

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 SUPPORT OF PRELIMINARY OBJECTIONS

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INTRODUCTION

Respondent, the Pennsylvania Department of Human Services (hereinafter “Department” or “Respondent”), through counsel, respectfully submits this Brief in Support of their Preliminary Objections. Respondent requests that the Petition for Review (“Petition”) filed by Petitioner Ivy Hill Congregation of Jehovah’s Witnesses (hereinafter “Ivy Hill” or “Petitioner”) be dismissed in its entirety.

The Child Protective Services Law (hereinafter the “CPSL”), 23 Pa. C.S. §§ 6301, *et seq.*, was enacted to encourage a more complete reporting of suspected child abuse. Under the CPSL, various persons, such as members of the clergy, are identified as mandatory reporters of suspected child abuse. When a person makes a specific disclosure to a member of the clergy that an identifiable child is the victim of child abuse it must be reported. The only exception applicable for the purposes of this litigation is when the disclosure is part of a confidential communication, protected by the clergy-communicant privilege.

Petitioner requests that the Court declare 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 to be either facially unconstitutional or unconstitutional as applied to Jehovah’s Witnesses (of which Petitioner is but one congregation), under both the State and

Federal Constitutions for violations of the Establishment Clause and Equal Protection provisions and to sever the disclosure exemption from the CPSL.

As identified by Respondent's preliminary objections, the Petition fails both procedurally and substantively and should be dismissed in its entirety. First, Ivy Hill lacks standing to bring this action because it has failed to aver that there is an actual controversy between the named parties. Second, Petitioner has failed to join, as a necessary party, the Office of Attorney General, the Pennsylvania State Police, or any of the county district attorneys who are the identified law enforcement officials tasked with investigating and enforcing the criminal provisions of the CPSL, such as the failure to report. Third, as to Count I of the Petition, Petitioner has failed to exhaust its administrative remedies by seeking to have the Department provide guidance as to the interplay between the mandatory reporting provisions and the application of the statutory privilege before seeking judicial intervention.

Further, even if the Petitioner overcomes these procedural hurdles, the Petitioner's claims are legally insufficient because the determination of an applicable evidentiary privilege is done on a case-by-case basis. Generally, declaratory relief is sought to determine contractual, arbitration, insurance, matrimonial, property, estate, tax, and zoning rights. Respondent was unable to locate a single case where a Pennsylvania Court established that a statutory evidentiary privilege applied to an identified individual or entity. Here, Petitioner

seeks for the Court to provide a blanket declaration that the seven present elders in this congregation are clergymen— a request that should be withheld because it seeks the establishment of future rights or a defense in anticipation of an event which may never happen.

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

QUESTIONS PRESENTED

1. Should the Petition be dismissed because the Petitioner lacks standing, failed to join indispensable parties, or failed to exhaust administrative remedies?
2. Should Count I of the Petition be dismissed because the requested relief would not terminate the alleged uncertainty of future enforcement?
3. Should Count II of the Petition be dismissed because Petitioner’s alternative argument lacks merit since the statutory privileged is not guaranteed and is subject to a case-by-case analysis by a competent court?

Suggested Answer to All: Yes.

RELEVANT FACTS

Ivy Hill is an unincorporated religious body consisting of approximately 130 congregants who meet regularly and worship in accordance with the beliefs and practices of Jehovah’s Witnesses. (Pet. ¶ 6) The Department is the Commonwealth agency charged with administering and overseeing the implementation of the CPSL. (*Id.* ¶ 7) Among other things, the Department is tasked with: (a.) promulgating regulations necessary to implement the CPSL (*see* 23 Pa. C.S. §

6306); (b.) maintaining a toll-free hotline for reporting abuses (*see id.* § 6332) and maintaining a statewide database of protective services (*see id.*); and, (c.) providing notice of reports of suspected child abuse to appropriate county agencies and law enforcement to conduct investigations and initiate enforcement actions (*see id.* § 6334). (*Id.* ¶ 8)

