

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IVY HILL CONGREGATION OF	:	
JEHOVAH'S WITNESSES,	:	
Petitioner	:	
	:	
v.	:	No. 316 MD 2020
	:	
DEP'T OF HUMAN SERVS.,	:	
Respondent	:	<i>Electronically Filed Document</i>

RESPONDENT'S BRIEF IN REPLY

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TABLE OF CONTENTS

INTRODUCTION1

REPLY ARGUMENTS3

 A. Without an Immediate or Threatened Injury to the Elders of Ivy Hill,
 Petitioner Lacks Standing to Continue3

 B. Ivy Hill Has Failed To Join Any Indispensable Law Enforcement Party.....9

 C. Ivy Hill Has Failed to Exhaust Administrative Remedies14

 D. The Petition Is Otherwise Legally Insufficient15

CONCLUSION17

TABLE OF CITATIONS

Cases

<i>City of Philadelphia v. Commonwealth</i> , 838 A.2d 566 (Pa. 2003)	12
<i>Commonwealth v. Stewart</i> , 690 A.2d 195 (Pa. 1997)	3, 15, 16
<i>Firearm Owners Against Crime v. City of Harrisburg</i> , 218 A.3d 497, (Pa. Commw. Ct. 2019)	4, 5, 6, 8
<i>Kowenhoven v. Cty. of Allegheny</i> , 901 A.2d 1003 (Pa. 2006)	14
<i>Leonard v. Thornburgh</i> , 467 A.3d 104 (Pa. Commw. Ct. 1983)	13
<i>Linda Coal & Supply Co. v. Tasa Coal Co.</i> , 204 A.2d 451 (Pa. 1964)	4, 14
<i>Mid-Centre County Auth. v. Township of Boggs</i> , 384 A.2d 1008 (Pa. Commw. Ct. 1978)	13
<i>Phantom Fireworks Showrooms, LLC v. Wolf</i> , 198 A.3d 1205, (Pa. Commw. Ct. 2018)	10, 11
<i>Robinson Twp., Washington Cty. v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013)	4, 6
<i>Thomas v. Corbett</i> , 90 A.3d 789 (Pa. Commw. Ct. 2014)	4
Statutes	
23 Pa. C.S. § 6334(g)	10
23 Pa. C.S. §§ 6334 (a)-(f)	10
71 P.S. § 732-205(6)	13
Constitutional Provisions	
Pa. Const. art. IV § 4.1	13

INTRODUCTION

Respondent, the Pennsylvania Department of Human Services (hereinafter “Department” or “Respondent”), through counsel, respectfully submits this Brief in Reply to the Brief in Opposition filed by Petitioner Ivy Hill Congregation of Jehovah’s Witnesses (hereinafter “Ivy Hill” or “Petitioner”).

It is not disputed by the parties that the Child Protective Services Law (hereinafter the “CPSL”), 23 Pa. C.S. §§ 6301, *et seq.*, requires “a clergyman, priest, rabbi, minister, Christian Science practitioner, religious healer or spiritual leader of any regularly established church or other religious organization” (hereinafter a “member of the clergy” and, collectively with other enumerated persons, “mandatory reporters”), to report suspected child abuse to the appropriate authorities. It is also not disputed that if a mandatory reporter fails to report suspected child abuse then that individual could be subjected to various criminal penalties.

Petitioner concedes that the elders of Ivy Hill are within the class of persons subject to the duty to report child abuse, but argues that there is some uncertainty that exists about their status as members of the clergy and this uncertainty has presented them with a fear of future enforcement actions, similar to an action brought against an Amish bishop, if they too fail to report suspected abuse.

To resolve this fear, Petitioner seeks a declaration that its seven present elders are members of the clergy as defined by the clergy-communicant privilege. Or alternatively, if the Court does not hold the above, to deem the statutory privilege unconstitutional. As a basic premise, however, Petitioner's fear of prosecution for failing to report can only exist if the elders of Ivy Hill are members of the clergy. For if they are not members of the clergy, it follows that they are not mandatory reporters under the CPSL subject to criminal penalties for failing to report suspected cases of child abuse. Therefore, the alleged issue presented before this Court – whether the elders at Ivy Hill are members of the clergy – would never arise in Petitioner's feared failure to report case.

Petitioner is clearly then seeking a validation for some future defense. If Petitioner concedes, as they have, that their elders fall within the definition of mandatory reporters and that they are not seeking a blanket declaration that all of their communications are privileged, then a declaration by this Court is not necessary to allow Petitioners to follow existing guidance concerning the clergy-communicant privilege.

