IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 316 MD 2020

IVY HILL CONGREGATION OF JEHOVAH'S WITNESSES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES,

Respondent.

BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Treatises

Law Reviews and Books

Other Authorities

I. INTRODUCTION

This action implicates one of the core liberties enshrined in both the Federal and State Constitutions—the right of ministers of a regularly established church to receive the same protections accorded all other regularly established churches. Petitioner Ivy Hill Congregation of Jehovah's Witnesses consists of adherents to the practices and teachings of Jehovah's Witnesses. Ivy Hill Congregation's beliefs and practices are now at issue given recent actual and threatened enforcement actions by the Commonwealth under the Child Protective Services Law (the "CPSL"), *see* 23 Pa.C.S. § 6301, *et seq*., combined with the peculiar construct of the privilege afforded to clergymen, such as ministers of the gospel, under that statute. In order to redress the harm caused by this disparate treatment and ensure that its congregants can maintain the confidentiality of communications made to clergymen, while also complying with the laws of this Commonwealth, the Ivy Hill Congregation seeks summary relief and declarations concerning the rights and responsibilities of its ministers of the gospel.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Role of Elders in the Ivy Hill Congregation

Petitioner Ivy Hill Congregation of Jehovah's Witnesses is an unincorporated religious body located in Philadelphia, Pennsylvania, consisting of approximately 130 congregants who meet regularly and worship in accordance with the beliefs and practices of Jehovah's Witnesses. *See* Petition for Review ("PFR") at ¶¶ 2, 6. Jehovah's Witnesses are a regularly-established Christian church (religion) with over 8.6 million worshippers spread among over 119,000 congregations around the world; in Pennsylvania, there are hundreds of congregations of Jehovah's Witnesses, of which the Ivy Hill Congregation is one. *See* PFR at ¶ 9.

Ivy Hill Congregation does not use paid, full-time clergy, such as is the case, for instance, with the Catholic Church; instead, the Ivy Hill Congregation is aided in the worship of God by spiritually mature men collectively referred to as the "body of elders," who take the spiritual lead in the Congregation. *See* PFR at ¶¶ 10-11. The elders at Ivy Hill Congregation are ordained ministers tasked with overseeing the spiritual needs of the Congregation in accordance with the Bible,

secular laws, and the beliefs and practices of Jehovah's Witnesses. *See* PFR at ¶ 14. The elders are also volunteers, for whom the practice of religion is an unpaid pursuit rather than a paid occupation, profession, or other form of employment. *See* PFR at ¶ 13. There are presently seven elders on the body of elders in the Ivy Hill Congregation. *See* PFR at ¶ 12.

The process for becoming an elder at Ivy Hill Congregation, or any congregation of Jehovah's Witnesses, is as follows. To begin, any male congregant may be appointed as an elder provided he satisfies certain Scriptural qualifications found in the Bible at 1 Timothy 3:1-13; Titus 1:5-9; James 3:17, 18; and 1 Peter 5:2, 3. *See* PFR at ¶ 15. Specifically, upon satisfying the foregoing Scriptural qualifications, a congregant may be recommended for appointment as an elder by the Congregation's existing body of elders. *See* PFR at ¶ 16. In turn, that recommendation is transmitted to a circuit overseer, who is an experienced traveling elder who oversees 16-20 congregations in a geographic area. *See* PFR at ¶ 17. If the circuit overseer is satisfied that the congregant recommended by the elders satisfies the necessary

Scriptural qualifications, he may appoint the congregant as an elder. *See* PFR at ¶ 18.

Elders also receive ongoing training. For instance, all the elders in the Ivy Hill Congregation receive ecclesiastical training through (a) semi-annual week-long visits of the circuit overseer; (b) one-day training classes known as Kingdom Ministry School that elders attend once every two years; and (c) a week-long intensive instruction course known as the School for Congregation Elders that elders attend once every five years. *See* PFR at ¶ 19. This training is designed to help elders more effectively carry out various aspects of their ecclesiastical responsibilities. *See* PFR at ¶ 19.

The responsibilities of the elders of the Ivy Hill Congregation, who are the spiritual shepherds of the Congregation, include: organizing the regular meetings held to strengthen the faith of the congregation and others in attendance; providing pastoral care for congregants; rendering spiritual assistance to congregants; officiating funerals; solemnizing marriages; and hearing confessions. *See* PFR at ¶ 20.

B. Spiritual Counseling in the Ivy Hill Congregation

A central component of the Ivy Hill Congregation's elders' obligation as spiritual shepherds is to provide spiritual guidance and counseling. *See* PFR at ¶ 21. Indeed, Jehovah's Witnesses believe that a congregant who commits a serious sin requires spiritual counsel and assistance in order to maintain his or her relationship with God, and, thus, all congregants are encouraged to seek spiritual counsel and assistance from the elders if they commit a serious transgression of God's laws. *See* PFR at ¶ 22. In order to obtain this needed spiritual counsel and assistance, congregants who have committed a serious sin disclose private and highly sensitive information to elders. *See* PFR at ¶ 23. Doing so allows the elders to provide the sinner with specific spiritual counsel and assistance and to make personalized petitions to God in prayer on their behalf. *See* PFR at ¶ 23.

Critically, in accordance with the religious beliefs and practices of Jehovah's Witnesses, only elders are authorized to hear and address confessions of serious sin. *See* PFR at ¶ 28.

Because open and free communication between congregants and elders is essential to providing effective spiritual encouragement,

counsel, and guidance, Jehovah's Witnesses—like many other Christian denominations—emphasize Biblical principles of privacy and confidentiality. *See* PFR at ¶ 24; *see also* Proverbs 25:9. As such, according to the Scriptural beliefs and practices of Jehovah's Witnesses, when a congregant in the Ivy Hill Congregation confesses a sin, or requests spiritual encouragement, counsel, and guidance, the communication with the elder is strictly confidential. *See* PFR at ¶ 25. The elders' obligation to maintain confidentiality is based on Scripture and has also been explained in the official publications of Jehovah's Witnesses. *See* PFR at ¶ 29.[1] And although the beliefs and practices of Jehovah's Witnesses require that a congregant who commits a "serious sin" confess to and be spiritually counseled and assisted by three or

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[1] *See* Proverbs 25:9; *The Watchtower*, April 1, 1971, pages 222-224, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/1971249; *Our Kingdom Ministry*, July 1975 page 3, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/201975247; *The Watchtower*, December 15, 1975, pages 764-66, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/1975928; *The Watchtower*, September 1, 1983, pages 21-26, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/1983644; *The Watchtower*, September 15, 1989, pages 10-15, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/1989683; *The Watchtower*, September 1, 1991, pages 22-24, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/1991646; *The Watchtower*, November 15, 1991, pages 19-23, *available at* https://wol.jw.org/en/wol/d/r1/lp-e/1991845.

The Watchtower is a regularly published magazine by Jehovah's Witnesses, which is used to explain Bible teachings.

more elders, the principles of privacy and confidentiality apply with equal force. *See* PFR at ¶ 27.

Because under the beliefs and practices of Jehovah's Witnesses, repentance and reconciliation with God is crucial to eternal salvation, the ability to confidentially divulge serious sin to elders is an important part of the congregants' faith and worship. *See* PFR at ¶ 26. In turn, relying on the Scriptural promise of confidentiality, congregants willingly open themselves to reveal their innermost thoughts, feelings, and confess serious sins to trusted elders as they seek to mend their relationship with God and to heal spiritually *See* PFR at ¶ 30. If an elder in the Ivy Hill Congregation revealed these confidential communications without a scriptural basis to do so, he could be removed as an elder and the breach could harm his relationship with God. *See* PFR at ¶ 31. In addition, an elder's breach of confidentiality could undermine his and the body of elders' credibility with the Congregation, possibly chilling future communications from congregants. *See* PFR at ¶ 32.

C. The Child Protective Services Law

The CPSL, *see* 23 Pa.C.S. § 6301, *et seq.*, is a statutory scheme governing reporting and investigating child abuse. Respondent Pennsylvania Department of Human Services ("DHS") is the Commonwealth agency charged with administering and overseeing the implementation of the CPSL, which is the statutory scheme with respect to which relief is sought. Among other things, under the CPSL, DHS is tasked with:

a. promulgating regulations necessary to implement the statute; *see id.* at § 6306;

b. providing "specific information" through "continuing publicity and education programs" regarding "[p]ersons classified as mandated reporters[,]"and the attendant "reporting requirements and procedures[.]" *id.* at §§ 6383(a.2)(2)(ii) & 6383(a.2)(2)(iii); *see also id.* at § 6383(a);

c. establishing and maintaining a "statewide database of protective services[;]" *see id.* at § 6331;

d. creating and maintaining a toll-free hotline for reporting abuse; *see id.* at § 6332;

e. ensuring it is "[c]ontinuous[ly] availab[le]" to address reports of child abuse; *see id.* at § 6333 (titled "[c]ontinuous availability of department");

f. conducting investigations under the CPSL and gathering reports; *see generally, e.g.*, *id.* at § 6334.1;

g. making reports received under the CPSL available to the Office of Attorney General, *see id.* at § 6340(a)(7), and any other law enforcement official for, among other things, failure to report abuse by a mandated reporter. *Id.* at § 6335(c)(1)(ii).