Jehovah's Witnesses are a regularly-established Christian church spread over 119,000 congregations around the world; in Pennsylvania, Ivy Hill Congregation is one of them. (*Id.* ¶ 9) At Ivy Hill, there are presently seven volunteers who serve as elders, taking the spiritual lead in the congregation as ordained ministers. (*Id.* ¶¶ 10-14) Elders are responsible for, *inter alia*: organizing the regular meetings held; providing pastoral care for congregants; rendering spiritual assistance to congregants; officiating funerals; solemnizing marriages; and hearing confessions. (*Id.* ¶ 20)

Congregants at Ivy Hill are encouraged to seek spiritual counsel and assistance from the elders if they commit a serious transgression of God's laws. (*Id.* ¶ 22) According to the 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. (*Id.* ¶¶ 25-32) These communications generally occur under the aegis

of religious and spiritual guidance, premised on the understanding and sincerely held belief that the communications will remain confidential. (*Id.* ¶ 45)

In an attempt to understand the interaction of the mandatory reporting provisions and their exemptions within the CPSL, counsel for the Jehovah's Witnesses sought a legal opinion from the State Attorney General in 1998. (*See id.* ¶ 43 and Ex. A) The application of the clergy-communicant privilege found in the CPSL has become a concern for Petitioner due to a recent criminal complaint filed in Lancaster County against 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 the CPSL. (*See id.* ¶ 47 and Pet. Ex. B & C)

Noted in the news article is the fact that investigators “were alerted [to this incident] after members of the Amish community had conversations with [the bishop] and other bishops about the child-sex abuse [in question] and were told to ‘let it go’ and that it had ‘been taken care of.’” (*See id.* Ex. B)

STANDARD OF REVIEW

When reviewing preliminary objections, 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). This Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of

opinion. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Commw. Ct. 1994). The Court may sustain preliminary objections when the law makes clear that the petitioner cannot succeed on the claim. *Id.* Furthermore, this Court may not supply facts that Petitioner has omitted from his pleading. *See Linda Coal & Supply Co. v. Tasa Coal Co.*, 204 A.2d 451 (Pa. 1964).

Courts shall have the power to declare the rights, status, and other legal relations of a party when sought. *See* 42 Pa. C.S. § 7532. Courts may refuse to render or enter a declaration where such judgment would not terminate the uncertainty or controversy giving rise to the proceeding. *See* 42 Pa. C.S. § 7537. When declaratory relief is sought, all persons shall be made parties who have or claim interest which would be affected by the declaration. *See* 42 Pa. C.S. § 7540.

Declaratory relief should be withheld when the request for relief is an attempt to adjudicate the validity of a defense to a potential future lawsuit. *Osram Sylvania Prods., Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846 (Pa. Super. Ct. 2004). Further, a declaratory judgment will not be rendered to decide future rights in anticipation of an event which may never happen, and a petition for declaratory judgment is properly dismissed where proceeding may prove to be merely academic. *McCandless Twp. v. Wylie*, 100 A.2d 590 (Pa. 1953).

ARGUMENT

The Petition fails both procedurally and substantively and should be dismissed in its entirety.

A. Relevant Statutory Framework

Pursuant to the CPSL, if “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”), has reasonable cause to suspect that a child is a victim of child abuse, they shall make a report of the suspected abuse to the Department. *See* 23 Pa. C.S. § 6311(a)(6).

Reasonable cause to suspect that a child is a victim of child abuse can arise when any one of the enumerated circumstances occurs, including, as applicable here, when a person makes a specific disclosure to the mandated reporter that *an identifiable child* is the victim of child abuse. *Id.* § 6311(b)(1)(iii) (emphasis added). If a circumstance arises where a member of the clergy received a disclosure that an identifiable child is the victim of child abuse and if the disclosure occurs during a confidential communication, the member of the clergy is not obligated to make a report. *See id.* § 6311.1(b)(1); 42 Pa. C.S. § 5943.

Section 5943 of the Judicial Code provides that a member of the clergy shall not be compelled, without consent of the disclosing individual, to disclose

information in any legal proceeding, trial or investigation that was obtained “in the course of his duties” . . . “secretly and in confidence[.]” *See* 42 Pa. C.S. § 5943 (hereinafter the “clergy-communicant privilege”).¹

The Department is tasked with receiving reports of suspected child abuse. *See* 23 Pa. C.S. § 6334(g). If the Department receives a report that a criminal offense has been committed against a child, the Department shall transmit a notice to the appropriate law enforcement official. *Id.* § 6334(c).

