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316 MD 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 316 MD 2020

IVY HILL CONGREGATION OF JEHOVAH'S WITNESSES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES,

Respondent.

BRIEF OF PETITIONER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In the Court's Memorandum Opinion and Order of June 17, 2021, the Court ruled that fact discovery was needed on whether the elders of Petitioner Ivy Hill Congregation of Jehovah's Witnesses are "clergymen," and even if they are, whether nevertheless they are subject to a statutory exception to privilege. The relevant discovery is now complete and the material facts are not in dispute. What those facts reveal is simple: the elders of Ivy Hill are entitled as a matter of law to the protections afforded by the clergymen privilege codified at 42 Pa.C.S. § 5943. This also means that in certain circumstances, the exemption to mandatory reporting under the Child Protective Services Law (CPSL) found at 23 Pa.C.S. § 6311.1(b)(1) applies to these elders. This is true even if the exception in Section 5943 applies to Jehovah's Witnesses, since that exception separately violates *both* the Federal and State Constitutions and must, therefore, be severed.

Accordingly, for the reasons set forth in the Motion for Summary Judgment, and those set forth below, the Court should grant summary judgment in favor of Ivy Hill, and against Respondent Department of Human Services (DHS), on all counts in the Petition for Review (PFR).

II. SUMMARY JUDGMENT STANDARD

This matter is in the Court's original jurisdiction. *See* PFR ¶ 5. The pending motion is for summary judgment. *See* Pa.R.C.P. 1035.2. In its original jurisdiction, the Commonwealth Court looks "'to the rules of civil procedure for the standard to determine whether [it] should grant summary judgment.'" *Underground Storage Tank Indemnification Fund v. Morris & Clemm, PC*, 107 A.3d 269, 272 n.7 (Pa. Cmwlth. 2014) (quoting *Shaffer–Doan ex rel. Doan v. Dep't of Pub. Welfare*, 960 A.2d 500, 505 n.8 (Pa. Cmwlth. 2008)). Relief should be granted "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id. at* 272.

III. QUESTIONS PRESENTED

1. Are the elders of Ivy Hill Congregation of Jehovah's Witnesses "clergymen" within 42 Pa.C.S. § 5943, such that they are also subject to the exception to mandatory reporting in 23 Pa.C.S. § 6311.1(b)(1)? *Suggested answer: yes.*

2. Is Ivy Hill a "regularly established church" such that the exception to privilege in 42 Pa.C.S. § 5943 does not apply? *Suggested answer: yes.*

3. If the exception to privilege in 42 Pa.C.S. § 5943 applies to Jehovah's Witnesses, is the exception an unconstitutional denominational preference that must be severed? *Suggested answer: yes.*

IV. BACKGROUND

A. Jehovah's Witnesses Generally

Jehovah's Witnesses are a regularly established church: there are over 8.6 million Jehovah's Witnesses, spread among 240 lands and in over 120,000 congregations around the world, who meet weekly in Kingdom Halls to worship Jehovah. (**Motion, Statement of Material Facts (SMF) ¶ 5**.) In Pennsylvania, there are hundreds of congregations of Jehovah's Witnesses. (**SMF ¶ 6**.)

The modern-day organization of Jehovah's Witnesses began at the end of the 19th Century to promote the teachings of Jesus Christ and to follow the practices of the first-century Christian congregation. (**SMF ¶ 1**.) At that time, a small group of Bible students began a systematic analysis of the Bible. They compared the doctrines taught by the churches with what the Bible really teaches. They began publishing what they learned in books, newspapers, and the journal that is now called *The Watchtower—Announcing Jehovah's Kingdom*, which was first published in 1879. (**SMF ¶ 7**.) The goal of the Bible Students, as the group was then

known, was to promote the teachings of Jesus Christ and to follow the practices of the first-century Christian congregation. (**SMF ¶ 8**.)

Since Jesus is the founder of Christianity, Jehovah's Witness view him as the head of the organization. (**SMF ¶ 2**.) Jehovah's Witnesses are Christians. (**SMF ¶ 3**.) This is so because:

a. They try to follow closely the teachings and behavior of Jesus Christ.

b. They believe that Jesus is the key to salvation, that "'there is not another name under heaven that has been given among men by which we must get saved.'"

c. When people become Jehovah's Witnesses, they are baptized in the name of Jesus.

d. They offer their prayers in Jesus' name.

e. They believe that Jesus is the Head, or the one appointed to have authority, over every man.

(**SMF ¶ 3**.) However, Jehovah's Witnesses are different from other religious groups that are called Christian; for example, Jehovah's Witnesses believe that the Bible teaches that Jesus is the Son of God, not part of a Trinity. (**SMF ¶ 4**.)