As is material here, the CPSL includes a provision requiring certain individuals to report all incidents of suspected child abuse, *see* 23 Pa.C.S. § 6311 (the "Mandatory Reporting Provision"), including individuals who are a "clergyman, priest, rabbi, minister, Christian Science practitioner, religious healer or spiritual leader of any regularly established church or other religious organization." *See* 23 Pa.C.S. § 6311(a)(6). Any person who is obligated to report suspected abuse under the Mandatory Reporting Provision must submit an oral or written report to DHS "immediately," 23 Pa.C.S. § 6313(a)(1), which report, if oral, must be followed within 48 hours with a "written report." 23 Pa.C.S. § 6313(a)(2). A violation of the Mandatory Reporting Provision is a criminal offense. *See* 23 Pa.C.S. § 6319; *see also* 18 Pa.C.S. § 4304.

In the CPSL, however, a critical exception to the Mandatory Reporting Provision exists for certain persons in Section 6311.1 of the CPSL. Indeed, confidential communications subject to the clergymen

privilege (found in the Judicial Code) are exempt from the Mandatory Reporting Provisions and the penalties associated therewith. *See* 23 Pa.C.S. § 6311.1(b)(1) (citing 42 Pa.C.S. § 5943). The clergymen privilege, codified at 42 Pa.C.S. § 5943 ("Clergymen Privilege Statute"), which the CPSL incorporates by reference, was codified in 1959 (*see* P.L. 1317 (Oct. 14, 1959)) but is premised on a common-law doctrine that had been recognized in Pennsylvania prior to its enactment. *See In re Shaeffer's Estate*, 52 Dauphin Co. Reports 45 (1942).

Section 5943 of the Judicial Code, entitled "Confidential communications to clergymen," provides:

> No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

42 Pa.C.S. § 5943. As reflected in its plain language, the statute applies the privilege to communications made to a "clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization." 42 Pa.C.S. § 5943. However, the privilege does not apply

to communications to clergymen or ministers who are either (a) self-ordained; or (b) "members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers[.]" 42 Pa.C.S. § 5943.

The Pennsylvania House floor debate regarding the incorporation of the Clergymen Privilege Statute into the CPSL demonstrates the General Assembly's policy decision that the inclusion of the privilege was central to encouraging individual spiritual growth and protecting religious liberties. *See* Pa.H.R. Legis. J., at 1851-52 (Oct. 5, 1993).[2] Nevertheless, understanding the exact interaction of the CPSL and the Clergymen Privilege Statute has proven evasive since, among other things, the Commonwealth has historically refused to give complete meaning to the two statutory schemes, even when asked for information directly by Jehovah's Witnesses. *See* PFR, Ex. A (3/26/98 & 4/6/98 Letters).

D. Recent Enforcement Action Under the CPSL

In accordance with the Scriptural beliefs and practices of Jehovah's Witnesses, elders in the Ivy Hill Congregation receive

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[2] *Available at* https://www.legis.state.pa.us/WU01/LI/HJ/1993/0/19931005.pdf.

information regarding serious sins, including possible abuse of minors, which—absent the Clergymen Privilege Statute—would implicate the Mandatory Reporting Provision. *See* PFR at ¶ 44. These communications generally occur under the aegis of religious and spiritual guidance, premised on the understanding and the sincerely held belief by all parties involved that the communications will remain confidential. *See* PFR at ¶ 45.

A recent news report, however, has highlighted the lack of clarity in the application of the Clergymen Privilege Statute to elders in the Ivy Hill Congregation and suggests that when they receive confidential communications regarding child abuse they may be subject to criminal prosecution under the CPSL for following the plain language of the Clergymen Privilege Statute. *See* PFR at ¶ 46. Specifically, the application of the Clergymen Privilege Statute came into sharp focus following a recent criminal complaint filed in Lancaster County against Levi Esh, a Bishop in the Amish faith, alleging that his failure to report a confession of child abuse by a member of the Amish community constituted a violation of Section 6319 of the CPSL. *See* PFR at ¶ 47 (citing Matt Miller, *Amish bishop charged with failing to report*

suspected sex abuse of girls, PennLive (Apr. 22, 2020) (PFR, Ex. B); Docket, *Com. v. Esh*, No. MJ-02303-CR-100-2020 (Magisterial Dist. Ct.) (PFR, Ex. C)).[3]

In light of the foregoing recent development, the Ivy Hill Congregation is concerned about the unclear application of the Clergymen Privilege Statute, which legal ambiguity has and will expose them to criminal prosecution. Under the religious beliefs and practices of Jehovah's Witnesses, divulging confidential communications without a Scriptural basis not only violates the beliefs and practices of their faith and harms an elder's relationship with God, but also calls into question his qualifications and could result in his removal from his role. *See* PFR at ¶ 49. The difficulties faced by the Ivy Hill Congregation are compounded by the fact that upon receipt of any communication in the course of their duties giving rise to a suspicion of child abuse, elders have to decide "immediately" whether the communication is protected by the Clergymen Privilege Statute or not, which decision triggers a

[3] Since the filing of the Petition for Review, the proceedings in *Commonwealth v. Esh* have advanced from the Magisterial District Court to the Lancaster County Court of Common Pleas. *See* Docket, *Com. v. Esh*, No. 36-CR-0002586-2020 (C.P. Lanc.), *available at* https://ujsportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-36-CR-0002586-2020&dnh=nso0mwzC5%2fe41a6mtBhE9Q%3d%3d.

duty to report or not under the Mandatory Reporting Provision. *See* PFR at ¶ 50.

Based on the recent criminal complaint described above, the elders of the Ivy Hill Congregation are now faced with an even more critical dilemma: if they legitimately believe a communication is privileged, both under their faith and the law, and law enforcement later disagrees, then they are subject to a felony charge under Section 6319(b) for a continuing failure to report, which has the potential to become a felony of the second degree if certain conditions exist. *See* PFR at ¶ 51. They also face the likelihood of having to make decisions on these matters "immediately," which permits no opportunity to seek judicial relief. *See* PFR at ¶ 52. In other words, the elders of the Ivy Hill Congregation face utter legal uncertainty about where the legitimate practice of their faith ends and a duty to communicate to DHS begins; relief from this Court will abate this legal uncertainty and allow all members of the Ivy Hill Congregation to fully exercise their faith, while still complying with the law. *See* PFR at ¶ 53.

III. ARGUMENT

This Court should hold that the clergyman privilege codified in 42 Pa.C.S. § 5943 applies to the elders of Ivy Hill Congregation, and, thus, they may avail themselves of the exemption to the CPSL's Mandatory Reporting Provision set forth in 23 Pa.C.S. § 6311.1(b)(1) when circumstances warrant. As a threshold consideration, the elders are entitled to summary relief because their status as clergymen presents a question of law, and, insofar as the inquiry implicates issues of fact, any dispute in that regard is neither material nor genuine—particularly in light of the principles of deference discussed below.

With regard to the merits, as a preliminary matter, given the statutory construct of the CPSL, this Court should have little difficulty concluding that the statutory exemption to the Mandatory Reporting Provision is coextensive with the clergyman privilege codified in Section 5943 of the Judicial Code, *see* 42 Pa.C.S. § 5943. And on the critical question of the privilege's application, the Court should conclude the elders of Ivy Hill Congregation are entitled to the protections afforded by the clergyman privilege—and concomitantly the exemption under the CPSL—for at least three reasons. *First*, elders are "clergymen"

under Section 5943, and any interpretation to the contrary is premised on a constitutionally flawed construct. *Second*, because Jehovah's Witnesses are not "a religious organization[] in which members other than the leader thereof are deemed clergymen or ministers," the exception to the clergyman privilege does not preclude the elders from the protections afforded by the privilege. *Third*, to the extent Section 5943 forecloses the privilege to elders on the grounds that "members other than the leader … are deemed clergymen or ministers" in Jehovah's Witnesses' faith, that particular clause violates the Federal and State Constitutions; thus, it must be severed from the remainder of the statute, leaving extant the principal part of the provision.

A. Summary relief is appropriate because ascertaining the elders' status as clergyman does not require resolution of a factual dispute that is either material or genuine.

Preliminarily, summary relief is appropriate under the present circumstances because the Application presents a pure question of law and does not involve factual issues that are properly subject to dispute. *See Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1220 (Pa. Cmwlth. 2018). Specifically, while the elders' right to invoke the privilege relative to any specific communication in the future will

depend on the attendant factual circumstances, the more fundamental question of whether the elders are "clergymen" entitled to the protections of the privilege in the first instance does not require any factual development. Rather, resolution of that issue turns on the interpretation of "clergymen" under Section 5943 of the Judicial Code and the legal scope of the exception in that statute—both of which are quintessential issues of law. *See Gilbert v. Synagro Cent., LLC*, 131 A.3d 1, 17 (Pa. 2015).[4]

Moreover, any facts pertinent to that statutory exercise relate to the elders' ecclesiastic functions as set forth and prescribed by the established doctrine of Jehovah's Witnesses faith, with regard to which no factual disagreement may be countenanced. As relayed by this Court, in keeping with the First Amendment to the United States Constitution and Article I, Section 3 of Pennsylvania Constitution, in "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law[,]" the religion's own interpretations are controlling.

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[4] In this regard, while the Department asserts that "Petitioner seeks for the Court to provide a blanket declaration that all of the communications between their elders and congregants are privileged[,]" Answer at 3, Ivy Hill Congregation's submissions to this Court plainly demonstrate that the only relief it seeks is a declaration that its elders are clergymen who *may* invoke the privilege.

