

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 OPPOSITION TO PRELIMINARY
OBJECTIONS**

Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000 | Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com

Attorneys for Petitioner Ivy Hill Congregation of Jehovah's Witnesses

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. COUNTERSTATEMENT OF THE QUESTIONS INVOLVED..... 3

III. COUNTERSTATEMENT OF THE CASE..... 5

 A. Role of Elders in the Ivy Hill Congregation 5

 B. Spiritual Counseling in the Ivy Hill Congregation 9

 C. The Child Protective Services Law 12

 D. Recent Enforcement Action Under the CPSL 15

 E. Procedural History 19

IV. SUMMARY OF THE ARGUMENT 20

V. ARGUMENT 22

 A. Ivy Hill Congregation has standing to pursue the claims in the
 Petition for Review..... 23

 B. Ivy Hill Congregation has joined all indispensable parties..... 26

 C. Ivy Hill Congregation has not failed to exhaust administrative
 remedies because no such remedies exist..... 32

 D. Ivy Hill Congregation’s claims in Counts I are legally sufficient. 34

 E. Ivy Hill Congregation’s claims in Counts II are legally sufficient.
 35

VI. CONCLUSION..... 36

TABLE OF AUTHORITIES

Cases

<i>J.S. v. Pennsylvania State Ethics Comm’n</i> , 669 A.2d 1105 (Pa. Cmwlth. 1996)	30
<i>Arsenal Coal Co. v. Com., Dep’t of Envtl. Resources</i> , 477 A.2d 1333 (Pa. 1984)	32
<i>C.S. v. Com., Dep’t of Human Servs.</i> , 184 A.3d 600 (Pa. Cmwlth. 2018)	31
<i>City of Philadelphia v. Com.</i> , 838 A.2d 566 (Pa. 2003).....	29, 30, 31
<i>Com. v. Stewart</i> , 690 A.2d 195 (Pa. 1997).....	21, 34
<i>Cty. of Berks ex rel. Baldwin v. Pa. Lab. Rel. Bd.</i> , 678 A.2d 355 (Pa. 1996)	32
<i>Delaware River Port Auth. v. Com., State Ethics Comm’n</i> , 558 A.2d 932 (Pa. Cmwlth. 1989).....	30
<i>Firearm Owners Against Crime v. City of Harrisburg</i> , 218 A.3d 497 (Pa. Cmwlth. 2019)	3, 20, 24, 25
<i>First Philadelphia Preparatory Charter Sch. v. Com., Dep’t of Educ.</i> , 179 A.3d 128 (Pa. Cmwlth. 2018)	29
<i>In re Shaeffer’s Estate</i> , 52 Dauphin Co. Reports 45 (1942)	14
<i>Phantom Fireworks Showrooms, LLC v. Wolf</i> , 198 A.3d 1205 (Pa. Cmwlth. 2018)	26, 31
<i>Robinson Twp., Washington Cty. v. Com.</i> , 83 A.3d 901 (Pa. 2013)	24
<i>Stedman v. Lancaster Cty. Bd. of Commissioners</i> , 221 A.3d 747 (Pa. Cmwlth. 2019)	29
<i>Stilp v. Com.</i> , 910 A.2d 775 (Pa. Cmwlth. 2006)	31

Statutes

18 Pa.C.S. § 4304.....	13
23 Pa.C.S. § 6302.....	28
23 Pa.C.S. § 6303.....	30
23 Pa.C.S. § 6306.....	12
23 Pa.C.S. § 6311.....	13, 25
23 Pa.C.S. § 6311.1.....	passim
23 Pa.C.S. § 6313.....	13, 25, 27, 28
23 Pa.C.S. § 6319.....	13, 27
23 Pa.C.S. § 6331.....	12
23 Pa.C.S. § 6332.....	12
23 Pa.C.S. § 6333.....	12
23 Pa.C.S. § 6334.....	28
23 Pa.C.S. § 6334.1.....	12
23 Pa.C.S. § 6335.....	13
23 Pa.C.S. § 6340.....	12
23 Pa.C.S. § 6383.....	12
42 Pa.C.S. § 5943.....	passim
42 Pa.C.S. § 7541.....	23, 35
65 Pa.C.S. § 1107.....	30
P.L. 1317 (Oct. 14, 1959).....	14