“Law enforcement official” is a defined term under the CPSL that includes: the Attorney General; a Pennsylvania district attorney; a Pennsylvania state police officer; or a municipal police officer. *Id.* § 6303. If the suspected child abuse includes a violation of a criminal offense, the appropriate law enforcement official is tasked to investigate. *See id.* § 6334.1. A mandatory reporter who willfully fails to report or make a referral concerning a suspected case of child abuse may be subject to various criminal offenses as enumerated. *See id.* § 6319.

¹ 42 Pa. C.S. Section 5943 states in its entirety:

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.

B. Petitioner Cannot Overcome Procedural Hurdles

Ivy Hill lacks standing to bring this action; has failed to join necessary parties; and has failed to exhaust its administrative remedies before seeking judicial intervention. As such, the Court should dismiss the Petition in its entirety.

1. Without an actual controversy, Ivy Hill lacks standing.

Petitioner seeks to have the Court declare that its seven elders are “clergymen” as described within the clergy-communicant privilege, thereby entitling these elders to protections for failing to report child abuse; however, Petitioner lacks standing because it has failed, as a threshold requirement, to demonstrate that it has been aggrieved or that there is an actual controversy between the parties. *See Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655 (Pa. 2005); *Petition of Capital Bank & Trust Co.*, 6 A.2d 790, 791 (Pa. 1939); *see also, In re: Carwithen's Estate*, 194 A. 743 (Pa. 1937).

Pennsylvania Rule of Civil Procedure 1028(a)(4) permits a party to file preliminary objections based on the legal insufficiency of a pleading. Pa.R.C.P. No. 1028(a)(4). “A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur . . . or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991). “To have standing to seek relief in the nature of a declaratory judgment, a plaintiff must

possess an interest which is ‘direct, substantial and present, as contrasted with a remote or speculative, interest.’” *Pennsylvania Gamefowl Breeders Ass'n v. Com.*, 533 A.2d 838, 839 (Pa. Commw. Ct. 1987), *quoting*, *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970).

The Petition utterly fails to include any allegation that the Department has an actual or threatened enforcement action against Petitioner. Presuming for the purposes of this preliminary objection that the Department has the ability to take enforcement action against Ivy Hill, merely because one of the elders of Ivy Hill Congregation *may become* a target of an enforcement action in the future does not create standing for Ivy Hill here. The Petition merely alleges that Petitioners “beliefs and practices are now at issue given *recent actual and threatened enforcement actions by the Commonwealth[.]*” (Pet. ¶ 3) (emphasis added).

Petitioner evidences the recent actual enforcement action as one taken against an Amish bishop by the Lancaster County District Attorney – not an action taken by the Department against Ivy Hill. (*See* Pet. ¶ 47 and Ex. B & C) For standing to exist, Ivy Hill must plead – at a minimum – that an identifiable member is currently the target of an investigation by the Department. Without factual allegations presenting a direct, substantial and present interest as to Petitioner or its elders, Ivy Hill lacks standing.

Further, any attempt by Ivy Hill to seek relief on behalf of all Jehovah's Witnesses is inappropriate. (*See e.g.*, Pet. ¶¶ 70, 75 and Count II Wherefore Clause at 24-25) Ivy Hill is one Congregation of Jehovah's Witnesses out of 119,000 around the world; hundreds in Pennsylvania alone. (*See id.* ¶¶ 6, 9) Ivy Hill individually brings this action on behalf of its present elders. (*See id.* ¶¶ 9, 12) There has been no factual allegations made that all congregations practice and follow the beliefs of Jehovah's Witnesses similarly to permit this one congregation to seek relief on behalf of all.

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss the Petition because Petitioner lacks standing to bring this action on behalf of its elders as there is no actual controversy; or on behalf of all Jehovah's Witnesses because Ivy Hill is but one congregation of thousands.

