling interest in preserving life, such as general discussions of suicide which would be an expression of a viewpoint and not narrowly aimed at the preservation of life. *Id.* at 23-24. Because of the broad speech implications found in these words, the direct, causal link between the speech and the state's compelling interest in preserving life could not be found. *Id.* at 24.

a. *The requirement of a direct, causal link does not necessitate a finding of intent.*

The Archdiocese confuses and conflates the *Melchert-Dinkel* strict scrutiny analysis and asserts the Court must find causation and intent in order for the contributing statutes to be constitutional. *Melchert-Dinkel* does not analyze intent under the suicide statute, nor does the decision stand for an intent requirement.

In order for a statute to be narrowly tailored, it must be "actually necessary" to advance the government's compelling interest. *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) *cert. denied* 135 S. Ct. 1550 (2015). Ultimately, the statute must be narrowly drawn in a way that the speech restriction can be shown to have a direct, causal relationship to the government's interest in limiting the speech. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2742, 180 L. Ed. 2d 708 (2011) (government could not show direct causal link between violent video games and harm to minors in order for law prohibiting sale or rental of violent video games to minors under 18 to pass strict scrutiny analysis); *Alvarez*, 132 S. Ct. at 2537 (government could not show direct causal link between restriction imposed and the injury to be prevented and thereby statute criminalizing false

speech found unconstitutional under strict scrutiny analysis). The direct causal link requirement refers to the relationship between the limited speech and the government's interest, not a requirement of intent.

The Archdiocese focuses entirely on an intent requirement to attempt to advance an argument that the *Melchert-Dinkel* analysis applies. However, the cases cited by the Archdiocese are not on point with the *Melchert-Dinkel* First Amendment analysis. None of the cases cited reflect a First Amendment strict scrutiny analysis. The cases examine due process void for vagueness challenges and sufficiency of the evidence. *State v. Flinn,* 208 S.E.2d 538 (1974) (contributing statute found to be constitutional under void for vagueness challenge when causal connection is clear and delinquent act reasonably sure to follow)[16]; *Vachon v. New Hampshire,* 414 U.S. 478 (1974) (record lacked evidence that defendant willfully sold lewd button to minor or was aware of the sale or was present in store at time of the sale); *State v. Crary,* 155 N.E.2d 262 (Ohio C.C.P. 1959) (evidence not sufficient to establish magazine sold to minor contained obscene, lewd, and lascivious pictures). Because these cases do not analyze direct causal link under a strict-scrutiny, narrow-tailoring analysis, the holdings are inapplicable.

b. *Minnesota's contributing statutes are narrowly tailored.*

Beyond asserting that the State cannot prove intent, the Archdiocese does not argue the statutes are not narrowly tailored.[17] The State has a compelling interest in protecting the safety, welfare, and best interest of children in this matter, and the State can prove that the contributing statutes at issue are narrowly tailored to serve that compelling interest. Each of the words which implicate speech – encouraging, causing, and contributing – restrict speech that reaches this

---

[16] In this case, the court cited to seventeen other states that have constitutionally valid contributing statutes. *Id.*

[17] Without citing any authority, the Archdiocese argues the Court must look to the plain meaning of the statutory words and require a direct causal link. Def's Memo 11. This line of reasoning was not advanced in *Melchert-Dinkel*, is not part of a First Amendment analysis, and is more appropriately analyzed under an intent requirement.

compelling interest. The Court in *Melchert-Dinkel* found that the suicide statute would restrict conversations regarding general discussions about suicide which are a matter of public concern. *Id. at 24.* "Right to die" conversations are a current political hotbed being debated around the country. The contributing statutes are drawn much more narrowly than the suicide statute. In sharp contrast, it would be hard to argue that any reasonable person would in general conversation want to suggest a child should be sexually abused.

The contributing statutes are constitutional under a First Amendment analysis and the State has more than enough evidence to prove that the Archdiocese's words encouraged, caused, or contributed to the need for protection or services and the delinquency of the victims.[18] As such, the Archdiocese does not advance an argument that the words in the contributing statutes cannot be narrowly drawn to reach the government's compelling interest in preventing child sexual abuse. The motion should be denied.

B. The Religion Clauses of the First Amendment of the United States Constitution and Minnesota State Constitution do not afford the Archdiocese protection from its crimes.