Other Authorities

Docket, *Com. v. Esh*, No. 36-CR-0002586-2020 (C.P. Lanc.).....17

Docket, *Com. v. Esh*, No. MJ-02303-CR-100-2020 (Magisterial Dist. Ct.)
.....17

Matt Miller, *Amish bishop charged with failing to report suspected sex
abuse of girls*, PennLive (Apr. 22, 2020) 16

Pa.H.R. Legis. J. (Oct. 5, 1993) 15

U.S. Dep’t of Justice, *Census of State and Local Law Enforcement
Agencies, 2008* (July 2011) 30

I. INTRODUCTION

Petitioner Ivy Hill Congregation of Jehovah’s Witnesses filed the Petition for Review to seek an answer to the following basic question: Are the elders of Ivy Hill “clergymen” for purposes of the exception to mandatory reporting found in 23 Pa.C.S. § 6311.1(b)(1)? Respondent Pennsylvania Department of Human Services (“DHS”) has never answered this question, even in any of its pleadings in this case, but has essentially provided this chilly rejoinder to the elders: you’ll find out if you are clergymen only when law enforcement comes to arrest you for a failure to report. *See* DHS br. at 14.¹ This is an unacceptable state of affairs, and is exactly the type of anxiety and pending jeopardy that a declaratory judgment action is intended to resolve. DHS attempts to sidestep this by ignoring binding *en banc* precedent regarding standing, by grossly understating its statutory role under the Child Protective Services Law (“CPSL”) (e.g., DHS actually states that whether child abuse is reported to it is “*of no consequence*,” DHS br. at 14 (emphasis

¹ “[W]hether an elder at Ivy Hill, or any mandatory report for that matter, fails to report a suspected instance of child abuse is of no consequence to the Department. The CPSL does not provide the Department with the ability to investigate an allegation that a mandatory report failed to report. Failure to report a case of suspected child abuse is a criminal offense investigated and prosecuted by law enforcement officials.” DHS br. at 14.

added)), and by serially mischaracterizing the relief Ivy Hill
Congregation seeks in the Petition for Review. With each of the
foregoing properly framed, as is done below, the Court will see that
none of the pending Preliminary Objections withstands scrutiny, and
will see that each should be overruled.

II. COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Where the elders at Ivy Hill Congregation are within the class of persons with a duty to “immediately” report suspected child abuse under the CPSL, do they have standing to file a pre-enforcement, declaratory relief action regarding the CPSL under the standards of *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497 (Pa. Cmwlth. 2019)?

Suggested answer: yes.

2. Where the CPSL mandates reporting only to DHS, and where a report to DHS is the only way to guarantee non-prosecution under the CPSL, is DHS the only indispensable party to an action seeking declaratory judgment regarding the duty to report?

Suggested answer: yes.

3. Where DHS has not identified any statutory or regulatory administrative remedy available to seek clarification under the CPSL, does this Court have immediate jurisdiction to provide such clarification?

Suggested answer: yes.

4. Given the Pennsylvania Supreme Court's guidance on which communications are subject to the clergymen's privilege, and given that Ivy Hill Congregation in Count I is only seeking a declaration that its elders are statutorily eligible to claim the exception to mandatory reporting available to clergymen, has Ivy Hill Congregation stated a legally sufficient claim for relief in Count I?

Suggested answer: yes.

5. Given the possibility that the clergymen's privilege in the Judicial Code carries an unlawful denominational preference, has Ivy Hill Congregation stated a legally sufficient claim for relief in Count II that any such preference is unconstitutional?

Suggested answer: yes.

III. COUNTERSTATEMENT OF THE CASE

A. Role of Elders in the Ivy Hill Congregation

Ivy Hill Congregation 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, a male congregant may be appointed as an elder provided he satisfies certain Scriptural qualifications found in the Bible at 1 Timothy 3:1-13;² Titus

² 1 Timothy 3:1-13:

This statement is trustworthy: If a man is reaching out to be an overseer, he is desirous of a fine work. The overseer should therefore be irreprehensible, a husband of one wife, moderate in habits, sound in mind, orderly, hospitable, qualified to teach, not a drunkard, not violent, but reasonable, not quarrelsome, not a lover of money, a man presiding over his own household in a fine manner, having his children in subjection with all seriousness (for if any man does not know how to preside over his own household, how will he care for the congregation of God?), not a newly converted man, for fear that he might get puffed up with pride and fall into the judgment passed on the Devil. Moreover, he should also have a fine testimony from outsiders so that he does not fall into reproach and a snare of the Devil.