For these reasons, Respondent requests that this Honorable Court sustain the Respondent's preliminary objections and dismiss the Petition for Review.

REPLY ARGUMENTS¹

Petitioner's framing of the litigation further supports Respondent's arguments that their Petition fails as a matter of law. Ivy Hill concedes that they are not seeking a declaration that all of the elders' communications are entitled to be privileged. (*See* Pet'r Br. in Opp'n at 22). Ivy Hill *only* requests that this Court declare that its elders are clergymen as described by Section 5943 of the Judicial Code (*see id.*); but for what purpose? Petitioner concedes that their elders fall within the definition of mandatory reporters as members of clergy. (*See id.* at 24).

As claimed members of clergy, the elders at Ivy Hill would be entitled to invoke the clergy-communicant privilege. Petitioner fails to put forth any immediate or threatened injury to the elders of Ivy Hill as a result of the interplay between the mandatory reporting provision and the clergy-communicant privilege. As such, a declaration by this Court is not necessary for Petitioners to follow existing guidance set forth in *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997) concerning the application of the clergy-communicant privilege.

A. Without an Immediate or Threatened Injury to the Elders of Ivy Hill, Petitioner Lacks Standing to Continue

Respondent asserted as a preliminary objection that a declaratory judgment must not be employed to determine rights in anticipation of events which may

¹ Respondent incorporates its facts and statutory framework described within its Brief in Support of Preliminary Objections herein without restating them.

never occur. (*See* Resp't Br. in Supp. at 6). Petitioner footnotes that the Department's failure to take an affirmative position in this litigation, as to whether the elders at Ivy Hill are clergymen as described by the CPSL or the clergy-communicant privilege, furthers the legal uncertainties described in the Petition. (*See* Pet'r Br. in Opp'n at n.9). This statement, however, fails to acknowledge the current procedural posture of this case.

The Department has filed preliminary objections. In order to review such, the Court must "accept as true all well-pleaded material allegations in the petition for review" along with any inferences reasonably deduced from them. *Thomas v. Corbett*, 90 A.3d 789, 794 (Pa. Commw. Ct. 2014). The Department is not permitted to take an affirmative position at this point as neither the Court, nor the Department, may supply facts that the Petitioner has omitted from their pleading. *See Linda Coal & Supply Co. v. Tasa Coal Co.*, 204 A.2d 451 (Pa. 1964).

Petitioner then clarifies that it is presenting to this Court a pre-enforcement challenge under the Declaratory Judgment Act. (*See* Pet'r Br. in Opp'n at 23). Petitioner asserts that it has standing to bring this action under the principles set forth in *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 509 (Pa. Commw. Ct. 2019) (*en banc*) (referred to as "FOAC"), *appeal granted in part*, No. 29 MAP 2020 (Pa.) and *Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 924-25 (Pa. 2013).

In *FOAC*, a firearm rights organization and various individual gun owners brought an action for declaratory and injunctive relief against the city and various officials, seeking to strike down firearms regulations that included criminal penalties. *See* 218 A.3d at 502. One of the contested regulations would require firearms owners to report lost or stolen firearms to law enforcement within 48 hours after discovery of the loss or theft. *See id.* If any of the regulations or ordinances were violated, an individual could be subject to the issuance of a citation and summary criminal proceedings. *See id.* at 503.

The respondents in *FOAC* filed a preliminary objection as to standing. *See id.* at 504. The Commonwealth Court noted that “the general rule” is that a party seeking redress from the courts must establish standing to bring and maintain an action. *See id.* at 505 citing *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005). The Court recognized that the appellants/petitioners were seeking declaratory relief to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. *See id.* But in order to show that a party is aggrieved by the matter that he seeks to challenge, the party “must have a substantial, direct, and immediate interest in the outcome of the litigation[.]” *See id.* at 506 citing *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Commw. Ct. 2018) (*en banc*).

Because this instant action was not brought by the individual elders, Ivy Hill is more similarly situated to the firearms association in *FOAC*. As such, it was required to describe its affected member(s) in sufficient detail to show that the member(s) is/are aggrieved, meaning the affected member(s) has/have an immediate or threatened injury as a result of the action challenged. *See id.* at 511 citing *Ams. for Fair Treatment, Inc. v. Philadelphia Fed'n of Teachers*, 150 A.3d 528, 534-35 (Pa. Commw. Ct. 2016). *See also Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013). Petitioner argues that the facts in *FOAC* are virtually identical to the facts present in this instant action by noting that a mandatory reporter (such as the Petitioner's elders) is required to make reports of abuse immediately, as was the case with the petitioners in *FOAC*. (*See* Pet'r Br. in Opp'n at 24-25).