2. Ivy Hill has failed to join indispensable law enforcement parties.

Petitioner seeks to have the Court declare that its seven elders are "clergymen" as described within the clergy-communicant privilege, thereby entitling these elders to protections for failing to report child abuse; however, the protections from the statutory privilege would be asserted during a law enforcement investigation or subsequent criminal enforcement action. The interest affected by this declaration is whether or not an enforcement action for the failure

to report can proceed in light of the statutory privilege, which is an interest, held by law enforcement officials not by the Department.

Pennsylvania Rule of Civil Procedure 1028(a)(5) permits a party to file preliminary objections based on the lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action. Pa.R.C.P. No. 1028(a)(5). When declaratory relief is sought, such as here, all persons shall be made parties who have or claim interest which would be affected by the declaration. *See* 42 Pa. C.S. § 7540. The commonwealth and its agencies are separate and distinct legal entities. *See Tork-Hiis v. Commonwealth*, 735 A.2d 1256, 1259 (Pa. 1999).

“Law enforcement official” is a defined term under the CPSL that includes: the Attorney General; a Pennsylvania district attorney; a Pennsylvania state police officer; or a municipal police officer. *Id.* § 6303. The Office of Attorney General, while considered a “Commonwealth agency,” was established as an independent agency and not an executive agency. *See* 71 P.S. §§ 732-102, -201(a). As the state’s chief law officer, the Attorney General is tasked 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).

Similarly the Pennsylvania State Police is a separate and distinct Commonwealth agency. The Pennsylvania State Police have the duty to exercise

the powers and perform the duties by law vested in and imposed upon them. 71 P.S. § 250. Additionally, there are dozens of Pennsylvania district attorneys whose duties are to prosecute criminal offenses in the name of the Commonwealth as referred to them by municipal police officers. *See* 16 P.S. § 1402.

For the purposes of this preliminary objection, it is a reasonable inference deduced from the Petition that if there is a basis to report suspected child abuse as defined by Section 6311(b) of the CPSL then the elders of Ivy Hill are mandatory reporters. (*See gen. Pet.*) What is at issue is whether any alleged “confidential communication,” which may include a basis to report suspected child abuse, between an elder of Ivy Hill and one of its 130 communicants is to be reported to the Department.

Even with a cursory review of the CPSL it is clear that the Department is tasked with handling administrative matters, such as receiving reports of child abuse and maintaining a report database. Whereas the appropriate law enforcement officials, such as the Office of Attorney General, the Pennsylvania State Police, or the Pennsylvania district attorneys are tasked with investigating and enforcing criminal offenses concerning child abuse in the name of the Commonwealth. *Compare* 23 Pa. C.S. § 6334 *with* § 6334.1.

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 to ensure the safety of the child and if the report also includes details that a criminal offense has been committed, the Department shall transmit a notice to the appropriate law enforcement official. *Id.* §§ 6334 (a)-(f). Failing to report a case of suspected child abuse is a criminal offense investigated by law enforcement, not the Department. *Compare* 23 Pa. C.S. § 6334 *with* § 6334.1(2).

Ivy Hill asserts in the Petition that it's "beliefs and practices are now at issue given recent actual and threatened enforcement actions *by the Commonwealth*[" (Pet. ¶ 3) (emphasis added). Petitioner evidences the recent actual enforcement action as one taken by the Lancaster County District Attorney against an Amish bishop. (*See* Pet. ¶ 47 and Ex. B & C) No facts have been alleged in the Petition of any actual or threatened enforcement action by the Department.

Regardless, 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. The CPSL does not provide the Department with the ability to investigate an allegation that a mandatory reporter failed to report. Failure to report a case of suspected child abuse is a criminal offense investigated and prosecuted by law enforcement officials. Because Petitioner has failed to join necessary parties who would have a law enforcement interest which would be affected by the requested declaration, the Petition should be dismissed.

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss the Petition for Review because Petitioner failed to join necessary parties tasked with investigating whether a mandatory reporter failed to report an instance of child abuse.

3. Ivy Hill has failed to exhaust administrative remedies.

Petitioner seeks to have the Court declare that its seven elders are “clergymen” as described within the clergy-communicant privilege, thereby entitling these elders to protections for failing to report child abuse; however, Petitioner has never sought from the Department an interpretation of the statute it is charged with administering.