Ministerial servants should likewise be serious, not double-tongued, not indulging in a lot of wine, not greedy of dishonest gain, holding the sacred secret of the faith with a clean conscience.

Also, let these be tested as to fitness first; then let them serve as ministers, as they are free from accusation.

1:5-9³ James 3:17, 18;⁴ and 1 Peter 5:2, 3.⁵ 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

Women should likewise be serious, not slanderous, moderate in habits, faithful in all things.

Let ministerial servants be husbands of one wife, presiding in a fine manner over their children and their own households. For the men who minister in a fine manner are acquiring for themselves a fine standing and great freeness of speech in the faith that is in Christ Jesus.

All citations to the Bible herein are to the New World Translation of the Holy Scriptures.

³ Titus 1:5-9:

I left you in Crete so that you would correct the things that were defective and make appointments of elders in city after city, as I instructed you: if there is any man free from accusation, a husband of one wife, having believing children who are not accused of debauchery or rebelliousness. For as God's steward, an overseer must be free from accusation, not self-willed, not quick-tempered, not a drunkard, not violent, not greedy of dishonest gain, but hospitable, a lover of goodness, sound in mind, righteous, loyal, self-controlled, holding firmly to the faithful word as respects his art of teaching, so that he may be able both to encourage by the teaching that is wholesome and to reprove those who contradict.

⁴ James 3:17-18: "But the wisdom from above is first of all pure, then peaceable, reasonable, ready to obey, full of mercy and good fruits, impartial, not hypocritical. Moreover, the fruit of righteousness is sown in peaceful conditions for those who are making peace."

⁵ 1 Peter 5:2-3: "Shepherd the flock of God under your care, serving as overseers, not under compulsion, but willingly before God; not for love of dishonest gain, but eagerly; not lording it over those who are God's inheritance, but becoming examples to the flock."

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 (“But do not reveal what you were told confidentially[.]”). 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 ¶ 29.⁶ 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 more

⁶ 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.

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. DHS is the Commonwealth agency charged with administering and overseeing the implementation of the CPSL, *see* DHS br. at 8, 13-14, 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).⁷ 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 information regarding serious sins, including possible abuse of minors, which—absent the Clergymen Privilege Statute—would implicate the

⁷ Available at <https://www.legis.state.pa.us/WU01/LI/HJ/1993/0/19931005.pdf>.

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)).⁸

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

⁸ 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://ujisportal.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.

E. Procedural History

On May 20, 2020, Ivy Hill Congregation filed the Petition for Review, seeking declaratory relief under two counts. Count one seeks a declaration that elders in the Ivy Hill Congregation are “clergymen” for purposes of 42 Pa.C.S. § 5943 and 23 Pa.C.S. § 6311.1(b)(1); count two, in the alternative, seeks a declaration that a portion of 42 Pa.C.S. § 5943 is unconstitutional and should be severed. On May 22, 2020, Ivy Hill Congregation filed its Application for Summary Relief.

On July 31, 2020, DHS filed Preliminary Objections to the Petition for Review and filed an Answer to the Application for Summary Relief. Ivy Hill Congregation filed a Response to the Preliminary Objections on August 10, 2020. DHS filed its Brief in Support of Preliminary Objections on September 18, 2020.

IV. SUMMARY OF THE ARGUMENT

Ivy Hill Congregation has standing to pursue the claims set forth in the Petition for Review under the principles expressed in *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497 (Pa. Cmwlth. 2019). The elders are within the class of persons subject to the duty to report child abuse claims “immediately” to DHS upon receipt of such information. The information does not need to be reported under certain circumstances if the elders are “clergymen” under the law, and a present uncertainty exists about that status, which DHS is unwilling to resolve.

Next, DHS is the only indispensable party to this pre-enforcement declaratory judgment action since it is the only agency, under the CPSL, to whom a report *must* be made. Further, making a report to DHS is the only way to guarantee that a reporter will not be subject to criminal sanctions.