Poesnecker v. Ricchio, 631 A.2d 1097, 1102 (Pa. Cmwlth. 1993) (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)). As artfully summarized by the Pennsylvania Supreme Court:

> the right to practice one's belief and worship as one chooses is so deep a root of our constitutional culture that a court, even one with the best intentions, can be no more than a clumsy intruder into the most delicate and sensitive areas of human life. ***When Caesar enters the Temple to decide what the Temple believes, he can leave behind only his own views.***

Presbytery of Beaver–Butler v. Middlesex, 489 A.2d 1317, 1320 (Pa. 1985) (emphasis added); *see also Zernosky v. Kluchinsky*, 122 A. 262, 263 (Pa. 1923) ("The rules of a church organization constitute the law for its government[.]"); *Henderson v. Hunter*, 59 Pa. 335, 343 (1868) ("The rule in the civil court is that the churches are left to speak for themselves in matters of discipline and doctrine[.]").

Further, because a religion's relationship with its clergymen is its "lifeblood," all "'[m]atters touching this relationship must necessarily be recognized as of prime ecclesiastical concern'" subject to deference. *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1109 (Pa. 2009) (quoting *McClure v. Salvation Army,* 460 F.2d 553, 558-59 (5th Cir. 1972)). Indeed, this principle applies to all facts of the clergyman's role

and relationship with the congregation. *See Mundie v. Christ United Church of Christ*, 987 A.2d 794, 798 (Pa. Super. 2009).[5]

Moreover—and of particular relevance to the elders' right to summary relief—courts must treat the doctrinal interpretations and pronouncements "of the highest religious decision-maker ***as binding fact***, so long as those decisions are not tainted by fraud or collusion." *Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 418 (3d Cir. 2012) (emphasis added).

As such, any assessment of the elders' religious responsibilities is *per se* ecclesiastical, thereby requiring deference to the dictates and teachings of Jehovah's Witnesses. Concomitantly, given that such religious pronouncements are regarded as "binding fact," any dispute in this respect is immaterial and, thus, cannot forestall summary relief.

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[5] Parenthetically, this rule of deference is deeply-rooted in this Commonwealth, predating the United States Supreme Court's recognition of the principle. *Compare, e.g.*, *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 71 (1976) ("The principles limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights were initially fashioned in *Watson v. Jones*, 13 Wall. 679 (1872), a diversity case decided before the First Amendment had been rendered applicable to the States through the Fourteenth Amendment."), *with McGinnis v. Watson*, 41 Pa. 9, 14 (1862).

B. Under the CPSL, a clergyman is exempt from the Mandatory Reporting Provision if compliance would require a violation of the clergyman privilege.

As a threshold matter, the conterminous nature of the clergyman privilege statute and the exception to the CPSL's Mandatory Reporting Provision does not appear to be in genuine dispute. Nevertheless, insofar as the interplay between the two provisions is unclear, a brief review of the statutory language and legislative history confirms that a clergyman is exempt from the Mandatory Reporting Provision if submitting a report in accordance with that provision would require breach of the clergyman privilege.

Given that in all matters of statutory construction, "the starting point of analysis is with the language of the statute[,]" *Wertz v. Chapman Twp.*, 709 A.2d 428, 431 (Pa. Cmwlth. 1998), the lynchpin of the inquiry is the plain text of the CPSL. In this regard, under CPSL's Mandatory Reporting Provision, *see* Section (II)(C) *supra*, certain individuals, including any "clergyman, priest, rabbi, minister, Christian Science practitioner, religious healer or spiritual leader of any regularly established church or other religious organization[,]" 23 Pa.C.S. § 6311(a)(6), who have "reasonable cause" to suspect child abuse are

required to submit an oral or written report to the Department immediately. Furthermore, although Section 6311.1(a) of the CPSL, clarifies that the various evidentiary privileges are generally inapplicable in the context of child abuse and do not "[r]elieve the mandated reporter of the duty to make a report of suspected child abuse[,]" that provision is subject to the ensuing subsection, which expressly provides that "confidential communications made to a member of the clergy are protected under 42 Pa.C.S. § 5943 (relating to confidential communications to clergymen)." 23 Pa.C.S. § 6311.1(b)(1).

The accompanying regulatory scheme promulgated by DHS is also instructive. Specifically, the above exception for confidential communications to clergymen is included in the very definition of "required reporters" and, once again, Section 5943 of the Judicial Code is expressly incorporated by reference. *See* 55 Pa. Code § 3490.4.

Accordingly, the plain language of the CPSL reflects two directives relevant to the present action; *first*, where compliance with the Mandatory Reporting Provision would require violation of the clergyman privilege, a clergyman's failure to report does not constitute a violation of the CPSL; and *second*, Section 5943 of the Judicial Code

supplies the relevant framework for determining whether a given communication is subject to the clergyman privilege and, therefore, exempt from the Mandatory Reporting Provision. *See* 23 Pa.C.S. § 6311.1(b)(1) (citing 42 Pa.C.S. § 5943).

Although further analysis is unnecessary in light of the foregoing, to the extent this Court finds that the plain language lacks sufficient clarity, review of the legislative history further demonstrates that matters covered by the clergyman privilege (the scope of which is defined by Section 5943 of the Judicial Code) are not subject to the Mandatory Reporting Provision.

With regard to the exemption to the Mandatory Reporting Provision, the floor debates when the reporting obligation was first incorporated into the CPSL reflect the General Assembly's intent to maintain a robust clergyman privilege and exempt from the Mandatory Reporting Provision any directive which would require a violation of the clergyman privilege. *See* Pa.H.R. Legis. J., at 1852 (Oct. 5, 1993).[6]

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[6] Although this intent is evident from the entirety of the debate, the following remarks made by Representative Brown aptly encapsulate the protection contemplated by the General Assembly:

> All of us realize how important it is for Pennsylvania law to give every protection possible to our children against child abuse, but it is

Further, subsequent amendments to the CPSL also demonstrate that the General Assembly intended a wholesale incorporation of the statutory clergyman privilege into the CPSL. Specifically, in 2006 Section 6311, which is where the exemption for privileged communication to members of the clergy was previously housed, was amended for the stated purpose of making it consistent with Title 42:

> As I have stated, the purpose of this bill is to make, it is a three-title bill. We are making the provisions of Titles 23 and 42 consistent. That has been a very difficult task. There have been numerous parties, including the members of the Judiciary Committee, that have worked very, very hard and diligently on this.

Pa.H.R. Legis. J., at 2477 (Nov. 15, 2006).[7] Indeed, in response to a separate proposed amendment, which ultimately failed by a vote of 119-72, Representative O'Brien explained, "[a]nd for further clarification for

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> doubtful that eliminating confidentiality in communications to the clergy of all faiths, except of the one instance of confession, will help with the problem of child abuse. No other State, to my knowledge, has done this. New Jersey, for example, whose law mandates everyone to report child abuse, still provides confidentiality for communications to the clergy of all faiths, and in the spring of this year, the Illinois legislature, after thorough consideration of clergy confidentiality in its own law on reporting child abuse, decided to protect such confidentiality.

Pa.H.R. Legis. J., at 1852.

[7] *Available at* https://www.legis.state.pa.us/WU01/LI/HJ/2006/0/20061115.pdf#page=22.

the members, the purpose of this bill is to make Title 23 and Title 42 consistent. This amendment will disrupt that." *Id.* The foregoing legislative history is especially significant because, as explained by the State Supreme Court, consulting a prior iteration of a statute "is particularly sound and applicable in the construction and interpretation of an act which is a revision and consolidation for clearness, certainty, and convenience of all the prior statutes on the subject, a partial codification to the purpose of which amendment or change was only incidental." *Bell v. Abraham*, 22 A.2d 753, 755 (Pa. 1941) (internal quotation marks and ellipses omitted).

In sum, the plain language of the CPSL, as well as the legislative history, reflects the General Assembly's intent to exempt from the Mandatory Reporting Provision any matter that would require a violation of the clergyman privilege, the contours of which are defined by Section 5943 of the Judicial Code.

C. Elders are entitled to the invoke the clergyman privilege because they are "clergymen" under Section 5943 of the Judicial Code.

Applying settled precepts of statutory interpretation, the elders are clergymen, as that term is used in Section 5943. Specifically, as

developed below, the elders' status as clergymen is supported by not only the plain language of the statute, but also the tools of statutory construction used for ascertaining legislative intent.

1. Under the plain language of Section 5943 elders are clergymen and, thus, entitled to invoke the privilege the statute affords.

It is axiomatic that "[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning … the statute must be given its plain and obvious meaning." *Davis v. Sulcowe*, 205 A.2d 89, 91 (Pa. 1964). Although the statutory definition of terms is generally controlling, because the Judicial Code does not define "clergymen," this term must be interpreted in accordance with its ordinary usage. *See Treaster v. Union, Twp.*, 242 A.2d 252, 255 (Pa. 1968). Under such circumstances, the best indicator of a word's "common and approved usage" is its dictionary definition. *See Com. v. Hart*, 28 A.3d 898, 909 (Pa. 2011); *Hawes v. Bureau of Prof'l & Occupational Affairs, State Real Estate Comm'n*, 204 A.3d 1019, 1024 (Pa. Cmwlth. 2019).