What is striking is Petitioner's utter failure to present this Court with any details concerning an immediate or threatened injury to the elders at Ivy Hill as a result of the interplay between the reporting provisions and the clergy-communicant privilege. Instead, Petitioner spends time arguing that the Department's failure to cite *FOAC* in its supporting brief is an apparent admission that the Department cannot rebut the analysis presented in *FOAC*. (*Id.* at 25). While Respondent agrees that it did not cite to *FOAC* directly in its supporting

brief, Respondent cited to the general rule for standing relied upon in *FOAC*. (*See* Resp't Br. in Supp. at 9).

For standing to exist, Ivy Hill must plead that at least one of its members has an immediate or threatened injury as a result of the clergy-communicant privilege. Yet, from the Petition, while the role of the seven volunteers who serve as elders was described *ad nauseam*, the Petition only vaguely asserts that Petitioner's "beliefs and practices are now at issue given *recent actual and threatened enforcement actions by the Commonwealth[.]*" (*Compare* Pet. ¶¶ 10-14 20, 22, 25-32, 45 *with* ¶ 3) (emphasis added). The evidence of the recent actual enforcement action is one taken against an Amish bishop by the Lancaster County District Attorney – not an action taken by the Department against Ivy Hill. (*See id.* ¶ 47 and Ex. B & C) Further, the action taken against the Amish bishop was not due to the bishop's status as a member of the clergy. (*See id.*)

Distinguishable from the facts presented by *FOAC*, the Department has not enforced the challenged reporting provision or failure to report provision in the CPSL, against Petitioner or any other individual as the City and various officials had in *FOAC*. Petitioner's alleged fear of prosecution for failing to report child abuse cannot coexist with their claim that it is unclear whether or not they are members of clergy. Since Petitioner concedes that they are mandatory reporters of child abuse under the CPSL and the Petitioner has clarified that they are not

seeking a blanket declaration concerning their communications, then there is no immediate or threatened injury against an elder as a competent court will review any invocation of the clergy-communicant privilege on a case-by-case basis to determine if a charge for failing to report will proceed.

Additionally, it is important to note that the Commonwealth Court in the *FOAC* case did not grant standing on every claim. In fact, the Court rejected standing as to the emergency declaration ordinance because emergency declarations are “hopefully rare circumstances,” and there were no allegations in the complaint that the ordinance directly and immediately affected or impaired the plaintiffs. *FOAC*, 218 A.3d at 509-10 n.18. Similarly, while Petitioner may have an interest in the legality of the interplay between the mandatory reporting provisions and the clergy-communicant privilege, the Petitioner has failed to allege any facts in their Petition for this Court to conclude that the CPSL directly and immediately affects or impairs the elders’ alleged abilities to hear confessions and comply with their admitted duties to report.

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss the Petition. Petitioner lacks standing to bring this action on behalf of its elders, not because of an absence of injury to the congregation, but because none of the elders are suffering immediate or threatened

injury by the Department as a result of the interplay between the mandatory reporting provisions of the CPSL and the clergy-communicant privilege.

B. Ivy Hill Has Failed To Join Any Indispensable Law Enforcement Party

Petitioner claims that only the Department is an indispensable party to this action because under the CPSL, the Department is the only agency to whom a mandatory reporter is required to make a report of child abuse. (*See* Pet’r Br. in Opp’n at 26-27). It is the failure to report to the Department a case of suspected abuse that will subject a mandatory reporter to criminal sanctions. (*See id.* at 27).

Interestingly, Petitioner states that because they are “*only* seeking a declaration . . . of whether [their] elders have to speak to [the Department],” the Department is the only indispensable party. (*Id.* at 28). But this request, as to whether an elder must report child abuse to the Department, has already been answered by Petitioner – they have conceded that they are within the class of persons subject to a duty to report under the CPSL. (*See id.* at 24).

As such, Petitioner’s position as to joinder is disingenuous and misleading. As noted by the Petitioner, Ivy Hill concedes that they are not seeking a declaration that all of the elders’ communications are entitled to be privileged. (*See id.* at 22). Ivy Hill only requests that this Court declare that its elders are clergymen as described by Section 5943 of the Judicial Code. (*See id.*)

It is not disputed that the Department is tasked with receiving reports of suspected child abuse. *See* 23 Pa. C.S. § 6334(g). If the Department receives a report of child abuse, the Department shall immediately notify the appropriate county agency or law enforcement official. *Id.* §§ 6334 (a)-(f). The CPSL, however, does not provide the Department with the ability to investigate an allegation that a mandatory reporter failed to report suspected abuse. Failure to report a case of suspected child abuse is a criminal offense investigated and prosecuted by law enforcement officials.