Among Jehovah's Witnesses, a rank-and-file congregant is called a "publisher"; congregations usually have both baptized and unbaptized publishers. (**SMF ¶ 9**.) A publisher cannot be baptized upon demand; instead, the publisher must first meet with the elders to demonstrate he or she meets the Scriptural requirements for baptism. (**SMF ¶ 10**.) In accordance with the religious beliefs and practices of Jehovah's Witnesses, congregants who are baptized as one of Jehovah's Witnesses cease their affiliation and membership with any other denomination to which they may have previously belonged. (**SMF ¶ 24**.)

Any person baptized as one of Jehovah's Witnesses is considered to be an ordained minister of Jehovah God (regardless of age or gender), in that they individually accept as a personal obligation Jesus' command to preach to others about God's Kingdom. (**SMF ¶ 11**.) This does not mean that all such persons are empowered to take the spiritual lead in the congregation; that role is reserved for a smaller group of baptized men referred to as elders. (**SMF ¶ 12**.)

B. Religious Texts

The New World Translation of the Holy Scriptures is the primary translation of the Bible used by Jehovah's Witnesses. Jehovah's Witnesses consider the Bible to be the Word of God and endeavor to follow its direction in all aspects of life. (**SMF ¶ 13**.) *The Watchtower* is a regularly published magazine by Jehovah's Witnesses. It honors Jehovah God, the Ruler of the universe. This magazine has been published continuously since 1879 and is nonpolitical. It adheres to the Bible as its authority. (**SMF ¶ 14**.) *Awake!* is a regularly published magazine by Jehovah's Witnesses. It is published for the enlightenment of the entire public. It shows how to cope with today's problems. It reports the news, tells about people in many lands, and examines religion and science. (**SMF ¶ 15**.) *Our Kingdom Ministry* is a Jehovah's Witnesses publication. (**SMF ¶ 16**.) *Life and Ministry Meeting Workbook* provides information for the following meetings of Jehovah's Witnesses: *Treasures From God's Word*, *Apply Yourself to the Field Ministry*, and *Living as Christians*. (**SMF ¶ 17**.) Finally, the website JW.org is the official online source

for information about the beliefs of Jehovah's Witnesses. (**SMF ¶ 18**.)

In the regular course of ministry, worship, and governance at Ivy Hill Congregation of Jehovah's Witnesses, the elders, as well as the congregants, regularly rely on the following publications: (a) *The New World Translation of the Holy Scriptures*, (b) *Organized to Do Jehovah's Will; (c) Who are Doing Jehovah's Will Today?*; (d) *The Watchtower*; (e) *Awake!*; and (f) *Life and Ministry Meeting Workbook*. (**SMF ¶ 19**.) Various copies or editions of the foregoing were produced by Ivy Hill to DHS in this matter, bearing Bates numbers IVYHILL00001-IVYHILL02125. (**SMF ¶ 20**.)

C. Religious Services

Jehovah's Witnesses refer to their religious services as "congregation meetings," which are held twice a week in each congregation: one on the weekend and during mid-week. Each congregation meeting begins and ends with song and prayer. All congregation meetings are open to the general public. The structure of congregation meetings is the same in all congregations worldwide in all material aspects. Each congregation selects the best day and

time for its meetings. Generally, congregation meeting times do not change, unless more than one congregation uses the Kingdom Hall, in that case, meeting times are evaluated annually. (**SMF ¶ 21**.)

The weekend meeting consists of a 30-minute Bible discourse on how the Scriptures relate to the lives of those in attendance and to the times they live in. All are encouraged to follow along in their own Bible. Following the discourse, each congregation holds a one-hour Watchtower Study, in which the audience is welcome to participate in a discussion of an article from the study edition of *The Watchtower*. This discussion helps to apply the Bible's guidance in the lives of congregants. The same material is studied in every congregation of Jehovah's Witnesses worldwide. (**SMF ¶ 22**.)

Congregants also meet together on a midweek evening meeting entitled Our Christian Life and Ministry, which is based on material provided in a monthly *Life and Ministry Meeting Workbook* and consists of a three-part program:

a. The first part of this meeting, *Treasures From God's Word*, helps congregants to become familiar with a portion of the Bible that the congregation has read in advance.

b. Next, *Apply Yourself to the Field Ministry* includes demonstrations of how to discuss the Bible with others. A counselor makes observations that help congregants improve their reading and speaking skills.

c. The last part, *Living as Christians*, considers the practical application of Bible principles in day-to-day life. This includes a question-and-answer discussion that deepens congregants' understanding of the Bible.