Turning to the dictionary meaning of the term, Webster's Third New International Dictionary defines a "clergyman" as "a member of

the clergy." *Clergyman*, *Webster's Third New International Dictionary, Unabridged* (cited with favor by *People v. Thodos*, 49 N.E.3d 62, 67 n.4 (Ill. App. Ct. 2015)).[8] In turn, "clergy" is defined in the same dictionary as, *inter alia*, "a body of religious officials or functionaries prepared and authorized to conduct religious services and attend to other religious duties."[9] Similarly, while Webster's Collegiate Dictionary also provides an identical definition for "clergyman" (*i.e.*, "a member of the clergy"),[10] that dictionary defines "clergy" as "a group ordained to perform pastoral or sacerdotal functions in a Christian church."[11] In turn, while "sacerdotal" is defined as "of or relating to priests or a priesthood,"[12] "pastoral," is defined as "of or relating to spiritual care or guidance especially of a congregation."[13]

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[8] *Available at* https://unabridged.merriam-webster.com/unabridged/clergyman.

[9] *Clergy, Webster's Third New International Dictionary, Unabridged*, *available at* https://unabridged.merriam-webster.com/unabridged/clergy.

[10] *Clergyman*, *Webster's Collegiate Dictionary*, *available at* https://unabridged.merriam-webster.com/collegiate/clergyman.

[11] *Clergy*, *Webster's Collegiate Dictionary*, *available at* https://unabridged.merriam-webster.com/collegiate/clergy.

[12] *Sacerdotal*, *Webster's Collegiate Dictionary*, *available at* https://unabridged.merriam-webster.com/collegiate/sacerdotal.

[13] *Pastoral*, *Webster's Collegiate Dictionary*, *available at* https://unabridged.merriam-webster.com/collegiate/pastoral.

Notably, the definition of "minister" is largely coextensive with that of "clergyman." Specifically, Webster's Third defines "minister" as "one duly authorized (as by ordination) to conduct Christian worship, preach the gospel, and administer the sacraments[,]" or "one who performs the duties of a clergyman during his customary vocation but who has never been formally licensed or ordained as a minister." *Minister, Webster's Third New International Dictionary, Unabridged*. Similarly, Webster's Collegiate provides that a "minister" is "one officiating or assisting the officiant in church worship," or "a clergyman or clergywoman especially of a Protestant communion." *Minister, Webster's Collegiate Dictionary*.

Examined against the foregoing it is manifest that the functions performed by the elders satisfy the above definitional criteria. With respect to the definition of clergy offered in Webster's Third, all elders are trained (*i.e.*, "prepared") and authorized to conduct religious services and attend to a number of other religious duties. Specifically, as it relates to their training, in keeping with the tenets of the faith of Jehovah's Witnesses—which, as noted above, this Court must treat as a "binding fact," *Askew*, 684 F.3d at 418—the elders of the Ivy Hill

Congregation must satisfy certain Scriptural criteria, prior to their appointment, *see* PFR at ¶¶ 14-18, and continue to undergo a rigorous ecclesiastical training process. *See* PFR at ¶ 19. Furthermore, as it relates to their religious duties and the services they are authorized to perform, based on established doctrines of Jehovah's Witnesses, elders are responsible for, *inter alia*: overseeing and leading the regular meetings held to strengthen the faith of congregation members and others in attendance; officiating funerals; and solemnizing marriages. *See* PFR at ¶ 20. Similarly, given that the provision of spiritual care and guidance to the congregation is their chief function, the elders, as ministers of the gospel, easily satisfy Webster's Collegiate Dictionary's definition of clergyman. *See id.*

Moreover, the foregoing squarely comports with controlling authority from the Pennsylvania Supreme Court, which, despite never encountering the precise question presently before this Court, has long disapproved of a rigid definition of clergymen. For instance, in *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997), which is one of the few State Supreme Court decisions examining the clergyman privilege in detail, the panel noted that "[o]n the question who may invoke the

privilege, the courts … have held that a 'clergyman' within the meaning of the privilege may be not only a priest to whom direct confession of sin is an obligation of the believer as in the Roman Catholic Church, but also a minister, priest, rabbi, *or other similar functionary of a religious organization, including a Christian Science practitioner, or an individual reasonably believed so to be by the person consulting him or her ..., and a nun filling the office of 'spiritual director' to a postulant to her order*." *Id.* at 199 n.3 (emphasis added) (quoting Russell Donaldson, J.D., Annotation, *Communications to Clergyman as Privileged in Federal Proceedings*, 118 A.L.R. Fed. 449 (1996)).

Indeed, over a century before the clergyman privilege was codified in 1959, the Pennsylvania Supreme Court was tasked with determining whether a Methodist clergyman qualified for a ministerial privilege to decline public office. Cautioning against "measuring too nicely the length and breadth of clerical duties and employments," Chief Justice Tilghman explained, "[t]oo minute a scrutiny on this point, would involve us in unnecessary and unprofitable difficulties[,]" because "[d]ifferent societies require from their ministers different degrees of service." *Guardians of the Poor v. Greene*, 5 Binn 554, 560 (Pa. 1813).

Any other construct, the panel warned, would improperly relegate certain religious denominations to an inferior status. *See id.* at 558-59; *see also id.* at 561 (per, Yates, J.).

Authority from other jurisdictions also supports the conclusion that elders are clergymen. Indeed, appellate courts in at least three states have afforded elders clergymen status under their respective privilege statutes. *See, e.g.*, *Nunez v. Watchtower Bible & Tract Soc. of New York*, 455 P.3d 829 (Mont. 2020); *McFarland v. W. Congregation of Jehovah's Witnesses*, 60 N.E.3d 39 (Ohio Ct. App. 2016); *see also Elliott v. State*, 49 So.3d 795 (Fla. Dist. Ct. App. 2010) (parties agreed elders were clergy, without issue being decided expressly).[14]

Furthermore, cautioning that an overly narrow interpretation would raise serious constitutional concerns and create practical difficulties, a "leading treatise,"[15] which the Pennsylvania Supreme

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[14] In addition, a New Hampshire trial court held that elders were clergymen under the state's privilege statute and, thus, their communications with a woman seeking guidance were privileged. *See Berry v. Watchtower Bible & Tract Soc. of New York, Inc.*, No. 01-0318, 2003 WL 25739776, at *3 (N.H. Super. June 2, 2003). The New Hampshire Supreme Court affirmed the decision on other grounds, but did not decide the application of the privilege statute to the elders. *See Berry v. Watchtower Bible & Tract Soc. of New York, Inc.*, 879 A.2d 1124, 1128 (N.H. 2005) ("[W]e need not decide whether Jehovah's Witness elders qualify as 'clergy' to determine the case.").

[15] *Pratt v. St. Christopher's Hosp.*, 866 A.2d 313, 322 n.12 (Pa. 2005).

Court references regularly to resolve difficult questions of law, outlines various methods of interpreting "clergyman" in this context, and that treatise ultimately concludes that "the functions of a clergyman are three: (1) teaching; (2) preaching; (3) liturgical leadership." Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 (1st ed.). Viewed differently, a person qualifies as a clergyman if he is granted a "recognized leadership role within the sect," and is responsible for "spiritual counselling." *Id.* (quoting 2 Louisell & Mueller, Federal Evidence, at 835 (1985)).

In sum, mindful that "[d]ifferent societies require from their ministers different degrees of service," *Guardians of the Poor*, 5 Binn at 560, the most cogent definition gleaned from the above authorities is that a "clergyman" is an individual recognized by the adherents of a particular faith as a spiritual leader, who is conferred with a certain degree of responsibility and oversight.

Against this backdrop—and affording the requisite deference to the bona fide religious doctrines of Jehovah's Witnesses as required by the Federal and State Constitutions—elders plainly satisfy the statutory definition of clergymen under the statute. *See* PFR at ¶¶ 9-20.

2. The history of the clergyman privilege, the attendant policy considerations, and the presumption of constitutionality reflect a legislative intent to define "clergyman" broadly to include the elders.

As set forth above, based on the plain language of Section 5943, elders are clergymen and, thus, discerning legislative intent is unnecessary. *See Warrantech Consumer Products Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346, 354 (Pa. 2014) ("When the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning of the statute under the pretext of pursuing its spirit.'" (quoting 1 Pa.C.S. § 1921(c))). Nevertheless, to the extent this Court finds the statute ambiguous, application of the various tools of statutory construction yields the same result—namely, that the definition of "clergymen" subsumes elders. With regard to the General Assembly's intent, which is the cornerstone of statutory interpretation, the historic underpinnings of the clergyman privilege, as well as the legislative history surrounding its enactment, plainly reflect a legislative intent to encourage confidential communication for the purpose of spiritual guidance and protect it from compelled disclosure.

To illuminate this, as it pertains to the overarching object of the statute, which is one of the principal considerations here,[16] news accounts following the enactment of the original statute confirm that protecting confidential communications with clergymen was considered paramount. *See* 1 Pa.C.S. § 1921(c)(7) (instructing courts to examine, *inter alia*, the legislative history in discerning intent). Indeed, the day after the statute's enactment, it was reported that Governor Lawrence noted "that clergymen have rarely, if ever been required to divulge confidential information. But he said the act spells out their immunity." *See Clergymen Protected, New Law Helps Ministers Guard Confidence*, The York Dispatch, at 1 (Oct. 15, 1959).[17] That statutory immunity codified a common-law tradition that existed even before 1959,[18] under

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[16] 1 Pa.C.S. § 1921(c)(1)-(4) ("When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: (1) The occasion and necessity for the statute[;] (2) The circumstances under which it was enacted[;] (3) The mischief to be remedied[; and] (4) The object to be attained.").

[17] *Available at* https://www.newspapers.com/newspage/614361760/.