Pennsylvania Rule of Civil Procedure 1028(a)(7) permits a party to file preliminary objections due to a failure to exercise or exhaust a statutory remedy. Pa.R.C.P. No. 1028(a)(7). While this Court has original jurisdiction over “all civil actions or proceedings . . . [a]gainst the Commonwealth government,” the Court must refrain from exercising equity jurisdiction when there is an adequate statutory remedy. 42 Pa. C.S. § 761; *see also Arsenal Coal Co. v. Dep’t of Env’tl. Res.*, 477 A.2d 1333, 1338 (Pa. 1984); *Funk v. Commonwealth*, 71 A.3d 1097, 1101 (Pa. Commw. Ct. 2012).

The doctrine of exhaustion of administrative remedies is intended to prevent the premature interruption of the administrative process, which would restrict the

agency's opportunity to develop a cohesive body of law in that area. *See Empire Sanitary Landfill, Inc. v. Dep't of Env'tl. Res.*, 684 A.2d 1047, 1054 (Pa. 1996).

Ordinarily, the failure to exhaust an administrative remedy "bars this Court from hearing claims for declaratory or injunctive relief with respect to that agency action." *Funk*, 71 A.3d at 1101. However, there are three narrow exceptions to the exhaustion requirement for constitutional attacks: (i.) where the jurisdiction of an agency is challenged; (ii.) where the constitutionality of a statutory scheme or its validity is challenged; or, (iii.) where the legal or equitable remedies are unavailable or inadequate, or the administrative agency is unable to provide the requested relief. *Empire Sanitary*, 684 A.2d at 1054.

After consideration of the Department's initial objections, the Court must determine if Petitioner can proceed against the Department with Count I despite failing to exhaust its administrative remedies. For the purposes of this objection, the first exemption to exhaustion (jurisdiction of the Department) is not at issue and since Petitioner seeks relief in the alternative, the second exception to exhaustion (constitutionality or validity) is only applicable to Count II of the Petition.² As such, what remains for the Court to determine is whether

² Respondent acknowledges that if the objection as to standing is overruled and the Petition is interpreted as asserting a pre-enforcement action, once the necessary parties are joined to this action, the requirement to exhaust administrative remedies as to Count I would be moot as long as Petitioner is otherwise able to establish a direct and immediate effect upon its elders. *See*

circumstances concerning the third exception (unavailable or inadequate remedies) are present to permit the Petitioner to proceed with Count I in the Petition.

A party seeking to avoid exhaustion 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). “[S]ubstantial policy reasons require exhaustion of administrative remedies where the constitutional claims challenge only the *application of the statute*.” *Funk*, 71 A.3d at 1102 (emphasis added).

Our state Supreme Court has explained that it is both sensible and efficient to permit administrative agencies to address constitutional challenges to a statute’s application because: (i.) the agency is given an opportunity to interpret the statute it is charged with administering; (ii.) administrative competency is not an issue; (iii.) agencies are better situated than courts to develop agency-specific issues, and to find facts; and, (iv.) without the Court’s refusal to consider the challenge, litigants are allowed to circumvent the exhaustion of administrative remedies doctrine before seeking judicial review. *See Lehman v. Pennsylvania State Police*, 839 A.2d 265, 276 (Pa. 2003); *accord Funk*, 71 A.3d at 1102.

Bayada Nurses v. Dep’t of Labor & Indus., 8 A.3d 866 (Pa. 2010); *see also Arsenal Coal Co.*, 477 A.2d at 1339.

As noted by the Petitioner, the Department is charged with administering and overseeing the implementation of the CPSL. (Pet. ¶ 7). Among other things, the Department is tasked with promulgating regulations necessary to implement the statute providing information regarding persons classified as mandatory reporters and the reporting requirements and procedures. (*Id.* ¶ 8(a)-(b) *citing* 23 Pa. C.S. §§ 6306 and 6383(a.2)(2)(ii)-(iii)).