The religion clauses of the First Amendment of the United States Constitution provide in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S.Const. amend. 1. The First Amendment prohibits excessive entanglement of religious matters by government actors and protects the right of free exercise of religion. *Cantwell v. State of Conn.*, 310 U.S. 296, 303 (1940). The First Amendment applies to the states through Fourteenth Amendment incorporation. *Id.*

The Minnesota State Constitution also protects the freedom of religion. Section 16 of the Minnesota State Constitution reads in relevant part:

[18] Even if the Court severs the speech portion of the statute, the statutes still contemplate "acts" or "omissions" which do not implicate speech and the case may move forward.

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state. . .

Minn. Const. art. I, § 16. The Minnesota Constitution affords greater protection to the exercise of religious liberty than does the federal constitution. *Odenthal v. Minnesota Conf. of Seventh-Day Adventists,* 649 N.W.2d 426 (2002). The Minnesota Constitution prohibits any action that limits the free exercise of religion, but also precludes infringement on or interference with religious freedom. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).[19]

There is no doubt that religious liberty is a foundational right protected by both federal and state constitutions. Religious liberty, however, is not without boundaries, nor is religiously based conduct absolutely protected. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In fact, the Court has said that some relationship between government and religious organizations is inevitable, and "the line of separation, far from being a 'wall' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971). The Minnesota Constitution specifically states that it will not protect acts of licentiousness or practices inconsistent with the peace and safety of the State.

The sexual abuse of minors is one of the most egregious harms that can befall a child and it rips apart the families and communities it touches. There can be no excuse for the criminal acts of the Archdiocese in this matter and they will not find protection in either the United States or

[19] The Archdiocese argues that the State cannot interfere with the "free exercise of religion." Def's Memo at 29. In order to properly advance a Free Exercise argument under the First Amendment the Archdiocese would have to advance that the issue of child sexual abuse and the Archdiocese's acts, words, or omissions in response thereto are deeply held religious beliefs which would inhibit review by the court. *Hill-Murray Def'n of Teachers v. Hill-Murray High School,* 487 N.W.2d 857, 865 (Minn. 1992). Since the Archdiocese does not advance such an argument, the State will not address it.

Minnesota Constitution. The Church does not enjoy the protections of the Constitution for criminal acts which contributed to the delinquency and need for services of the child victims in this case. As such, the motion to dismiss under these premises should be denied.

1. The State has a compelling interest in protecting the health, safety, and welfare of children from sexual abuse.

As previously noted, the purpose of Minnesota's juvenile protection laws is to promote the health, safety, and best interests of the child. *See* Minn. Stat. §260C.001 (2015). The courts have long held that the state's interest in protecting the well-being of minors is compelling and the protections of the Constitution are not absolute. *Ferber*, 458 U.S. 747. Courts frequently uphold laws that might otherwise be found to be unconstitutional when legislation "is aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757. The Court in *Ferber* found child pornography to be outside the protections of the First Amendment because the government's interest in protecting the "well-being of its youth" justified special treatment because of the relationship of child pornography to child sexual abuse and exploitation. *Id.* at 759.

In *Osborne v. Ohio*, the Court again found a compelling state interest in protecting children from sexual exploitation and abuse where possessing child pornography in one's home was criminalized. 495 U.S. 103 (1990). The Court found that the government had a compelling interest in "safeguarding the physical and psychological well-being" of children and upheld the statute at the expense of the right to privacy. *Id.* at 109. In both *Ferber* and *Osborne*, the sexual exploitation and abuse of children was the central concern that made allowable the government interest to outweigh the constitutional right at stake.

Minnesota has also held that a church-employer can be sued for failing to take reasonable actions to prevent sexual harassment under the Minnesota Human Rights Act without violating the First Amendment or the state constitution, even if it would burden religious activity or belief

because the state's interest in eradicating sexual harassment in the workplace is compelling. *Black,* 471. N.W.2d at 721. The Court found there was no First Amendment violation under the neutral principles of law theory (discussed *infra*). *Id.* It follows, then, that if the court found sexual harassment in the workplace to be a compelling interest, then the sexual abuse of children most certainly rises to the compelling interest standard.