(**SMF ¶ 23**.)

Regular attendance at congregation meetings is a central component of the faith and all congregants are encouraged to attend such meetings regularly. It is common for attendance at a congregation meeting to exceed the number of congregants in a congregation, because interested persons and family members routinely attend congregation meetings even though they are not Jehovah's Witnesses. (**SMF ¶ 25**.)

In the faith of Jehovah's Witnesses, parents are responsible for raising and instructing their children. A parent's willful failure to provide materially for their children is considered a sin. (Jehovah's

Witnesses believe God expects both parents to care for the emotional needs of their children, fostering an environment of security, love and respect. Parents are encouraged to take seriously their responsibilities to teach their children about God and the moral standards set out in the Bible. (**SMF ¶ 26**.) Because parents have the God-assigned responsibility for training and educating their children, families worship together during congregation meetings. Jehovah's Witnesses do not sponsor programs that separate children from their parents. (**SMF ¶ 27**.)

D. Kingdom Hall

Congregations of Jehovah's Witnesses are composed of individuals and families who gather together to worship in buildings called Kingdom Halls. (**SMF ¶ 28**.) Jehovah's Witnesses do not call the Kingdom Hall a "church"; this is so because in the Bible, the Greek term that is sometimes translated "church" refers to a group of worshippers, not to the building they meet in. Yet a Kingdom Hall is a place where Jehovah's Witnesses meet to worship Jehovah, the God of the Bible, and to witness, or testify, about him; thus, the Kingdom Hall is a place of worship. (**SMF ¶ 29**.) Kingdom Halls are

sometimes shared worship spaces between two or more congregations of Jehovah's Witnesses. However, each congregation is distinct and meets at specific times at the Kingdom Hall. (**SMF ¶ 30**.) Congregations of Jehovah's Witnesses are small so that elders can assist each congregant to keep his or her faith in Jehovah strong. (**SMF ¶ 31**.)

E. Role of Elders

Jehovah's Witnesses have long rejected the concept of a paid clergy class distinct from the laity, which distinction they believe is not supported by the Bible and not based on the model set by Jesus' apostles and other early Christians. (**SMF ¶ 32**.) Instead of a paid clergy class for whom religion is an occupation, profession, or type of employment, each congregation of Jehovah's Witnesses is aided in the worship of God by a small group of volunteers (typically from 5 to 7) who take the spiritual lead. (**SMF ¶ 33**.) They are known collectively as the body of elders and are tasked with spiritual oversight of the congregation in accordance with the Bible, secular laws, and the beliefs and practices of Jehovah's Witnesses. (**SMF ¶ 34**.)

The term "elders" refers to spiritually mature men who meet the Scriptural guidelines to qualify for appointment as overseers of the congregation. (**SMF ¶ 35**.) Elders serve voluntarily in this appointed capacity. Their focus is on pastoral care, spreading the good news of God's Kingdom, and teaching the congregation that they serve. (**SMF ¶ 36**.)

Any male congregant who satisfies certain Scriptural qualifications found in the Bible may be appointed as an elder. Those qualifications include that he:

a. be irreprehensible;

b. be a husband of one wife;

c. be moderate in habits;

d. be sound in mind;

e. be orderly;

f. be hospitable;

g. be qualified to teach;

h. not be a drunkard;

i. not be violent;

j. be reasonable;

k. not be quarrelsome;

l. not be a lover of money;

m. be a man presiding over his own household in a fine manner;

n. has his children in subjection with all seriousness;

o. not be a newly converted man; and

p. has a fine testimony from outsiders.

(**SMF ¶ 37**.)

Specifically, upon satisfying the above Scriptural qualifications, a congregant may be recommended for appointment as an elder by the Congregation's existing body of elders. (**SMF ¶ 38**.) In turn, that recommendation is transmitted to a circuit overseer, who is an experienced traveling elder who oversees 16-20 congregations in a geographic area. (**SMF ¶ 39**.) 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. (**SMF ¶ 40**.)

All the elders in a 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. This training is designed to help elders more effectively carry out various aspects of their ecclesiastical responsibilities. (**SMF ¶ 41**.)

As the spiritual shepherds, elders in a congregation care for a variety of responsibilities, *inter alia*:

a. organizing the regular meetings held to strengthen the faith of the congregation and others in attendance;

b. providing pastoral care for congregants;

c. rendering spiritual assistance to congregants;

d. taking the lead in door-to-door ministry;

e. approving congregants for baptism;

f. officiating funerals;

g. solemnizing marriages;

h. hearing confessions; and

i. hearing pleas for reinstatement.