With that statutory scheme in mind, Petitioner could have reached out to the Department to determine whether or not they are mandatory reporters and whether the Department has promulgated regulations concerning the reporting requirements of the elders of Ivy Hill. Instead, Petitioner identifies that the Watchtower Bible and Tract Society of New York, Inc., which serves the interests of Jehovah's Witnesses throughout the United States, reached out to the Attorney General, a separate independent agency, to obtain an opinion concerning child abuse reporting in Pennsylvania. (*Id.* ¶ 43 and Ex. A).

While Petitioner states that “the Commonwealth” has historically refused to give complete meaning to the interaction of the CPSL and the clergy-communicant privilege (*see id.*), Petitioner has failed to present evidence that it approached the Department, who is tasked with promulgating regulations for the CPSL, to give meaning to the two statutory schemes.

Respectfully, it is not the burden of the Respondent, at this point in the litigation, to demonstrate whether the remedy available 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 before invoking this Court's jurisdiction.

C. The Petition Is Otherwise Legally Insufficient

Further, even if the Petitioner could overcome the procedural hurdles identified above, the Petitioner's claims are legally insufficient because the determination of an applicable privilege is done on a case-by-case basis.

1. The requested relief in Count I would not terminate the alleged uncertainty of future enforcement.

Petitioner seeks to have the Court declare that its seven elders are "clergymen" as described within the clergy-communicant privilege, thereby entitling these elders to protections for failing to report child abuse; however, regardless of whether these seven elders are declared to be clergymen, the

application of the clergy-communicant privilege is considered by a court on a case-by-case basis.

Pennsylvania Rule of Civil Procedure 1028(a)(4) permits a party to file preliminary objections based on the legal insufficiency of a pleading. Pa.R.C.P. No. 1028(a)(4). Courts should not render or enter a declaratory judgment where such judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding. 42 Pa. C.S. § 7537. Declaratory relief should be withheld when the request for relief is an attempt to adjudicate the validity of a defense to a potential future lawsuit. *Osram Sylvania Prods., Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846 (Pa. Super. Ct. 2004). Further, a declaratory judgment will not be rendered to decide future rights in anticipation of an event which may never happen, and a petition for declaratory judgment is properly dismissed where proceeding may prove to be merely academic. *McCandless Twp. v. Wylie*, 100 A.2d 590 (Pa. 1953).

Respondent was unable to locate a single case where a Pennsylvania court established that a statutory evidentiary privilege, such as the clergy-communicant privilege, applied to an identified individual or entity. In Count I, Ivy Hill requests that the Court enter judgment in its favor declaring that the status of the elders of the Ivy Hill Congregation entitles them to the protections set forth in Section

6311.1(b)(1) of the CPSL and they are entitled to the privileges afforded by Section 5943 of the Judicial Code. (*See* Pet. at 20).

Even presuming for the purposes of this objection that the elders of the Ivy Hill Congregation are members of the clergy who are entitled to assert the statutory privilege, declaratory judgment, as requested in Count I, cannot be granted because the relevant question regarding the privilege is not based solely on the member of the clergy's status, as overwhelmingly argued by Petitioner, but is also based on whether the communication in question was made in confidence in the context of a penitential or spiritual matter.

The mere fact that a communication is made to a member of the clergy is not sufficient alone to invoke the clergy-communicant privilege. *See Commonwealth v. Stewart*, 690 A.2d 195, 198 (Pa. 1997), *discussing Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. Ct. 1992). Courts must look to the circumstances of the communication in question to determine whether a communicant's statements were made in secrecy and confidence to a clergyman in the course of his duties. *Commonwealth v. Patterson*, 572 A.2d 1258, 1265 (Pa. Super. Ct. 1990).

Petitioner has already admitted that elders at Ivy Hill Congregation are responsible for, *inter alia*: organizing the regular meetings held; providing pastoral care for congregants; rendering spiritual assistance to congregants; officiating funerals; solemnizing marriages; and hearing confessions. (Pet. ¶ 20) Petitioner has

also admitted that the communications between elders and congregants at Ivy Hill Congregation *generally occur* under the aegis of religious and spiritual guidance. (*Id.* ¶ 45) (emphasis added).