Whether the elders may invoke the clergy-communicant privilege during a law enforcement investigation or subsequent criminal enforcement action is a direct interest held by law enforcement officials, not by the Department. Ivy Hill asserts that adding any law enforcement official would be unnecessary as they are not indispensable, citing to *Phantom Fireworks Showrooms, LLC v. Wolf* (hereinafter “*Phantom Fireworks*”), 198 A.3d 1205, 1214 (Pa. Commw. Ct. 2018). (*See* Pet’r Br. in Opp’n at 26). In *Phantom Fireworks*, a constitutional challenge authorizing fireworks sales at certain temporary structures was lodged against the Governor and various Commonwealth agencies. *See* 198 A.3d at 1211-1212. One preliminary objection, in particular, was filed seeking to have the Attorney General joined to the action because of the sole constitutional claim. *See id.* at 1214.

This Court noted that “[a] 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.” *See id. citing Pa. State Educ. Ass’n v. Pa. Dep’t of Educ.*, 516 A.2d 1308 (Pa. Commw. Ct. 1986). *Phantom Fireworks* is distinguishable to this case. Most notably, Senator Scarnati argued that petitioners’ failure to join the Attorney General deprived the Court with original jurisdiction. *See id.* As to this issue, the Court noted that while petitioners were required to notify the Attorney General of the constitutional challenge, the Attorney General may, but need not intervene to be heard on the issue of constitutionality. *See id.*

In this instant litigation, the Department did not aver in its preliminary objections that Petitioner had failed to notify the Attorney General of the constitutional challenge – this was an issue presented in opposition to the Application for Summary Relief, which has a different standard of review – but averred that Petitioner failed to join the Attorney General as an indispensable law enforcement official identified by the CPSL as one official charged with investigating and enforcing the criminal provisions of the CPSL. (*See Resp’t Br. in Supp. at 12-15*). Petitioner’s alleged fear is that *the Commonwealth* will bring forth a criminal action against the elders at Ivy Hill for failing to report an instance of suspected child abuse. (*See Pet’r Br. in Opp’n at 15-18*). Permitting a declaration that would prejudice the rights of law enforcement officials from bringing future

enforcement actions without joining, at least, the state's chief law officer would be violative of the underlying purposes of the Declaratory Judgments Act.

Petitioner also asserts that since the Office of Attorney General is representing the Department, the "rights" and "interests" of the Office of Attorney General are adequately preserved. (*See* Pet'r Br. in Opp'n at 29 n.12 *citing City of Philadelphia v. Commonwealth*, 838 A.2d 566, 582 (Pa. 2003)). While the Supreme Court, in *City of Philadelphia v. Commonwealth*, found it significant that the Commonwealth and the Governor were represented by the Attorney General in a constitutional challenge (*see* 838 A.2d at 582), this proclamation by Petitioner ignores the fact that Petitioner asserts two separate legal claims here.

Petitioner seeks a declaration in Count I that its seven present elders are members of the clergy as defined by the clergy-communicant privilege, to which the Department has presented an objection as to joinder, not notice. Alternatively, if the Court does not hold the above, Petitioner seeks in Count II to deem the statutory privilege unconstitutional.

The fact that undersigned counsel is a Deputy with the Office of Attorney General and is representing the Department as statutorily required, *may* resolve Petitioner's concerns as to notice concerning Count II. *See generally City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003) (The Supreme Court only provided as dicta that it was significant to their analysis, as to whether or not

the Attorney General was an indispensable party for a constitutionality claim, that the Commonwealth and the Governor were represented by the Attorney General.)

The Department has contended that it cannot bring an enforcement action against Petitioner for any alleged failure to report suspected abuse. As such, at a minimum, the state's chief law officer, the Attorney General, should be joined to this action for the purposes of Count I because he is tasked with prosecuting criminal charges referred to him by a Commonwealth agency arising out of the enforcement provisions of a statute charging the agency with a duty to enforce its provisions. *See* Pa. Const. art. IV § 4.1; *see also* 71 P.S. § 732-205(6).