[18] *See* Jacob M. Yellin, *The History and Current Status of The Clergy-Penitent Privilege*, 23 Santa Clara L.Rev. 95, 107-08 (1983) ("By 1955 thirty states had enacted such statutes, while Pennsylvania seemed to recognize the privilege without benefit of statute."); Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 Ind. L.J. 1037, 1072 (2005) ("In 1955, Tinnelly's research revealed that thirty states had statutes codifying the Philips clergy privilege, and that it had been recognized as state common law in Pennsylvania.").

which the importance of the clergyman's privilege was already recognized. *See In re Shaeffer's Estate*, 52 Dauphin Co. Reports 45 (1942).

Furthermore, in the absence of a specific provision to the contrary, a statute's use of a term that has acquired a specific meaning through judicial interpretation evinces a legislative intent to adopt that construct. *See Rahn v. Hess*, 106 A.2d 461, 464 (Pa. 1954); *see also Raymond v. Sch. Dist. of City of Scranton*, 142 A.2d 749, 751 (Pa. Super. 1958). As such, given that "clergyman" is not defined in the Judicial Code, there is a presumption that the General Assembly intended to incorporate and adopt the broad interpretation in *Guardians of the Poor* outlined above.

Similarly, the floor debates on amendments to the CPSL further reflect the General Assembly's intent to maintain a robust and multi-faith-encompassing privilege under Section 5943. *See* Pa.H.R. Legis. J., at 1852. As noted by Representative Brown, prior to the incorporation of the privilege into the CPSL, the protection afforded by Section 5943 was understood broadly to encompass *all faiths* and their clergymen:

> All of us realize how important it is for Pennsylvania law to give every protection possible to our children against child

> abuse, but it is doubtful that eliminating confidentiality in communications to the *clergy of all faiths*, except of the one instance of confession, will help with the problem of child abuse. No other State, to my knowledge, has done this. New Jersey, for example, whose law mandates everyone to report child abuse, still provides confidentiality for communications to the *clergy of all faiths*, and in the spring of this year, the Illinois legislature, after thorough consideration of clergy confidentiality in its own law on reporting child abuse, decided to protect such confidentiality.

Id. at 1852; *see also id.* at 1854 (remarks of Representative O'Brien) ("There is a very unique relationship between an individual and the clergy for his respective church.").

In light of the foregoing statutory precepts, irrespective of whether this Court ultimately decides to analyze Section 5943 under its plain language, or resort to the tools of statutory construction, the most coherent reading of the statute is that elders are clergymen.

3. Because the narrow exception to the clergyman privilege does not apply to Jehovah's Witnesses, elders are not precluded from invoking the privilege.

Finally, the exception to the clergymen privilege in Section 5943, which makes the privilege inapplicable to clergymen or ministers who are "members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers[,]" 42 Pa.C.S.

§ 5943 (hereinafter, the "Exception Clause"), is inapplicable for two discrete reasons.[19] *First*, Jehovah's Witnesses are not "a religious organization," but rather a regularly established church. *Second*, Jehovah's Witnesses do not deem all members, other than the leader thereof, clergymen or ministers.

(a) The exception to the clergyman privilege is facially inapplicable here because Jehovah's Witnesses are a "regularly established church," rather than a "religious organization."

The Exception Clause does not apply to the elders because under the plain language of the statute, Jehovah's Witnesses are a "regularly established church," rather than a "religious organization." As such, Section 5943's narrow exception is entirely inapplicable to the elders and any further analysis of that clause—including whether "members other than the leader [of the Jehovah's Witnesses] are deemed clergymen or ministers"—is superfluous.

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[19] Although the exception also prohibits so-called "self-ordained" clergymen or ministers from invoking the privilege, the Ivy Hill Congregation elders were appointed to their position only after a specific process controlled by the existing body of elders and the circuit overseer, *see* PFR at ¶¶ 16-18; accordingly, the elders are plainly not "self-ordained" and any assertion to the contrary would be utterly unsustainable.

(i) The Exception Clause applies only to "religious organizations."

Turning to the relevant statutory language, while the general protection afforded by Section 5943 applies to any "clergyman … or minister of the gospel of any regularly established church ***or*** religious organization," the Exception Clause only references "religious organizations." Given that the General Assembly "is presumed to understand that different terms mean different things," *PECO Energy Co. v. Com. of Pa.*, 919 A.2d 188, 191 (Pa. 2007), the plain language of Section 5943 reflects a legislative intent to ascribe distinct meanings to the phrases "regularly established church" and "religious organization." *Accord Cent. Westmoreland Career & Tech. Ctr. Educ. Ass'n, PSEA/NEA v. Penn-Trafford Sch. Dist.*, 131 A.3d 971, 976 (Pa. 2016) (citing *Com. v. Elliott*, 50 A.3d 1284, 1290 (Pa. 2012)). That presumption is particularly strong here because the differential treatment between an "established church" and a "religious organization" is reflected in both statutes and caselaw, with both phrases having acquired discrete legal meanings. *See, e.g.*, *PECO Energy*, 919 A.2d at 191 (holding that where a statute referred to "cost … as reflected on the books of account" it was fair to assume the

General Assembly intended that "books of account" be interpreted in accordance with the meaning it had been given in other contexts).

The most prominent example of that distinction is the Marriage Law (enacted six years before the clergyman privilege was first codified),[20] which establishes separate rules for marriages solemnized by "regularly established churches" and those performed by "religious organizations." Specifically, under Section 1503(a)(6) any "minister, priest or rabbi of any regularly established church or congregation" is authorized to "solemnize marriages between persons that produce a marriage license"—irrespective of the religious affiliation of the individuals involved. 23 Pa.C.S. § 1503(a)(6). Importantly, however, in an ensuing subsection, titled "religious organizations," the statute separately permits religious societies and organizations to perform marriages in accordance with their own rules and customs, but only if at least one of the persons is a member of that organization or society. *Id.* at § 1503(b) ("Every religious society, religious institution or religious organization in this Commonwealth may join persons together

[20] The Marriage Law was first enacted in 1953, *see* P.L. 1344 (Aug. 21, 1953) while the clergymen's privilege was first enacted in 1959. *See* P.L. 1317 (Oct. 14, 1959).

in marriage when at least one of the persons is a member of the society, institution or organization, according to the rules and customs of the society, institution or organization."). As such, the General Assembly in 1959 plainly intended "regularly established church" and "religious organization" to be different things, and thus the Exception Clause—by its express terms—applies only to "religious organizations." In turn, this means the Clause is presumptively ***inapplicable*** to clergymen or ministers of the gospel of a "regularly established church." And as developed below, decisions from federal courts and Pennsylvania courts support the conclusion that Jehovah's Witnesses are a "regularly established church" and *not* a "religious organization."

(ii) Because Jehovah's Witnesses have an established congregation and provide regular religious services, they are a "regularly established church."

Turning, initially, to the federal caselaw, the most developed exposition of the difference between the churches and religious organizations is found in decisions arising under the Internal Revenue Code, which provides certain benefits to "churches" that are not available to "religious organizations." Specifically, churches—unlike "religious organizations"—are exempt from, *inter alia*, "annual

informational filings." *Spiritual Outreach Soc. v. C.I.R.*, 927 F.2d 335, 337 n.2 (8th Cir. 1991). Adopting a fourteen-factor test promulgated by the Internal Revenue Service,[21] federal courts have distilled the inquiry to a consideration of the most salient factors for determining whether an entity is a "church," or a "religious organization." *Id.* As relayed by the Eighth Circuit Court of Appeals, of "central import" to the assessment are: "the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code[.]" *Id.* at 339.

An alternative method for distinguishing a "church" from other forms of religious organizations used in the context of the Internal Revenue Code is the "associational test." As summarized by the District Court for the District of Columbia, "[t]he means by which an avowedly

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[21] Those factors are: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers. *See* I.R.S., Pub. 2018, *Tax Guide for Churches and Religious Organizations*, at 33 (Rev 8-2015), *available at* https://www.irs.gov/pub/irs-pdf/p1828.pdf.

religious purpose is accomplished separates a 'church' from other forms of religious enterprise." *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980). A church, according to that Court, "[a]t a minimum … includes a body of believers or communicants that assembles regularly in order to worship[,]" and "[u]nless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role." *Id.*; *accord Lutheran Soc. Serv. of Minnesota v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985).

More recently, the "associational test" has also been applied by the Federal Circuit Court of Appeals alongside the fourteen-factors mentioned above. *See Found. of Human Understanding v. United States*, 614 F.3d 1383, 1389 (Fed. Cir. 2010). Noting the "substantial overlap" between the two modes of assessment, the Court ultimately concluded that, "whether applying the associational test or the 14 criteria test, courts have held that in order to be considered a church … a religious organization must create, as part of its religious activities, the opportunity for members to develop a fellowship by worshipping together." *Id.*

Religious organizations, on the other hand, are best understood as associations that—despite their generally religious nature—do not espouse a distinct doctrine or belief system. *See Tax Guide for Churches and Religious Organizations*, at 1 (describing religious organizations as "nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion"). In addition, a common distinguishing factor of a religious organization is that its members can (and often do) belong to other religious sects that are regularly established churches. *Spiritual Outreach Soc.*, 927 F.2d at 338 (holding that a religious organization where the regular attendees were congregants in other churches, the ministers were guest ministers from other churches, and no system of religious education for the young was present was not a "church"); *see also Found. of Human Understanding*, 614 F.3d at 1390 (holding that a religious organization was not a church where the in-person services it conducted were incidental to its central purpose and where the entity lacked an established community of service); *Chapman v. C.I.R.*, 48 T.C. 358, 363 (1967) (holding that a group of missionary

dentists was not a church because it drew its membership from various denominations).