Courts and state legislatures have consistently stated that the protection of the health, safety, and welfare of children is of tantamount importance. The sexual abuse of children is not an issue for which a church can use the First Amendment as a shield. The First Amendment protects religious institutions from government interference of the free exercise of religion and from governmental interference with church governance issues. This case is not about church governance. This case is about the abuse of three young victims and the complete institutional failure of the Archdiocese as a corporation to take appropriate action to prevent the delinquency and need for services of the victims. The Archdiocese is not able to hide behind the First Amendment; neither case law nor public policy support such a proposition.

2. The proper Constitutional analysis is under the Establishment Clause, and admissibility is an issue for the court at trial.

The Establishment Clause is meant to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon,* 403 U.S. at 612. *Lemon* articulates a three- part test to determine whether or not the Establishment Clause has been violated: "1) the statute must have a secular legislative purpose; 2) the principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster 'an excessive government entanglement with religion." *Id.* at 612-613. This test was adopted by Minnesota courts in *Piletich v. Deretich*, 328 N.W.2d 696 (Minn. 1982). At issue in this case is the third prong of the *Lemon* test.

The Court has said that in order to determine whether excessive entanglement exists, the

court must examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon,* 403 U.S. at 615. When an issue involves "core questions of church discipline and internal governance, the Court has acknowledged that the inevitable danger of government entanglement precludes judicial review." *Black,* 471 N.W.2d at 720 (Minn. App. 1991). Indeed, "under the entanglement doctrine, a state may not inquire into or review the internal decision making or governance of a religious institution." *Odenthal,* 649 N.W.2d at 435. However, if neutral principles of law apply there is no entanglement problem and a district court has subject-matter jurisdiction over the claims. *Id.* at 435–36. In order for neutral principles of law to apply, rules and standards must be developed and applied without particular regard to religious institutions or doctrines. *Id* at 435. "Excessive entanglement is ultimately a question of degree," and the Establishment Clause is not an automatic bar to government action. *Black,* 471 N.W.2d at 721.

3. The Archdiocese has not demonstrated its actions cannot be examined under neutral principles of law.

The Archdiocese cites much case law hoping to convince the Court that it may not examine the religious doctrine of the Catholic Church. In order to avoid entanglement issues, courts may not examine issues of religious doctrine or polity. *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 709 (1976). But "the Establishment Clause is not implicated where neutral principles of law, developed and applied without particular regard to religious doctrines, establish the applicable standard of care." *Odenthal,* 649 N.W.2d at 426; *J.M. v. Minn. Dist. Council of Assemblies of God,* 658 N.W.2d 589, 594 (Minn. App. 2003). Nothing in the Archdiocese's cited case law stands for the proposition that the State is absolutely prohibited from examining evidence regarding a church.

The Archdiocese argues that the Court may not examine religious evidence in any manner, conveniently picking and choosing evidence from the complaint that it believes will constitute an

examination of the Archdiocese's internal policies or doctrinal beliefs. The Archdiocese prefaces its argument on the Supreme Court's decisions in both *Milivojevich* and *Jones v. Wolf*, 426 U.S. 696, 709 (1976); *443 U.S. 595 (1979).* These cases, however, are easily distinguishable as they involve church property disputes. By their very nature, property disputes require a court to look at issues of church constitutions and church law to render an opinion usually determined on interpretation of church law in order to resolve the dispute. It is the interpretation by the government of internal church law that triggers a First Amendment violation.

Minnesota courts have found that *Milivojevich* is distinguishable from clergy sex abuse cases. In *Mrozka v. Archdiocese of St. Paul & Minneapolis*, the court found that the First Amendment did not protect the church in cases of child sexual abuse because the case involved conduct by the Church that resulted in both external and secular harm. 482 N.W.2d 806, 811-12 (Minn. App. 1992) *citing General Council on Fin. & Admin. of United Methodist Church v. Superior Court of Cal.*, 439 U.S. 1369, 1372–73 (1978) (the Constitution does not prevent a court from independently examining and making a decision regarding the structure and operation of a hierarchical church and its constituent units in a purely secular dispute). In fact, the Catholic Church conceded that the "examination of the reasonableness of its actions and the bases for its decisions regarding the placement and discipline of Adamson (priest at issue in the case) was constitutionally allowable for purposes of determining negligence and compensatory damages." *Mrozka,* 482 N.W.2d. at 812. The Court also found that the Church could not be protected under the Minnesota Constitution for the repeated placement of a priest within parishes without restriction because doing so would be condoning licentious behavior and justifying practices inconsistent with the peace and safety of the state. *Id.*