Further, Ivy Hill Congregation has not failed to exhaust administrative remedies because no such remedies exist. In its Preliminary Objections and in its brief, DHS could not point to one.

The relief requested in Count I will resolve the legal uncertainty here because a declaration of whether or not the elders at Ivy Hill Congregation are clergymen will guide their conduct when coupled with existing precedent in *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997).

Finally, Count II states a claim for relief because Ivy Hill Congregation is not seeking a blanket declaration that all of its elders' communications are privileged. Instead, Ivy Hill Congregation is seeking, in the alternative, a declaration that if the only reason its elders cannot claim the clergymen's privilege is their chosen faith, then a portion of the Judicial Code should be declared unconstitutional.

V. ARGUMENT

Most of DHS’s preliminary objections are based on a fundamental mischaracterization of what Ivy Hill Congregation is seeking in the Petition for Review, accordingly, before turning to each objection, an appropriate frame for what is, and what is not, at issue is relevant. To that end, Ivy Hill Congregation is *not* seeking a declaration that “all of [the elders’] communications” are entitled to a “blanket privilege[.]” *See* Prelim. Obj. at 2; DHS br. at 2-3. On the contrary, Ivy Hill Congregation is seeking only a narrow declaration that its elders are “clergymen” under 42 Pa.C.S. § 5943, and thus, if the statutory conditions about a given communication are otherwise met (i.e., “in the course of his duties”; “in confidence”), then the elders are subject to the exemption to reporting in 23 Pa.C.S. § 6311.1(b)(1). *See* Petition for Review at 20, Prayer for Relief. To be clear, Ivy Hill Congregation is *absolutely not* seeking a declaration that every communication elders engage in with congregants is privileged and exempt from reporting under 23 Pa.C.S. § 6311.1(b)(1), or that some per se exemption to reporting applies if they are deemed clergymen by this Court.

Against the foregoing context, the Court will readily see that the Preliminary Objections based on standing, indispensable parties, failure to exhaust administrative remedies, and failure to state a claim are without merit and should be overruled.

A. Ivy Hill Congregation has standing to pursue the claims in the Petition for Review.

The faulty premise of DHS’s standing challenge appears to be that a party can only file a declaratory relief action *after* enforcement proceedings are already underway. *See* DHS br. at 10. This is not correct, as this Court, *en banc*, just last year declared.

To illuminate, the case before the Court is a pre-enforcement challenge under the Declaratory Judgment Act (“DJA”). Critically, the DJA is intended to be remedial legislation, which is liberally construed, “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]” 42 Pa.C.S.

§ 7541(a).⁹ Against this remedial purpose, Ivy Hill Congregation has standing under the principles set forth in *Firearm Owners Against*

⁹ Of note, at no point in the Preliminary Objections or in its brief in support thereof does DHS take an affirmative position on whether the elders at Ivy Hill Congregation are “clergymen” under 23 Pa.C.S. § 6311.1(b)(1) or 42 Pa.C.S. § 5943, which just furthers the legal uncertainties described in the Petition for Review.

Crime v. City of Harrisburg, 218 A.3d 497, 509 (Pa. Cmwlth. 2019) (*en banc*) (hereafter, *FOAC*), *appeal pending*, No. 29 MAP 2020 (Pa.). See also *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 924-25 (Pa. 2013).

In *FOAC*, the petitioners were within the class of persons subject to a mandatory duty to report lost/stolen firearms within 48 hours of such an event. Even though they had not yet lost a firearm nor had they reported any such loss, the Commonwealth Court held they had standing to challenge the law. It did so stating, among other things, that “[a]lthough the reporting obligation is triggered only in the event a firearm is lost or stolen, the reporting obligation nonetheless exists now. The harm that the Individual Plaintiffs wish to abate is the affirmative obligation to report lost/stolen firearms to local government officials as a result of their decision to own and carry firearms in the City.” *FOAC*, 218 A.3d at 509.

The facts in *FOAC* are virtually identical to the facts at bar. Ivy Hill Congregation’s elders are within the class of persons subject to a duty to report under the CPSL when, or if, reportable facts come to their attention, and they must make the report “immediately” when the

duty to report is triggered. *Compare* PFR at ¶¶ 44, 50, 57, *and*, 23 Pa.C.S. § 6311(a) (identifying “mandated reporters”), § 6313(a)(1) (requiring mandatory reporters to make reports “immediately”), *with FOAC*, 218 A.3d at 509 (nothing petitioners’ heightened interest in gun ordinance based on its application to them as gun owners, and noting ordinance required a report, when circumstances warranted it, within 48 hours). Thus, just as was the case with the petitioners in *FOAC*, Ivy Hill Congregation has standing in this matter.