Applying these guideposts, Ivy Hill Congregation and Jehovah's Witnesses are plainly a regularly established church, rather than a "religious organization." Examining each of the 14 factor under the federal tax guidelines, *see supra*, Ivy Hill Congregation easily satisfies the first twelve. *See Tax Guide for Churches and Religious Organizations*, at 33. Specifically, Jehovah's Witnesses have: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; and (12) regular religious services. *See* PFR at ¶¶ 2, 6, 9-32, 60, 61-64. Furthermore, although Jehovah's Witnesses do not have "Sunday schools for religious instruction of the young[,]" the rejection of any activities that separate children from their parents is a specific doctrine

of their faith. *See* Jehovah's Witnesses, About Us, Frequently Asked Questions, *Do Jehovah's Witnesses have Sunday schools?*, JW.org.[22] Similarly, while Jehovah's Witnesses do not have a distinct "schools for the preparation of ministry[,]" all elders are trained and must undergo Scriptural studies. *See* PFR at ¶¶ 15-19.

(iii) Because Jehovah's Witnesses have a clear belief system and an established congregation that gathers regularly for prayer, they are a "regularly established church."

Furthermore, the above definitions squarely comport with Pennsylvania law. Returning once again to the Marriage Act, courts that have had the opportunity to expound upon the meaning of a

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[22] *See* Jehovah's Witnesses, About Us, Frequently Asked Questions, *Do Jehovah's Witnesses have Sunday schools?*, JW.org:

> No, we do not separate children for religious instruction. The Bible shows that God wants people to worship him without being separated by age. For example, God commanded the Israelites: "Gather the people together, the men, the women, the children, and your foreign resident who is within your cities, in order that they may listen and learn about and fear Jehovah your God and take care to carry out all the words of this Law." (Deuteronomy 31:12) We follow this pattern in our meetings by encouraging families to sit together. Parents know what their children hear, and this helps them to fulfill their responsibility to provide religious instruction for their children.—Ephesians 6:4.

Available at https://www.jw.org/en/jehovahs-witnesses/faq/jw-education-school/#link3.

"church" under that statute have emphasized the existence of a clear belief system and a regular congregation. *See, e.g.*, *O'Neill v. O'Neill*, No. 08-1620-29-1, 2008 WL 11513009, at *4 (C.P. Bucks Dec. 31, 2008) (holding "church" refers "to religion and faith in the broader sense" and finding Universal Life Church was a "regularly established church" because it had a clear belief system, ordains ministers, has existed for many decades, and has tax protection under 501(c)(3)); *Heyer v. Hollerbush*, No. 2007-SU-2132-Yo8, 2007 WL 9808299, at *3 (C.P. York Sept. 7, 2007) (defining "regularly established church" as requiring "an activity that occurs on habitual or patterned basis at a place of worship (church) or before a group of individuals gathered together for the same purpose (congregation)").

Various appellate decisions in Pennsylvania have also repeatedly emphasized that the central distinguishing feature of a "church" is its function as a medium for "religious worship, where people join together in some form of public worship." *Appeal of Upper St. Clair Twp. Grange No. 2032*, 152 A.2d 768, 771 (Pa. 1959). In *Laymen's Week-End Retreat League of Philadelphia v. Butler*, 83 Pa. Super. 1 (1924), for instance, the Superior Court held that property used by a religious organization

as a retreat site was not a church because regular public worship did not occur there, explaining:

> an actual place of religious worship--which contemplates a place consecrated to religious worship … where people statedly join together … in some form of worship, and not merely individual communion with one's Maker apart from a church, meetinghouse or some regular place of stated worship[.]

Id. at 6; *accord In re Her-Bell, Inc.*, 107 A.2d 572, 574 (Pa. Super. 1954) (explaining that a church is a place of worship where people join together for the stated purpose of worship); *see also Mullen v. Erie Cty. Comm'rs*, 85 Pa. 288, 292 (1877) (holding that a statute exempting churches from certain taxes required a showing of regular public worship); *Master et al. v. Machen et al.*, 35 Pa. D. & C. 657, 664 (C.P. Phila. 1938) (noting that "churches are established for the promulgation of faith under the regulations of definite religious organizations").[23]

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[23] As for the definition of "religious organization," the primary distinction identified by the Pennsylvania Supreme Court is largely in accord with the federal decisions outlined above—*i.e.*, absence of a clear religious creed, and membership in other religious denominations. *See, e.g.*, *Forbes Rd. Union Church & Sunday Sch. v. Inc. Trustees of the Salvation Army of Pa.*, 113 A.2d 311, 312 (Pa. 1955) (describing the Salvation Army, in the context of a challenge alleging infringement of religious liberties that the Salvation Army is a religious organization that serves "without any financial remuneration, has no separate creed, is not denominational, has no roll of members, but conducts religious services and acts as spiritual advisers to all who may attend its services"); *see also Rutledge v. State*, 525 N.E.2d 326, 328 (Ind. 1988) (holding, in the context of the clergy-penitent privilege statute, that a member of Gideons International, which it described as "a group of businessmen who also

Although these cases from Pennsylvania's appellate courts were decided in the context of property, the fundamental principle remains the same: a religious organization or a religious purpose can take many forms, but a "church" is more narrowly construed to denote a congregation regularly gathering together for public worship. *See Mount Zion New Life Ctr. v. Bd. of Assessment & Revision of Taxes & Appeals*, 503 A.2d 1065, 1069 (Pa. Cmwlth. 1986) (explaining that "the mere existence of an established schedule" is not controlling, but rather, the lynchpin is "the intent of individuals to join together in worship, with the worshipers' establishment of a schedule being a manifestation of that intent"). Moreover, the Superior Court has specifically applied this framework to Jehovah's Witnesses, despite the fact that under the tenets of their faith, they do not refer to any particular building as a church. *See Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit*, 130 A.2d 240, 243 (Pa. Super. 1957) (recognizing and treating Jehovah's Witnesses as a church).

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pass out the word of God," was not a clergyman because, *inter alia*, the group consisted of individuals from various other Christian denominations).

Applying these precepts here, Ivy Hill Congregation also easily meets the criteria under state law, since its congregants regularly gather for the stated purpose of worshipping in accordance with the teachings and traditions of Jehovah's Witnesses. *See* PFR at ¶¶ 2, 6, 9, 60-64.

In sum, given that the cornerstone of a "regularly established church" under both federal and state law is the existence of a cohesive group that gathers regularly for the specific purpose of public worship in accordance with a given doctrine or creed, Jehovah's Witnesses are a regularly established church and, thus, not subject to the Exception Clause.

(b) The exception to Section 5943 is inapplicable to the Congregations because Jehovah's Witnesses do not deem all members other than the leader thereof clergymen or ministers.

Even if this Court finds that Jehovah's Witnesses are a "religious organization" under Section 5943, the conclusion that all members of Jehovah's Witnesses "are deemed clergymen or ministers" under the Exception Clause is unsustainable. Returning once more to the principles of statutory construction, an ambiguity exists if a provision is

susceptible to two or more reasonable interpretations, *see id.,* or where "*any* reading of the statute's plain text raises non-trivial interpretive difficulties." *McGrath v. Bureau of Prof'l & Occupational Affairs, State Bd. of Nursing*, 173 A.3d 656, 662 n.8 (Pa. 2017) (emphasis in original).

Here, because Section 5943's exception presents "non-trivial interpretive difficulties," this Court must resolve the issue by ascertaining the legislative intent through the tools of statutory construction. Specifically, the phrase "minister" lacks substantial clarity, as it could be interpreted in its hyper-technical sense, such that the ecclesiastic use by Jehovah's Witnesses of the word minister in reference to many of its members brings the faith within the scope of the Exception Clause. Alternatively, the provision can be interpreted in its proper context, by reference to the statute's subject and purpose. As discussed below, if properly interpreted, the exception does not apply to elders.

In terms of the proper framework for resolving the ambiguities in this statute, while the statute excludes clergymen who belong to "religious organizations in which members other than the leader thereof are deemed clergymen or ministers" from its privilege's ambit, it fails to

explain ***who*** is responsible for the "deeming" and how to determine whether the religious organization is one which "deem[s]" members "other than the leader thereof … clergymen or ministers." In light of the principles of deference discussed above, the Court must accept Jehovah's Witnesses good faith allegations regarding the tenets of their religion and defer to their prior ecclesiastical publications and pronouncements on this question.

Applying these principles of deference, the Exception Clause does not apply to Jehovah's Witnesses because, as set forth in Sections (IV)(C)(1) and (2) *supra*, they do not deem all members other than their "leader" as ministers or clergyman in a *statutory* sense. While all baptized members of the congregation are denominated as "ministers," that nomenclature signifies a religious principle that all members have a *religious* duty to spread God's word and does not confer any leadership responsibilities relative to the member's congregation. Instead, the functions associated with the ordinary definition of clergyman and minister are specifically vested in the elders of each congregation. Indeed, permitting theological nomenclature to *constrain*—or, for that matter, expand—the secular/legal meaning of a

statutory term would plainly run afoul of the principles of deference outlined above and the concomitant prohibition against judicial entanglement in religious matters.