This law enforcement interest held by the Attorney General is not indirect or incidental. *Contra Mid-Centre County Auth. v. Township of Boggs*, 384 A.2d 1008 (Pa. Commw. Ct. 1978). Undersigned counsel's representation of the Department does not deem counsel "the official designee of the Attorney General" in this litigation. *Contra Leonard v. Thornburgh*, 467 A.3d 104, 105 (Pa. Commw. Ct. 1983) (*en banc*). Thereby counsel's participation is insufficient, especially since counsel's representation of the Department is not identical to any position that may be asserted by the Attorney General. *Contra id.*

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss the Petition for Review because Petitioner failed

to join *any* necessary party tasked with investigating whether a mandatory reporter failed to report an instance of child abuse.

C. Ivy Hill Has Failed to Exhaust Administrative Remedies.

Petitioner seems to believe that it is the Department's burden to express whether legal or equitable remedies are available or adequate, or whether the Department is able to provide the requested relief. (*See* Pet'r Br. in Opp'n at 32-34, n.16). Again, Petitioner seems to fail to appreciate the current posture of the litigation as the Department is not permitted to supply facts that the Petitioner has omitted from their pleading. *See Linda Coal & Supply Co. v. Tasa Coal Co.*, 204 A.2d 451 (Pa. 1964).

Petitioner also ignores the fact that when seeking to avoid the issue of exhaustion Petitioner must demonstrate a "substantial question of constitutionality (and not a mere allegation) *and* the absence of an adequate statutory remedy." *Kowenhoven v. Cty. of Allegheny*, 901 A.2d 1003, 1012 n.8 (Pa. 2006) (emphasis added). The Department's reference to Petitioner's Exhibit A was to underscore the fact that Petitioner has never sought an opinion directly from the Department. (*See* Resp't Br. in Supp. at 18). The Office of Attorney General is a separate independent agency from the Department. Therefore, the Department cannot be said to have refused to provide guidance, when guidance has never been sought.

Respectfully, it is not the burden of the Respondent, at this point in the litigation, to demonstrate whether the remedy sought is available or is adequate. It is the burden of the Petitioner to show that the administrative process before the Department is unavailable or inadequate or that it will suffer any harm awaiting the agency to respond to a request. As such, Count I of the Petition should be dismissed because the Petitioner was required to exhaust its administrative remedies with the Department before invoking this Court's jurisdiction.

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss Count I of the Petition for Review with prejudice because Petitioner failed to exhaust its administrative remedies.

D. The Petition Is Otherwise Legally Insufficient

Petitioner asserts that *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997) has identified which communications are privileged, but not *who* specifically has the right to invoke the privilege. (*See* Pet'r Br. in Opp'n at 34). A declaration by this Court as to whether the elders of Ivy Hill are clergymen will allow the elders to apply *Stewart* appropriately and eliminate uncertainty about future enforcement. (*See id.*) Petitioner's argument is limited, as it must, because there can be no present controversy when Petitioner has already conceded that their "elders are within the class of persons subject to a duty to report under the CPSL[.]" (*See id.* at 24). As such, no declaration is necessary as the elders can apply *Stewart*

appropriately to eliminate any alleged uncertainty about future enforcement by law enforcement officials.

The relevant question regarding the privilege is not based solely on the member of the clergy's status, but is based on whether the communication in question was made in confidence in the context of a penitential or spiritual matter. *See Stewart*, 690 A.2d at 198, *discussing Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. Ct. 1992). Clearly, therefore, even if this Court provides Petitioner a declaration that the elders of Ivy Hill Congregation are members of the clergy, the alleged uncertainty of future enforcement actions would not terminate because not every communication between an elder and congregants at Ivy Hill Congregation is entitled to the protections of the clergy-communicant privilege. A court, not the Department, will have to evaluate on a case-by-case basis whether a particular communication of suspected child abuse is disclosed in confidence in the context of a penitential or spiritual matter or in some other context.

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss Count I of the Petition for Review with prejudice because Petitioner's requested relief would not terminate the alleged uncertainty of future enforcement actions because each communication would need to be evaluated on a case-by-case basis.

CONCLUSION

Respondent respectfully requests that this Honorable Court sustain its preliminary objections and dismiss the Petition for Review with prejudice for the various reasons articulated above.

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CONFIDENTIAL INFORMATION CERTIFICATION

I certify that this filing complies with applicable state and local rules and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts*, which require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I, Nicole R. DiTomo, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on October 9, 2020, I caused to be served a true and correct copy of the Respondent's Reply Brief to the following:

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