Critically, in explaining its challenge to standing, DHS **does not even cite to *FOAC*** in its brief, let alone distinguish it. This is remarkable given that *FOAC* utterly controls the outcome here and given that Ivy Hill Congregation cited to *FOAC* extensively in its Response to the Preliminary Objections as well as in its initial brief in support of summary relief, filed on September 4, 2020.¹⁰ *See* Response to Prelim. Obj. at ¶¶ 29-33; Ivy Hill br. in support of summary relief at 81-82. Plainly DHS was on notice of the importance of *FOAC* here, yet it entirely ignored it; that DHS did so is a tacit, if not express, admission that it has no rebuttal to *FOAC*.

¹⁰ This brief was later struck by the Court. *See* Sept. 23, 2020 Order.

Therefore, the standing preliminary objection by DHS should be overruled.

B. Ivy Hill Congregation has joined all indispensable parties.

DHS contends that Ivy Hill has failed to join an *additional sixty-nine parties* to this action, including the Office of Attorney General, the Pennsylvania State Police, and the local district attorneys for the sixty-seven counties across the Commonwealth. *See* DHS br. at 11-15. According to DHS, these sixty-nine parties are indispensable to this declaratory judgment action because these “law enforcement officials” are tasked with investigating and prosecuting any alleged criminal violations under the CPSL that are referred to them by DHS. *See id.* But none of these sixty-nine “law enforcement officials,” nor any other “municipal police officers,” are necessary, let alone indispensable, to this *pre-enforcement* challenge that concerns solely DHS. A respondent party is indispensable “when its rights are so connected with the claims of the litigants that no relief can be granted without infringing on those rights.” *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1214 (Pa. Cmwlth. 2018). Under the claims set forth in the Petition for Review, DHS is the *only* indispensable party to this action.

To explain, under the CPSL, DHS is the only Commonwealth agency to whom a mandatory reporter is *required* to make a report of child abuse. *See* 23 Pa.C.S. § 6313(a)(1) (“A mandated reporter *shall immediately make an oral report* of suspected child abuse *to the department* via the Statewide toll-free telephone number under section 6332 (relating to establishment of Statewide toll-free telephone number) or a written report using electronic technologies under section 6305 (relating to electronic reporting).” (emphasis added)). It is the failure to speak *to DHS* that subjects a reporter to potential or actual criminal sanction. *See* 23 Pa.C.S. § 6319(a)(1) (“A person or official required by this chapter to report a case of suspected child abuse or to make a referral to the appropriate authorities commits an offense if the person or official willfully fails to do so.”). Further, only if the mandated reporter speaks *to DHS* is the reporter *guaranteed* to be immune from criminal prosecution; a report to anyone else is subject to an additional layer of scrutiny regarding whether the report was in “good faith.” *See* 23 Pa.C.S. § 6319(a)(4) (“A report of suspected child abuse to law enforcement or the appropriate county agency by a mandated reporter, made in lieu of a report *to the department*, shall not constitute an

offense under this subsection, *provided that the report was made in a good faith effort* to comply with the requirements of this chapter.”

(emphasis added)). And because Ivy Hill Congregation is only seeking a declaration through the Petition for Review of whether its elders have to speak to DHS under the CPSL, *see* PFR at 20, Prayer for Relief, DHS is the only indispensable party.¹¹

Furthermore, the ***sixty-nine additional parties*** identified by DHS as purportedly necessary or indispensable are *not* entities or individuals under the CPSL to whom communications are mandatory. Only communications to DHS, the Respondent here, are compulsory under the CPSL, and it is DHS who refers these compulsory communications to a “law enforcement official,” if necessary. *See* 23 Pa.C.S. § 6313(a)(1) (“A mandated reporter shall immediately make an oral report of suspected child abuse to the department...”); 23 Pa.C.S. § 6334(c) (“If the department receives a report of suspected child abuse that also alleges that a criminal offense has been committed