In this connection, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), which was decided mere weeks ago, provides substantial guidance. Assessing a ministerial exception under a federal employment statute, the United States Supreme Court roundly rejected the notion that the titles used by a particular religion are determinative. *See id.* at 2064. In addition to highlighting the practical difficulties in such an approach, the Court emphasized that "[r]equiring the use of the title would constitute impermissible discrimination[.]" *Id.* In this regard, noting that for Muslims, who also reject a distinct clerical class,[24] "an inquiry into whether imams or other leaders bear a title equivalent to 'minister' can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all

[24] *See generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 202 (2012) (Alito, J., concurring) ("In Islam, for example, 'every Muslim can perform the religious rites, so there is no class or profession of ordained clergy. Yet there are religious leaders who are recognized for their learning and their ability to lead communities of Muslims in prayer, study, and living according to the teaching of the Qur'an and Muslim law.'" (quoting 10 Encyclopedia of Religion 6858 (2d ed. 2005)).

believers—and risking loss of ministerial exception protections." *Id.* (internal quotation marks omitted). In the end, the Court held that the function performed, rather than the title, was controlling and concluded:

> If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail. Moreover, attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.

Id.; *see also Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring) (urging that the ministerial exception should turn on the "functional status" of the person in question and noting that "Jehovah's Witnesses consider all baptized disciples to be ministers" to illustrate the problems in defining the ministerial exception along the lines formal titles).

Indeed, federal decisions interpreting the Military Selective Services Act, *see* 50 U.S.C. § 3801, *et seq.*, have also adopted a similar approach. By way of necessary background, that statute generally requires all adult males between the ages of eighteen and twenty-six to register for training and service in the Armed Forces, but exempts "[r]egular or duly ordained ministers of religion." 50 U.S.C. § 3806(g)(1).

In addition to providing a definition of "duly ordained minister of religion" and "regular minister of religion"—which, notably, are largely in accord with the ordinary definition of clergyman discussed *supra*—the statute also clarifies that the term "regular or duly ordained minister of religion" does not include a person who either:
(1) "irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization;" or (2) "may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a bona fide vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization." 50 U.S.C. § 3814(g).

Examining the application of this ministerial exemption, federal courts have been nearly unanimous in holding that the theological interpretation of "ministers" in the faith of Jehovah's Witnesses is not controlling; rather, the definition of a minister under the law turns on the substance—not form—of the leadership duties performed by the person seeking an exemption. A contrary interpretation, these Courts

have held, would improperly deprive all adherents of that religion from statutory protections and privileges available to clergymen of all faiths. For instance, in *United States v. Hurt*, 244 F.2d 46 (3d Cir. 1957), the Third Circuit Court of appeals reversed the trial court's refusal to grant one of Jehovah's Witnesses who was a "company servant" a ministerial exemption under the statute.[25] Specifically, the Court found it immaterial that "all adherents are ordained as ministers when they are baptized" because the lynchpin of the exemption is the specific function performed by the person. As cogently relayed by that panel, one whose duties are consistent with the function performed by ministers, "cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith[,]" since such a construct "would leave a congregation without a cleric." *Id.*; *see also Pate v. United States*, 243 F.2d 99, 103 (5th Cir. 1957) ("[T]he real trouble here is … that the local board has tried to fit and mold an ordained pioneer minister of Jehovah's Witnesses into the orthodox straight-jacket of ministers of an orthodox church, in the face

[25] Company servant is the former name for a congregation elder in the faith of Jehovah's Witnesses.

of the fact that it is impossible to fit the garments of orthodoxy on a pioneer minister of Jehovah's Witnesses, and that by their footless effort to do so, the local board erred to the prejudice of defendant and to the denial of rights accorded him by the act and regulations.").

Thus, given its common law roots—and in the absence of a specific statutory definition—the phrase "minister" should not be interpreted based on the theological terminology of Jehovah's Witnesses, but rather, must be interpreted in accordance with its ordinary statutory and caselaw usage.[26] *Accord Guardians of the Poor*, 5 Binn. at 560. Thus, the term "minister," as detailed above, implies an individual who is recognized by the adherents of a given religion as one who is authorized to take the lead and conferred a certain degree of spiritual responsibility and oversight.

Indeed, in addition to the substantial authority from various federal courts and the United States Supreme Court in *Our Lady of Guadalupe*, in the specific context of a similar privilege statute, other

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[26] *See generally Treaster*, 242 A.2d at 255 ("Both by statute and decisional law we are required to construe words and phrases according to their common and approved usage; statutes are presumed to employ words in their popular and plain everyday sense and the popular meaning of such words must prevail unless the statute defines them otherwise or unless the context of the statute requires another meaning." (internal citations and quotation marks omitted)).

courts have also cautioned that an individual's status as a clergyman under privilege provisions must be decided by referencing the teachings of the religion in question—and not be grounded in extensive judicial inquiry. *See Waters v. O'Connor*, 103 P.3d 292, 297 (Ariz. Ct. App. 2004); *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 52 (Iowa 2018); *Reutkemeier v. Nolte*, 161 N.W. 290, 292 (Iowa 1917); *see also* Jeffrey H. Miller*, Silence is Golden: Clergy Confidence and the Interaction Between Statutes and Case Law*, 22 Am.J.Tr.Adv. 31, 46-47 (1998) ("Courts should not get tangled up in the determination of clergy status. The ruling on matters of religious dogma by secular courts is unseemly.").

Because the detailed exposition above firmly establishes that Jehovah's Witnesses—despite their deeply-held religious belief that all congregants have a duty to spread the gospel and, thus, are ministers upon baptism—do not regard all members as spiritual leaders, this Court should conclude that the Exception Clause does not apply. Any other interpretation would elevate form over substance and require substantial judicial entanglement in religious matters.

(c) The canon of constitutional avoidance militates against depriving elders of the protections of the clergyman privilege based on the exception to Section 5943.

Finally, given the significant constitutional issues associated with any interpretation of the Exception Clause that would foreclose the privilege to Jehovah's Witnesses—which are set forth in greater detail in Subsection (4) *infra*—the canon of constitutional avoidance further militates against categorially depriving elders of the clergyman privilege. Specifically, under that doctrine, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Com. v. Veon*, 150 A.3d 435, 443 (Pa. 2016). Because this canon counsels judicial restraint in addressing constitutional questions in the first instance, the mere specter of a constitutional violation attendant in a specific construction is a sufficient basis to reject it. *See United States v. Cong. of Indus. Organizations*, 335 U.S. 106, 121 (1948).

In this regard, it is important to reiterate that the potential constitutional problems with delimiting the privilege along the denomination lines to the detriment of certain faiths have been detailed

not only by various courts—including, most recently, the United States Supreme Court[27]—but also by members of the General Assembly in the course of enacting the CPSL. *See* Pa.H.J., at 1853 (remarks of Representative Olasz) ("I think there is a constitutional question that arises when you start tampering with religion."). Accordingly, inasmuch as any interpretation that would categorically preclude the elders from the protections afforded by Section 5943 because of the tenets of their faith would cast significant doubt on the statute's constitutionality, this Court should reject it.

4. If the Court finds that the exception to the clergyman privilege bars the elders from invoking the privilege, that specific part of Section 5943 should be declared unconstitutional and severed from the statute.

As discussed immediately above, the most sensible approach is to construe the Exception Clause's reference to "ministers" in accordance with the ordinary usage of that term, thereby averting the constitutional issue altogether. However, to the extent this Court concludes that the *only* reasonable interpretation of the exception to the clergyman privilege is that elders are excluded from the protections it

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[27] *Our Lady of Guadalupe*, 140 S.Ct. at 2064 ("Requiring the use of the title would constitute impermissible discrimination[.]").

affords, Section 5943 must be declared unconstitutional, as it violates the prohibition against granting denominational preferences under the First and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 3, of the Pennsylvania States Constitution. *See generally Larson v. Valente*, 456 U.S. 228, 242-46 (1982).

With regard to the Federal Constitution, the First Amendment to the United States Constitution prohibits discrimination against a particular denomination or religious sect. *See Larson*, 456 U.S. at 246. Moreover, because "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another[,]" such statutory schemes are subject to the strict scrutiny standard of review, rather the more forgiving "*Lemon* test" applied in other Establishment Clause cases. *See Larson*, 456 U.S. at 252 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Accordingly, when a law is either facially discriminatory or "discriminatory in impact,"[28] its constitutionality is adjudged under a strict scrutiny standard, which requires the state to establish that the law is: (a) necessary to advance a

[28] *Meltzer v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 577 F.2d 311, 318 (5th Cir. 1978).

compelling governmental interest; and (b) narrowly tailored to further that purpose. *See Larson*, 456 U.S. at 252.