Further, the Archdiocese uses the Court's decision in *J.M. v. Minn. Dist. Council of Assemblies of God* to advance an argument that the State may not look into the hiring practices of a

religious institution. 658 N.W.2d 589. *J.M.* is a civil matter regarding *J.M.'s* claims against the St. James Assembly of God Church and the Minnesota District Council of the Assemblies of God for the hiring and retention of a pastor that engaged in a sexual relationship with a parishioner during counseling sessions. *Id.* The Court found that it was not permissible to inquire into a church's hiring practices as it would "implicate core, fundamental church doctrines governing identification of individuals "called" to the ministry." *Id.* at 594. As to *J.M.'s* claim of negligent retention, however, the court found it was not necessary to:

> investigate the role of pastor within church hierarchy or the nature of [the pastor's] employment with the church in order to resolve a claim of negligent retention. The unfitness alleged is the secular act of sexually violating a parishioner, not any alleged unfitness that relates to [the pastor's] duties as a pastor. The court only need evaluate what the church knew or should have known about [the pastor's] propensity to sexually violate parishioners with whom he was counseling, and, if there was such knowledge, whether the church's actions were reasonable considering the problem.

Id. at 597–98; *see also Olson,* 661 N.W.2d at 264 (standards used to evaluate negligent-retention claim when alleged unfitness is an act of sexual penetration are based on neutral principles of law and do not require examination of church doctrine or practice); *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 137 (Minn. App. 2007) (whether abuse occurred within the scope of the alleged employment does not require interpretation of doctrinal matters).

The reasoning in *J.M.* is particularly on point here. Just as the act of sexually violating a parishioner was found to be secular, so too is the act of sexually violating a child (and also providing that child drugs, alcohol, and tobacco). It is entirely possible for the State to present evidence of what the church knew about Wehmeyer, and his known propensities. These actions are secular actions and have nothing to do with church doctrine.

The Archdiocese also relies on the Court's most recent criminal opinions in *Bussmann I and II,* and *Wenthe.* However despite the Archdiocese's contention, the *Bussmann* cases, which most severely limit the State's ability to examine evidence regarding a church, still do not stand as a

complete bar to the examination of religious evidence. *State v. Bussmann*, 741 N.W.2d 79 (Minn. 2007); *State v. Bussmann*, No. A08-0858, 2009 WL 2015416 (Minn. App. July 14, 2009).

The *Bussmann* cases involve a constitutional challenge to Minnesota's clergy sexual conduct statute under the Establishment clause. *See* Minn. Stat. § 609.344, subd. 1(l)(ii) (2006). The Supreme Court in *Bussmann I* limited testimony of Catholic Church doctrine. 741 N.W.2d at 79. Specifically, the Court found that "extensive evidence regarding religious power of priests over parishioners; the church's official policy on counseling and pastoral care, the Church's concern about priest sexual misconduct; and the Church's official investigation and findings regarding Bussmann's behavior" allowed the court to become entangled with religious doctrine. *Id.* at 94. The Court worried that the jury found the priest guilty because he violated church doctrine and not because he violated the statute at issue. *Id.* at 92. The Court said the religious evidence "engrafted religious standards onto the statute." *Id.* 92-93. The Court found that the evidence was not sufficiently linked to any secular standard, and was therefore highly prejudicial, and that is where the constitutional violation arose. *Id.* at 93. The case was remanded. *Id.*

On subsequent appeal, as to the same Entanglement issue, the Court of Appeals found that among other things; "religious evidence of *Bussmann's* role and responsibilities within the church, the process of assigning priests to parishes, *Bussmann's* employment with the church, and the process by which parishioners can report problems, concerns, or believed abuses was not testimony regarding church doctrine" and therefore was not a violation of the Establishment Clause. *State v. Bussmann*, No. A08-0858, 2009 WL 2015416, at *2 (Minn. App. July 14, 2009). The ruling in *Bussmann* II show that the Establishment Clause is far from an absolute bar on religious evidence.