Clearly, therefore, even if this Court provides Petitioner a declaration that the elders of Ivy Hill Congregation are members of the clergy as defined by the clergy-communicant privilege, 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. This is especially highlighted by the news article attached to the Petition wherein investigators “were alerted [to the incident of failing to report abuse] after members of the Amish community had conversations with [the bishop] and other bishops about the child-sex abuse [in question] and were told to ‘let it go’ and that it had ‘been taken care of.’” (*See id.* Ex. B)

Investigators for the Lancaster County District Attorney’s Office, not the Department, determined to take enforcement action against the identified bishop, not because the status of clergyman was debated, but because the conversations, as

described, are clearly separate and distinct from communications made in confidence in the context of a penitential or spiritual matter. Because the alleged uncertainty of future enforcement actions would not terminate, even if this Court were to declare the elders of Ivy Hill clergymen as described by Section 5943 of the Judicial Code, this Court should reject Petitioner's request.

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 be evaluated on a case-by-case basis.

2. Relief sought in the alternative in Count II lacks merit

Petitioner requests, in the alternative, to the extent the clergy-communicant privilege is not available to the elders of the Ivy Hill Congregation that the statutory privilege is declared facially unconstitutional or unconstitutional as applied to Jehovah's Witnesses throughout the Commonwealth, because it violates the Establishment Clause and Equal Protection provisions under the State and Federal Constitution. (*See* Pet. ¶¶ 75-76) However, Petitioner incorrectly infers that the statutory evidentiary privilege is a guaranteed privilege based upon a member of the clergy's status without explaining that a case-by-case analysis must occur

concerning the nature of the underlying communication before a court determines the privilege applies.

Pennsylvania Rule of Civil Procedure 1028(a)(4) permits a party to file preliminary objections based on the legal insufficiency of a pleading. Pa.R.C.P. No. 1028(a)(4). While only well-pleaded material allegations in the petition may be accepted as true, this Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Commw. Ct. 1994). The state legislature did not intend a *per se* privilege for all communication to a clergymen based on his status. *See Commonwealth v. Patterson*, 572 A.2d 1258, 1265 (Pa. Super. Ct. 1990). Only the court can determine if a statutory privilege applies. In making such a finding, the Court must: (i.) determine whether the party asserting a privilege shows that it is properly invoked; and, (ii.) determine whether the party seeking disclosure shows that disclosure will not violate the accorded privilege. *See, e.g., In re Subpoena No. 22*, 709 A.2d 385, 388 (Pa. Super. Ct. 1998).

Petitioner spends the bulk of their argument setting forth the entitlement of their seven elders to the clergy-communicant privilege. (*See, e.g., Pet.* ¶¶ 57-73) Despite Petitioners broad stroke assertion, the clergy-communicant privilege does not grant a denomination preference because the relevant question to the applicability of the privilege relates to the nature of the underlying communication,

not solely on the clergymen's status or denomination. *Stewart*, 690 A.2d at 200.

This Court has held that the statutory clergy-communicant privilege does not prohibit all testimony by members of the clergy; instead, the privilege is limited to protect information told in confidence to the member of the clergy in their roles as confessors or counselors. *Fahlfeder v. Bd. of Prob. & Parole*, 470 A.2d 1130 (Pa. Commw. Ct. 1984).

A constitutional analysis is simply unnecessary as Petitioner's alternative argument lacks merit because the statutory clergy-communicant privilege is not guaranteed to any member of the clergy as it is a fact specific inquiry evaluated on a case-by-case basis by a competent court.

Respondent respectfully requests that this Honorable Court sustain this preliminary objection and dismiss Count II of the Petition for Review with prejudice because Petitioner incorrectly infers that the statutory privilege is a guaranteed privilege based upon a member of the clergy's status without explaining that a case-by-case analysis must occur concerning the nature of the underlying communication before a court determines the privilege applies.

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.

Respectfully submitted,

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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 WORD COUNT

Pursuant to Rule 2135(a)(1) of the Appellate Rules of Procedure, counsel certifies that this principal brief does not exceed 14,000 words. Counsel relied upon the word count feature of the word processing system used to prepare the brief when making this certification.

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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 September 18, 2020, I caused to be served a true and correct copy of the Respondent's Brief in Support of Preliminary Objections to the following:

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