¹¹ Incredibly, DHS states in its brief that, “whether an elder at Ivy Hill, or any mandatory reporter for that matter, fails to report a suspected instance of child abuse is of no consequence to the Department.” DHS br. at 14. Such a callous statement is not only factually and legally incorrect, but it runs directly counter to the very purpose of the CPSL. *See* 23 Pa.C.S. § 6302(b) (“It is the purpose of this chapter to encourage more complete reporting of suspected child abuse[.]”).

against the child, the department shall immediately transmit an oral notice or notice by electronic technologies to the appropriate law enforcement official in the county where the suspected child abuse is alleged to have occurred.”). In other words, no referral is made to any “law enforcement official,” unless and until a report is made to DHS (and DHS alone), and then DHS determines that a criminal offense may have been committed.¹² *See Stedman v. Lancaster Cty. Bd. of Commissioners*, 221 A.3d 747, 760 (Pa. Cmwlth. 2019) (holding Attorney General was *not* an indispensable party to lawsuit implicating provisions of Forfeiture Act that pertained solely to “conduct, duties, and responsibilities” of Lancaster County parties, and not Attorney General); *First Philadelphia Preparatory Charter Sch. v. Com., Dep’t of Educ.*, 179 A.3d 128, 135 (Pa. Cmwlth. 2018) (holding Office of Attorney General was *not* indispensable party based on its general obligation to enforce the laws of the Commonwealth).

¹² It should be noted that the Office of Attorney General is representing DHS in this matter. Thus, to the extent that the “rights” or “interests” of the OAG are potentially implicated in this action, they are being adequately preserved and presented by the OAG through its representation of DHS. *See City of Philadelphia v. Com.*, 838 A.2d 566, 582 (Pa. 2003) (“where a person's official designee is already a party, the participation of such designee may alone be sufficient, as the interests of the two are identical, and thus, the participation of both would result in duplicative filings”).

Also, employing the logic of DHS to its complete end, since every “law enforcement official” in the Commonwealth could potentially investigate a child abuse allegation (including “municipal police officer[s]”), presumably the list of “indispensable” respondents should include the over 1000 law enforcement agencies and 27,000 sworn police officers statewide. *See* 23 Pa.C.S. § 6303 (defining “law enforcement official” to include “a municipal police officer”); U.S. Dep’t of Justice, *Census of State and Local Law Enforcement Agencies, 2008*, at 15 (July 2011) (listing Pennsylvania as having 1117 law enforcement agencies and 27,413 sworn personnel).¹³ A holding that Ivy Hill needs to join over 28,000 additional parties would be absurd.¹⁴ *See City of Philadelphia*, 838 A.2d at 582-83 (discussing disruptive nature of a requirement to join, among other parties, all police officers in the Commonwealth; holding a requirement to join all parties with “any interest” in a

¹³ Available at <https://www.bjs.gov/content/pub/pdf/cslllea08.pdf>.

¹⁴ Similar to DHS under the CPSL, the Pennsylvania State Ethics Commission has the authority under the Public Official and Employee Ethics Act to refer matters to “law enforcement officials” for criminal prosecution. *See* 65 Pa.C.S. § 1107. However, as here, this criminal referral authority under the Ethics Act does not make all, or even some, of the “law enforcement officials” indispensable parties to declaratory judgment actions involving the State Ethics Commission. *See P.J.S. v. Pennsylvania State Ethics Comm’n*, 669 A.2d 1105 (Pa. Cmwlth. 1996) (declaratory judgment action challenging jurisdiction of State Ethics Commission to investigate individual); *Delaware River Port Auth. v. Com., State Ethics Comm’n*, 558 A.2d 932 (Pa. Cmwlth. 1989) (same).

declaratory relief action “would result in an unwieldy judicial resolution process”).

In the end, it is the statutory requirement to speak, or not, *to DHS* under the CPSL that is at issue in this pre-enforcement challenge, and DHS is the appropriate, and *only*, party necessary in a declaratory relief challenge of this type. *Cf. C.S. v. Com., Dep’t of Human Servs.*, 184 A.3d 600 (Pa. Cmwlth. 2018) (declaratory relief action concerning provisions of CPSL where the Department’s Bureau of Hearings and Appeals was the only respondent). Indeed, because of the specific statutory requirement to speak *to DHS* and no one else, the sixty-nine other entities and individuals identified by DHS do not have “rights [that] are so connected with the claims of the litigants that no relief can be granted without infringing on those rights.”¹⁵ *Phantom Fireworks*, 198 A.3d at 1214.