(**SMF ¶ 42**.)

F. Confession & Confidentiality

A central component of an elders' obligation to a congregation is to provide spiritual guidance and counsel. (**SMF ¶ 43**.) Jehovah's Witnesses believe that confession of sin is essential to one's eternal salvation. (**SMF ¶ 44**.) 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. Thus, all congregants are encouraged to seek spiritual counsel and assistance from the elders if they commit a serious transgression of God's laws. (**SMF ¶ 45**.)

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. (**SMF ¶ 46**.) 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 the congregant's behalf. (**SMF ¶ 47**.)

In accordance with the religious beliefs and practices of Jehovah's Witnesses, only elders are authorized to hear and address confessions of serious sin. (**SMF ¶ 48**.) 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. (**SMF ¶ 49**.) As such, according to the Scriptural beliefs and practices of Jehovah's Witnesses, when a congregant confesses a sin, or requests spiritual encouragement, counsel, and guidance, the communication with the elder is strictly confidential. (**SMF ¶ 50**.) Furthermore, in accordance with the religious 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. (**SMF ¶ 51**.)

Although the religious 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 elders, the principles of privacy and confidentiality apply with equal force. (**SMF ¶ 52**.) The elders' obligation to maintain confidentiality is based on Scripture and has also been explained in the official publications of Jehovah's Witnesses. (**SMF ¶ 53**.) 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. (**SMF ¶ 54**.)

If an elder in a congregation revealed 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. (**SMF ¶ 55**.) In addition, an elder's breach of confidentiality could undermine his and the body of elders' credibility with the congregation. (**SMF ¶ 56**.)

G. Ivy Hill Congregation of Jehovah's Witnesses

Charles Duncan is an elder at Ivy Hill. (**SMF ¶ 57**.)[1] He has been one of Jehovah's Witnesses since June 18, 1983. (**SMF ¶ 59**.) Mr. Duncan has been an elder for nearly 30 years. (**SMF ¶ 60**.) He has been an elder at Ivy Hill for the last 9 years, but he previously served as an elder at Ivy Hill for several years when he first became an elder nearly three decades ago. (**SMF ¶ 61**.) In total, Mr. Duncan has served as an elder at five congregations. (**SMF ¶ 62**.)

[1] The parties agreed that Mr. Duncan's testimony could be presented via an affidavit rather than a live deposition. (**SMF ¶ 58**.)

Mr. Duncan is the coordinator of the body of elders at Ivy Hill. (**SMF ¶ 63**.) In that capacity, he serves as the chairman at meetings of the body of elders. (**SMF ¶ 64**.) There are presently nine elders on the body of elders in the Ivy Hill Congregation. (**SMF ¶ 76**.).

Based on his experiences, Mr. Duncan is familiar with the religious beliefs, practices, and governance at Ivy Hill Congregation of Jehovah's Witnesses. ((**SMF ¶ 67**.) Further, Mr. Duncan is familiar with the religious beliefs, practices, and governance of Jehovah's Witnesses in general. (**SMF ¶ 68**.) Mr. Duncan has personally performed all of the responsibilities of elders described above. (**SMF ¶ 65**.) Further, Mr. Duncan has personally solemnized several marriages; in each case he identified himself as a minister. (**SMF ¶ 66**.)

Mr. Duncan revealed the following about Ivy Hill. The congregation is an unincorporated religious body located in Philadelphia, Pennsylvania, consisting of approximately 140 congregants who meet regularly and worship in accordance with the beliefs and practices of Jehovah's Witnesses. (**SMF ¶ 69**.) All of the

beliefs and practices of Jehovah's Witnesses generally are observed by the congregants and the body of elders at Ivy Hill. (**SMF ¶ 70**.)

The physical place of worship used by Ivy Hill is located at 6826 Ardleigh Street, Philadelphia, PA, 19119. (**SMF ¶ 71**.) The building in which Ivy Hill's congregants worship is known as a Kingdom Hall. (**SMF ¶ 72**.) As is a common practice among Jehovah's Witnesses, the Kingdom Hall that Ivy Hill uses is shared by other congregations of Jehovah's Witnesses. (**SMF ¶ 73**.) The Kingdom Hall is completely tax exempt from Philadelphia property taxes because it is deemed by the city to be a house of worship. (**SMF ¶ 74**.) Ivy Hill is also federally tax exempt as a church. (**SMF ¶ 75**.)