Against this backdrop, to the extent Section 5943's Exception Clause categorically precludes the application of the clergyman privilege to communications between elders and congregants, it violates the Establishment Clause of the First Amendment. As a preliminary matter, the discriminatory impact is self-evident under any construct that would categorically bar the elders from asserting the privilege because of the tents of their faith, since it would single out a specific religion for unfavorable treatment. In this regard, while limitations pertaining to ordination are not uncommon, it is notable that a comprehensive survey of similar provisions in other jurisdictions reveals that Section 5943 is unique in excluding "members of religious organizations in which members other than the leader thereof are deemed clergyman or ministers." Indeed, that peculiar exception has been highlighted by various scholars for its discriminatory impact—and, perhaps, intent—relative to Jehovah's Witnesses.[29] For instance,

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[29] *See* Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 (1st ed.) (singling out the exception in Section 5943, and noting that "[w]riters who favor such a restriction have sometimes been more candid in admitting that the aim is to deny the privilege to Jehovah's Witnesses"); William H.

one leading treatise presents substantial authority for the proposition that Section 5943's exception was seemingly borne out of prejudice against Jehovah's Witnesses and cautions that "[t]hose who think it possible to deny the privilege to Jehovah's Witnesses do not consider whether or not this amounts to a judicial intervention into the internal organization of religions that presents problems under the First Amendment." Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 n.123 (1st ed.).[30]

Tiemann & John C. Bush, *The Right to Silence: Privileged Clergy Communications and the Law*, at 115 (1st ed. 1983) (noting that "Pennsylvania's statute limit[s] the rights of Jehovah's Witnesses"); Seward Reese, *Confidential Communications To The Clergy*, 24 Ohio St.L.J. 55, 64 (1963) (noting that Section 5943 "seems to preclude Jehovah's Witnesses from claiming the privilege even though all Jehovah's Witnesses are 'ministers'").

[30] The discriminatory intent of this statute is unfortunate, but unsurprising, given the description of Jehovah's Witnesses in various decisions during the era immediately preceding its enactment in 1959. *See*, *e.g.*, *Reid v. Borough of Brookville*, 39 F. Supp. 30, 31 (W.D. Pa. 1941) ("The plaintiffs are members of a cult known as 'Jehovah's witnesses', and the defendants are boroughs of the Western District of Pennsylvania and their officers."); *Com. v. Hessler*, 15 A.2d 486, 488 (Pa. Super. 1940) (reciting the trial court's opinion, which found that Jehovah's Witnesses" belief system "seems to be a doctrine fraught with dangers inimical to the rights of the community which, if carried to its logical extent, would permit every member of Jehovah's Witnesses to make for himself the laws that control and regulate his conduct with his fellowmen"); *see also United States v. Balogh*, 157 F.2d 939, 941 (2d Cir. 1946) (referring to Jehovah's Witnesses as a cult), *vacated*, 329 U.S. 692 (1947); *Leiby v. City of Manchester*, 33 F. Supp. 842, 843 (D.N.H. 1940) (same), *decree rev'd*,117 F.2d 661 (1st Cir. 1941); *Summers v. Summers*, 22 N.W.2d 81, 82 (Mich. 1946) (same); *Csiki v. City of Moultrie*, 29 S.E.2d 791, 791 (Ga. App. 1944) (same); *Emch v. City of Guymon*, 127 P.2d 855, 858 (Okla. Crim. 1942) (same).

Even more recent decisions in this Commonwealth have treated the religion with a level of suspicion rarely found in published opinions. *See Com. ex rel.*

In light of the *prima facie* showing of Section 5943's discriminatory impact (if not outright discriminatory intent), the statute is plainly subject to strict scrutiny. In this respect, it is not at all clear what compelling governmental interest the Exception Clause advances, since any *legitimate* interest the government may have in keeping the privilege within its proper bounds is advanced by *Stewart*'s four-prong test.[31] Relatedly, while the statute may, in fact, be narrowly tailored to discriminate against a specific religion—*i.e.*, Jehovah's Witnesses—it is in no way tailored to achieve a compelling legitimate interest. Notably, various federal and state courts have previously cautioned that delimiting the clergyman privilege to certain chosen denominations raises serious First Amendment concerns. *See In re Grand Jury Investigation*, 918 F.2d 374, 385 n.14 (3d Cir. 1990) ("[T]he prospect of restricting the privilege to Roman Catholic penitential communications raises serious first amendment concerns."); *see also*

Lebowitz v. Lebowitz, 307 A.2d 442, 443 (Pa. Super. 1973) ("It is possible to sympathize with the husband's bitterness and frustration because of his wife's interest in what he considered a strange cult[.]").

[31] Again, the Wright & Miller treatise offers a cogent rejoinder in this regard. *See* Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 (1st ed.).

Cox v. Miller, 296 F.3d 89, 107-111 (2d Cir. 2002); *State v. Martin*, 975 P.2d 1020, 1028 (Wash. 1999); *Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994); *accord State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998); *Waters*, 103 P.3d at 294. In short, whatever the governmental interest may be, a statute that has the effect (if not intent) of excluding a specific religious group, while including other similarly situated faiths, is hardly closely fitted to achieve that goal.

Separate and apart from the violation of the Federal Constitution, interpreting the Exception Clause as an unqualified prohibition against the elders' right to avail themselves of the clergyman privilege also violates Article I, Section 3 of the Pennsylvania Constitution. Pa. Const. art. I, § 3. Although the most recent decision addressing Article I, Section 3 of the Pennsylvania Constitution and its Federal counterpart suggests that it is conterminous with the First Amendment to the United States Constitution, *see Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366 (Pa. 1974), that decision was rendered prior to the Pennsylvania Supreme Court's landmark ruling in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), which held that the Pennsylvania Constitution may afford greater protections than its Federal

counterpart when individual liberties are involved. Specifically, the *Edmunds* Court announced a four-factor test for determining whether a right guaranteed under the State Constitution should be interpreted as providing greater protections than one secured in the Federal Constitution:

> 1) text of the Pennsylvania constitutional provision;
>
> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case-law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Id. at 893.

Turning to the *Edmunds* analysis, application of the first factor alone brings the heightened protection afforded under the State Constitution into focus, since the State Constitution, among other things, expressly proscribes laws granting denominational preferences—a prohibition which is only implicit in its Federal counterpart. *See* Pa. Const. art. I, § 3 (providing that "no preference shall ever be given by law to any religious establishments or modes of worship"). Those enhanced protections are also underscored by other provisions in the State Constitution. For instance, unlike provisions in

the Federal Constitution relating to the armed forces, Article III, Section 16 of the State Constitution, which provides for the creation of the National Guard, expressly exempts individuals who harbor religious objections from military service. *See* Pa. Const. art. III, § 16. Accordingly, the State Constitution is decisively more forceful than its Federal counterpart in pronouncing that religious liberties must be scrupulously protected.

As for the second factor, several decisions from the 1800s evince the broader protections afforded under the State Constitution. For instance, in *Guardians of the Poor*, discussed *supra*, Chief Justice Tilghman remarked:

> The minds of *William Penn* and his followers would have revolted at the idea of an established church. *Liberty to all, but preference to none;* this has been our principle, and this our practice. But although we have had no established church, yet we have not been wanting in that respect, nor niggards of those privileges, which seem proper for the clergy of *all religious denominations.*

Id. at 558-560 (emphasis in original) (per Tilghman, J.); *see also id.* at 561 (per Yates, J.). The caselaw aside, the history of Pennsylvania's founding also reflects a paramount concern for protecting the religious liberties of minority groups and faiths that are regarded as "non-

mainstream." *See* Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81, 137 (2001).[32]

With regard to the third *Edmunds* factor, it does not appear that any clergyman privilege statute has been assessed under a state constitutional provision; however, at least ***eleven*** states have held that their respective state constitutions provide greater religious liberties than the Federal Constitution.[33] As noted by one commentator, "[t]he jurisprudence of other states whose constitutions resemble the text of Pennsylvania's charters, or whose history parallels the Commonwealth's abundant protection of minority faiths, have overwhelmingly supported strict scrutiny of neutral laws of general applicability that burden religion." Gildin, *Coda to William Penn's Overture*, 4 U. Pa. J. Const. L. at 140.

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[32] *See also* Gildin, *Coda to William Penn's Overture*, 4 U. Pa. J. Const. L. at 85.

[33] *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640 (Mont. 1993); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *In re Browning*, 476 S.E.2d 465 (N.C. Ct. App. 1996); *State v. Evans*, 796 P.2d 178 (Kan. Ct. App. 1990).

As for the fourth factor, the General Assembly, as noted above, has already expressed a policy preference for protecting confidential communications and any factors unique to Pennsylvania—such as the religious liberties at the very foundation of the Commonwealth, *see generally id.*[34]—militate in favor of zealously guarding against violations of religious liberties.

Finally, with regard to the proper remedy, this Court should sever the unconstitutional portion of the Exception Clause, while keeping the remainder of the provision intact. It is well-settled that, unless "after the void provisions are excised, the remainder of the statute is incapable of execution in accordance with the General Assembly's intent[,]" *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.*), 161 A.3d 827, 840 (Pa. 2017), Pennsylvania courts generally favor severing the offending passages of a statute, rather than a wholesale invalidation of the provision. *See Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1228 (Pa. Cmwlth. 2018). Here, because Section 5943 can be easily executed without the unconstitutional Exception

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[34] *See also S*cott Douglas Gerber, *Law and the Holy Experiment in Colonial Pennsylvania*, 12 NYU J. L. & Liberty 618 (2019) (highlighting Pennsylvania's unique role in pioneering religious freedoms); Philip Hamburger, *Religious Freedom in Philadelphia*, 54 Emory L.J. 1603 (2005).

Clause, the proper remedy is to sever it, while keeping the remainder of the provision intact.

IV. CONCLUSION

Because the elders are clergymen under Section 5943 of the Judicial Code and are not members of a religious organization that deems all members other than "the leader," ministers, this Court should enter an order declaring that the elders of Ivy Hill Congregation are entitled to the invoke the clergyman privilege statute. To the extent this Court finds that the elders of Ivy Hill Congregation are precluded from invoking the privilege under the exception to Section 5943, that particular statutory clause should be declared unconstitutional and severed.

Respectfully submitted,

Dated: September 22, 2020

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WORD COUNT CERTIFICATION

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