¹⁵ To the extent that any “rights” or “interests” of the sixty-nine “law enforcement officials” identified by DHS may be implicated in this action, those “rights” or “interests” are “indirect or incidental,” such that joinder is not required. *See City of Philadelphia*, 838 A.2d at 582. Moreover, DHS can, and already has, adequately represented the “rights” and “interests” of these other parties in this case, without the need to join thousands of additional parties. *See Stilp v. Com.*, 910 A.2d 775, 786 (Pa. Cmwlth. 2006) (“The addition of hundreds of new parties to an already robust roster will not enhance the thoughtful disposition of [] challenges to legislative acts.”).

Therefore, DHS’s preliminary objection asserting the failure to join indispensable parties must be overruled as a matter of law.

C. Ivy Hill Congregation has not failed to exhaust administrative remedies because no such remedies exist.

DHS claims Ivy Hill Congregation has failed to exhaust administrative remedies, *see* Prelim. Obj. at ¶¶ 50-68; DHS br. at 15, but its argument suffers from a fatal flaw: it has not identified a single available remedy. To explain, while it is no doubt the case that a party must exhaust administrative remedies before turning to a court for relief, *see, e.g., Arsenal Coal Co. v. Com., Dep’t of Env’tl. Resources*, 477 A.2d 1333, 1338 (Pa. 1984), the linchpin of this rule is the *existence* of such a remedy. *See Cty. of Berks ex rel. Baldwin v. Pa. Lab. Rel. Bd.*, 678 A.2d 355, 360 (Pa. 1996) (“It is fundamental that prior to resorting to judicial remedies, litigants must exhaust all the adequate *and available* administrative remedies *which the legislature has provided.*” (emphasis added)). Here, DHS seems to imply that the supplied “remedy” is some kind of general ability to ask DHS for guidance, *see* DHS br. at 18 (“Petitioner could have reached out to the Department...”)—perhaps by a phone call, a letter, or maybe even a

petition for review filed in the Commonwealth Court (which method DHS prefers is not disclosed). But notably, DHS does not say, *because it cannot*, which statutory or regulatory vehicle this request would employ, nor does it say that DHS is any way obligated to respond. It does not do so because there is no such statute or regulation that is available to persons in the position like Ivy Hill Congregation’s elders that permits them to seek binding guidance from DHS.¹⁶

Next, ironically, DHS relies on the Office of Attorney General’s letter response from 1998 as evidence that remedies are available, *see* DHS br. at 18, but that letter actually underscores the *lack* of an administrative outlet. Indeed, in the Attorney General’s letter, he states he *won’t* answer the questions posed to him because ***no statute permits*** him to do so: “Under Pennsylvania law and the Commonwealth Attorneys Act, the Attorney General is empowered to give legal advice and opinions only to the Governor or the head of a state government agency. *The Attorney General has no authority to advise local government or public officials or citizens.*” *See* PFR, Ex. A

¹⁶ DHS’s argument also begs this question: If DHS is in fact willing to supply an answer to the questions posed by the Petition for Review in some administrative way, why has it not supplied any such answer in the many months this matter has been pending?

(emphasis added). This response proves the lack of an administrative remedy here, and not the availability of one as DHS generally posits.

Therefore, the failure to exhaust administrative remedies preliminary objection by DHS should be overruled.

D. Ivy Hill Congregation’s claims in Counts I are legally sufficient.

As to Count I, DHS claims that a declaration about the status of its elders would be a futile or meaningless remedy, *see* Prelim. Obj. at ¶¶ 69-83; DHS br. at 19-23; this is not so. While the conditions under which communications are privileged have been explained by the Supreme Court in *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997), *see* DHS br. at 21 (citing *Stewart*), what has not been explained by that Court, or any court or agency, is *who* specifically has the right to invoke the privilege. In other words, who is a “clergyman” under the law is unresolved, and that is what triggered the present controversy. With the “who” question answered by a declaration from this Court, the Ivy Hill Congregation elders will be able to guide their conduct by applying the *Stewart* principles to specific communications, which will, in turn, eliminate the uncertainty about future enforcement under the CPSL. Thus, a declaration from this Court on Count I will “settle and ... afford

relief from uncertainty and insecurity with respect to rights, status, and other legal relations,” 42 Pa.C.S. § 7541(a), which makes it a legally valid claim.