In *Wenthe*, another constitutional challenge to the clergy sexual abuse statute, the Court again found excessive entanglement issues were not present because the statute could be applied through the use of neutral principles of law. *State v. Wenthe*, 839 N.W.2d 83, 90 (Minn. 2013).

The court found that when looking at the issue of the complainant receiving "advice, aid, or comfort" as required under the statute, the jury or court could assess these secular concepts without looking into religious doctrine. *Id.* The court reasoned that it could be determined whether a clergy member was acting as a '"helper," "advisor," or "comforter," according to secular notions of those relationships.'" *Id.* The Court stated evidence that could be examined without "testing or examining the validity of or basis for any particular aspect of the religious teaching or doctrine" would not trigger excessive entanglement. *Id.* at 91.

The *Bussmann* and *Wenthe* decisions require the State to connect the evidence to the secular elements of the crime. *Bussmann* and *Wenthe* stand for the proposition that the State cannot introduce evidence that would require a jury or the court to judge the Archdiocese's conduct against religious standards. Instead, the evidence must be applied through neutral principles of law.

The Archdiocese does not and cannot extend an argument that child sexual abuse or delinquency is part of religious doctrine. The Archdiocese would have the court believe that the State intends to prove its case through the argument that the Archdiocese should have never ordained or promoted or retained Curtis Wehmeyer. This is not the State's case. The criminal issues arise with the complete and utter institutional failure of the Archdiocese to adequately deal with a priest who presented warning signal after warning signal of dangerous proclivities, a clearly compelling secular concern. The Archdiocese received an abundance of information that put it on notice as to Wehmeyer's concerning behavior. From the reports of P.M. to McDonough of Wehmeyer making inappropriate advances towards younger-looking males in the Barnes and Noble; to the report by D.B. to Bishop Piché that Wehmeyer was in bed with one of his victims; and the concern of the Fillmore County 911 caller that kids may not be safe in Wehmeyer's presence. These few examples from the extensive Complaint show the Archdiocese had more than enough information that Wehmeyer's behavior was troubling; yet, it chose not to act. This evidence has

nothing to do with church doctrine and everything to do with protecting perpetrators at the expense of children. To allow a First Amendment claim such as the Archdiocese advances would set a dangerous precedent that religious institutions could simply hide behind a guise of church doctrine for any harmful behavior.

III. Issues of intent are not an appropriate basis for dismissal.

Between pages 19 and 25 of its memorandum, the Archdiocese argues over the issue of intent at length. Yet, without conceding that these offenses cannot be considered strict-liability offenses, the existing jury instruction as to the elements for Contributing to the Neglect or Delinquency of a Minor plainly comments that, "Intent is not an element of this offense." 10 Minn. Prac., CRIMJIG 13.100 (5th ed.) (West 2013). The JIG thus appropriately aligns with a statute that does not include "intent" as written, a statute that is noted to provide for "[t]he protection of the morals and general well-being of minors." *State v. Sobelman*, 271 N.W. 484 (Minn. 1937).

Further, issues of knowledge and intent are particularly within the province of the fact-finder. A finding of intent, "is a highly contextual exercise. As juries are often instructed, '[i]ntent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind.'" *Morris v Union Pacific R.R.*, 373 F.3d 896, 902 (8th Cir. 2004) (alteration of quote in *Morris*); *see also State v. Andrews*, 388 N.W.2d 723, 728 29 (Minn. 1986) (intent is generally proven by inferences drawn from words and actions in light of surrounding circumstances). When a corporation is involved, the issue becomes even more complex because, "the inquiry depends in part on corporate policies, but also to some extent on the intent of corporate employees, not all of whom will play the same role in every case." *Morris* at 902-03. In short, issues relating to intent should not be decided at this point and thus provide no basis to dismiss.

Additionally, the Collective Knowledge Doctrine, by definition, establishes the corporation's knowledge and supports its intent. Beyond this alone, very high-level personnel of

the Archdiocese acted, omitted to act, or made statements that will justify a Willful Blindness instruction.

In a case that extended the reach of the doctrine to a civil case, the United States Supreme Court noted:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 2068-69 (2011). The instruction provides that the corporation cannot successfully defend by having "purposely closed [its] eyes to avoid knowing what was going on around [it]." *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991). *See also United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004) ("Ignorance is deliberate if the defendant was presented with facts that put [it] on notice that criminal activity was particularly likely and yet [it] intentionally failed to investigate those facts.")