Therefore, the preliminary objection to Count I by DHS should be overruled.

E. Ivy Hill Congregation’s claims in Counts II are legally sufficient.

Finally, as to Count II, DHS claims that Ivy Hill Congregation is seeking a declaration that *all* communications its elders engage in are privileged, *see* Prelim. Obj. at ¶¶ 84-93; DHS br. at 23-25; this is also not so. With the Petition for Review in general, Ivy Hill is seeking only a *narrow* declaration that its elders are “clergymen” under 42 Pa.C.S. § 5943, and thus, if the statutory conditions about a given communication are otherwise met (*i.e.*, “in the course of his duties”; “in confidence”), then the elders are subject to the exemption to reporting in 23 Pa.C.S. § 6311.1(b)(1). *See* Petition for Review at 20, Prayer for Relief. And with Count II in particular, Ivy Hill Congregation is seeking a declaration, as alternative relief to Count I, that if 42 Pa.C.S. § 5943 does not apply to the elders of Ivy Hill Congregation solely because of the “exception” therein (“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”), then that exception should be declared unconstitutional and severed. *See* Petition for Review at 24-25, Prayer for Relief.¹⁷ Thus, the Department’s characterization of Count II is utterly incorrect; consequently, its challenge to Count II is likewise faulty.

Therefore, the preliminary objection to Count II by DHS should be overruled.

VI. CONCLUSION

Ivy Hill Congregation initiated this matter to eliminate any doubt about when its elders have a duty to report child abuse under the CPSL when they learn of the abuse in a spiritually confidential way. To be clear, the elders wish to follow the law fully, without exception. But they also wish to follow the dictates of their faith, which provides a safe

¹⁷ If the Court reaches Count II and grants the precise relief requested therein, the Court would sever 42 Pa.C.S. § 5943 as follows:

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.

harbor where congregants can privately confess their sins and solicit help in seeking forgiveness from God; just as is the case in other faiths. Yet the law is presently unclear as it applies to this scenario and to Ivy Hill Congregation's elders. DHS can, and should, resolve this lack of clarity with a single "yes" or "no" response (as in yes elders are clergymen, or no they are not clergymen), but it has, to date, refused to do so, which only *underscores* the need for judicial relief. Such relief is necessary because the stakes are simply too high to permit this doubt to linger. Accordingly, for the all the reasons set forth above, the Court should overrule all of DHS's preliminary objections and should immediately resolve the issues presented by the Petition for Review.

Respectfully submitted,

Dated: September 25, 2020

/s/ Joshua J. Voss _____

Matthew H. Haverstick (No. 85072)

Mark E. Seiberling (No. 91256)

Joshua J. Voss (No. 306853)

Shohin H. Vance (No. 323551)

KLEINBARD LLC

Three Logan Square

1717 Arch Street, 5th Floor

Philadelphia, PA 19103

Ph: (215) 568-2000

Fax: (215) 568-0140

Eml: mhaverstick@kleinbard.com

mseiberling@kleinbard.com

jvoss@kleinbard.com

svance@kleinbard.com

*Attorneys for Petitioner Ivy Hill
Congregation of Jehovah's
Witnesses*

WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 2135(a)(1). Based on the word count feature of the word processing system used to prepare this brief, this document contains 7451 words, exclusive of the cover page, tables, and the signature block.

Dated: September 25, 2020

/s/ Joshua J. Voss

Matthew H. Haverstick (No. 85072)

Mark E. Seiberling (No. 91256)

Joshua J. Voss (No. 306853)

Shohin H. Vance (No. 323551)

KLEINBARD LLC

Three Logan Square

1717 Arch Street, 5th Floor

Philadelphia, PA 19103

Ph: (215) 568-2000

Fax: (215) 568-0140

Eml: mhaverstick@kleinbard.com

mseiberling@kleinbard.com

jvoss@kleinbard.com

svance@kleinbard.com

*Attorneys for Petitioner Ivy Hill
Congregation of Jehovah's
Witnesses*