Very plainly, the law will not permit the Archdiocese to stick its head in the sand. And because the availability of the instruction remains an open question at this early point of litigation, dismissal is not appropriate.

IV. Prosecution initiated within the limitations period.

With respect to the limitations period, the Archdiocese here, too, misses the essential point that this case is not about Wehmeyer's crimes. It is about what the Archdiocese did and did not do. Focusing solely on Wehmeyer, and a supposed last known date of him abusing a child, and from there arguing untimeliness is misplaced and incorrect.

A. At the earliest, the limitations period could not begin until Wehmeyer's removal from ministry because the offenses were continuing.

The general rule is that a statute of limitations begins to run when a crime is "complete." *See Toussie v. United States*, 397 U.S. 112, 115 (1970); *State v. Danielski*, 348 N.W.2d 352, 355

(Minn. App. 1984), *pet. for rev. denied* (July 26, 1984) (*citing Toussie).* Depending on the facts of a given case, a crime is not "complete" when the illegal conduct has, in fact, continued. *See, e.g., State v. Tahash,* 160 N.W.2d 139, 141 (Minn. 1968) (child neglect/abandonment a continuing offense). *See also State v. O'Hagan,* 474 N.W.2d 613, 621 (Minn. App. 1991), *rev. denied* (Minn. Sept. 25, 1991) (concealing stolen property from rightful owner a continuing offense); *State v. Lawrence,* 312 N.W.2d 251, 253 (Minn. 1981) (same); *Lebo v. State,* 977 N.E.2d 1031, 1037-38 (Ind. App. 2012) (with mandatory reporting crime, a "complete" crime (*i.e.*, when all elements are met) can be different than not yet "completed" crime (*i.e.*, where statutory obligation remains unfulfilled)). *See also* Robinson, Paul H. *Criminal Law Defenses* 462 (1984); 21 Am.Jur.2d § 298 (with continuing violations, "statute of limitations does not begin to run from the occurrence of the initial act, which may in itself embody all the elements of the crime, but from the occurrence of the most recent act, or until such conduct terminates.").

Tahash is particularly instructive. In October 1963, a father pled guilty to abandonment and neglect to support his child from February 1959 to the date of the complaint (then termed an "information"). After failing on probation, sentence was executed. Defendant petitioned for a writ of habeas corpus.

The time span of neglect was four years, eight months before charging and the defendant argued the three-year limitations period applied. The court viewed the neglect as a continuing offense, stating "defendant's obligation to support his children continued throughout the entire period [of neglect]." 160 N.W.2d at 141. Further, "[t]he offense is committed not by any overt act but by omission or neglect, and the offense continues so long as the neglect continues without excuse." *Id.*

The Archdiocese points out in its Memorandum in Support of Striking Prejudicial Surplusage that the abuse of the victims happened between 2009 and 2011. Def's Memo at 12. The

Archdiocese takes issue with the inclusion of facts about Wehmeyer's behavior after this point in time. This evidence is entirely relevant, however, as it shows the Archdiocese's offenses continued, *i.e.*, that the archdiocese continued to expose the victims to Wehmeyer.

Given the paramount consideration for the health, safety and best interests of children, Archdiocese failures should rightly be assessed against the same consideration. Accordingly, the limitations period, at the earliest, could not have begun to run until Wehmeyer was removed from ministry.

B. <u>At the earliest, the limitations period did not begin to run until the report to law enforcement because Wehmeyer threatened and coerced his victims.</u>

Where a position of authority, threats or coercion are used against a child to prevent the reporting of sexual abuse, the limitations period does not begin to run until the offenses are reported to law enforcement. *Danielski*, 348 N.W.2d at 356-57. More generally, the limitations period does not begin to run in situations where a defendant's actions prevented discovery of or prosecution for the crime. *Id.*; *Lawrence*, 312 N.W.2d at 253 (possession/concealing of stolen property); *State v. Tahash*, 160 N.W.2d at 141 (child abandonment); *State v. Thang*, 246 N.W. 891 (Minn. 1933) (embezzlement from estate).

State v. Soukup involves an adoptive father who committed multiple sexual assaults against his minor daughter over three years, from 1984 to 1987. The victim told a cousin of the abuse in 1996, but she did not report to law enforcement until about twenty years later, in 2006. 746 N.W.2d 918, 920-21 (Minn. App. 2008). The core issue in the case was what the phrase "report the offense" meant as the term was used in the applicable limitations statute. *Id.* at 920. The court concluded "report" was not ambiguous and meant the limitations period began only when the victim reported to police. *Id.* at 921. The court also noted *Danielski*, observing that those who use their authority to both sexually abuse and then prevent reporting cannot thereby take advantage of the statute of limitations. 348 N.W.2d at 356.

In this case, Wehmeyer had abused multiple victims multiple times when he was their priest. A Catholic priest is considered a position of ultimate trust and significant honor to this particular family. Wehmeyer also abused on the church property of the parish in which his victims were members and their mother an employee. Remarkably, he even heard at least one victim's confession when alone with that victim at a campground. He also threatened and coerced. The criminal complaint against Wehmeyer for the sexual abuse in Ramsey County portrays he threatened that the mother would lose her job, he would no longer be able to be a priest, and the parish would fall apart if a victim reported.[20]

His threats predictably delayed reporting. The Archdiocese should not now receive any benefit.

C. <u>At the earliest, the limitations period did not begin to run until the report to law enforcement because the Archdiocese fraudulently concealed its failures.</u>

Minnesota follows the majority rule that a statute of limitations does not run during the time that a defendant fraudulently conceals from the plaintiff facts constituting the offense/ cause of action, regardless of whether the action sounds in fraud or on other grounds. *See Normania Twp v. Yellow Medicine Cty*, 286 N.W.2d 881, 884 (Minn. 1939). Any concealment by positive affirmative act is itself fraudulent so as to prevent the statute from running. *Id.; Danielski*, 348 N.W.2d at 356-57 (position of authority to conceal); *Lawrence*, 312 N.W.2d at 253 (concealing stolen property from rightful owners); *see also, e.g., Minn. Laborers Health and Welfare Fund et al. v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014) (concealment by principal obligor on surety bond); *Wild v. Rarig*, 234 N.W.2d 775, 795 (Minn. 1975) (defamation).

The Fraudulent Concealment Doctrine is based upon two broad principles:

1. A defendant who conceals a cause of action "should not be permitted to shield himself behind the statute of limitations where his own fraud placed him."

[20] The Wehmeyer criminal complaint is provided as Exhibit 22 to the supporting Affidavit of Thomas E. Ring.

2. A plaintiff who has not sued because of concealment is not within the "mischief" sought to be avoided by a statute of limitations.

Minnesota Laborers, 844 N.W. 2d at 514. There is no firm, categorical definition of "fraudulent concealment." *Wild*, 234 N.W.2d at 775. But the "concealment must be fraudulent or intentional and, in the absence of a fiduciary or confidential relationship, there must be something of an affirmative nature designed to prevent, or which does prevent discovery of the cause of action." *Id. at 795.*

In this case, the Archdiocese's POMS program is an example of just that type of fraud and concealment on the public that makes application of the doctrine appropriate. For years, the Archdiocese held POMS out publically as "state of the art" supervision when, in fact, it was "window dressing"; a sham. In the case of Wehmeyer in particular, it was a monitoring program that did not monitor; a detection tool that did not detect; and a supervision system that did not supervise.

In the face of concealment, as a practical matter, a limitations period cannot be permitted to start to run. In this case, the State had no knowledge, actual or constructive, before the report to law enforcement that any victim had been abused such that they would need services or protection or, alternatively, had themselves committed status offenses. Litigation before this point was not even theoretically possible. To state the obvious, the law does not require the State to divine the unknown.

CONCLUSION

For the foregoing discussion and analysis, the State requests the Court to deny the Archdiocese motion to dismiss in its entirety.

Respectfully submitted,

JOHN J. CHOI
RAMSEY COUNTY ATTORNEY

Dated: March 21, 2016

By: ______________________
Thomas E. Ring

By: ______________________
Stephanie L. Wiersma

John T. Kelly (#214098)
First Assistant County Attorney
Thomas E. Ring (#25082X)
Assistant County Attorney
Stephanie L. Wiersma (#0395741)
Assistant County Attorney
Office of the Ramsey County Attorney
345 Wabasha Street North, Suite 120
St. Paul, MN 55102
Telephone: (651) 266-3222