H. The Child Protective Services Law

The Child Protective Services Law, *see* 23 Pa.C.S. §§ 6307, *et seq.*, is a statutory scheme governing reporting and investigating child abuse. (**SMF ¶ 77**.) Among other things, the CPSL includes a provision requiring certain individuals to report 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). (**SMF ¶ 78**.) 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). (**SMF ¶ 79**.) A violation of the Mandatory Reporting Provision is a criminal offense. *See* 23 Pa.C.S. § 6319; *see also* 18 Pa.C.S. § 4304. (**SMF ¶ 80**.)

DHS is the Commonwealth agency charged with administering and overseeing the implementation of the CPSL. (**SMF ¶ 81**.) According to DHS itself, under the CPSL, DHS is tasked with:

> (a) promulgating regulations necessary to implement the law (*see id.* § 6306);
>
> (b) providing "specific information" through "continuing publicity and education programs" by working jointly with each county agency and by individually addressing topics, including, but not limited to, "[p]ersons classified as mandated reporters[,]" and "[r]eporting requirements and procedures" (*see id.* §§ 6383(a) and 6383(a.2)(2)(ii-iii));
>
> (c) establishing and maintaining a "statewide database of protective services" (*see id.* §§ 6331 and 6334(g));
>
> (d) creating and maintaining a toll-free hotline for reporting abuse (*see id.* §§ 6332-6333);

(e) ensuring DHS is "[c]ontinuousl[ly] availab[le]" to "receiv[e] oral reports of child abuse" and "monitor[] the provision of child protective services 24 hours a day, seven days a week" (*see id.* § 6333);

(f) gathering and receiving reports of suspected child abuse from county agencies and law enforcement personnel (*see id.* § 6334(a));

(g) identifying to any law enforcement official the existence, or non-existence, of a report in the Statewide database, which may be used for the purposes of investigating whether a mandatory reporter failed to report suspected child abuse as required (*see id.* § 6335(c)(1)(ii)); and, separately, protecting the confidentiality of the information contained within the reports received and only releasing the reports to the entities identified in the statute, including the Attorney General (*see id.* §§ 6339 and 6340(a)(7)).

(**SMF ¶ 82**.)

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 Provision 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* Act 443 of 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 a comprehensive child-protection scheme. *See* Pa.H.R. Legis. J. at 1851-52 (Oct. 5, 1993) ("Not every family troubled by child abuse is ready to report the abusive family member to the State or county authorities, but some of these families who trust their priests, ministers, or rabbis will seek their help if the matter can be kept confidential. Without confidentiality, however, in their communications even to their clergy, there will be nowhere to turn and the abuse might go on indefinitely. Hence, the removal of confidentiality intended to bring child abuse to light and thereby to rescue an abused child can have the reverse effect and keep the abuse hidden from everyone.").[2]

The CPSL does not define the following words or phrases (the CPSL Words or Phrases):

a. members of the clergy;

b. clergyman;

c. priest;

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

d. rabbi;

e. minister;

f. Christian Science practitioner;

g. religious healer;

h. spiritual leader;

i. regularly established church; and

j. religious organization.

(**SMF ¶ 83**.) DHS has not separately defined the CPSL Words or Phrases in any internal document, nor has it adopted any formal definition of the CPSL Words or Phrases in DHS regulations or publicly available materials. (**SMF ¶ 84**.) If an individual were to contact DHS seeking to learn the meaning of the CPSL Words or Phrases, DHS, its agents, and employees would state that DHS cannot provide guidance or legal advice and would recommend the individual speak with legal counsel. (**SMF ¶ 85**.)

V. SUMMARY OF THE ARGUMENT

For at least three reasons, the elders of Ivy Hill are entitled as a matter of fact and law to the protections afforded by the clergymen privilege, 42 Pa.C.S. § 5943, and concomitantly the exemption to reporting under the Child Protective Services Law (CPSL), 23 Pa.C.S. § 6311.1(b)(1). *First*, elders are "clergymen" under Section 5943, and any interpretation to the contrary is premised on a flawed construct. *Second*, because Jehovah's Witnesses are not "a religious organization[] in which members other than the leader thereof are deemed clergymen or ministers," the exception to the clergymen privilege does not preclude the elders from the protections afforded by the privilege. *Third*, to the extent Section 5943 forecloses the privilege to elders on the grounds that "members other than the leader … are deemed clergymen or ministers" in Jehovah's Witnesses' faith, that particular clause violates the Federal and State Constitutions; thus, it must be severed from the remainder of the statute, leaving the principal part of the privilege.

VI. ARGUMENT

Summary judgment in favor of Ivy Hill is warranted because the undisputed material facts demonstrate the elders of Ivy Hill are entitled to invoke, as a matter of law, the clergymen protections under the CPSL. If the statutory clergymen protections do not apply, the relevant statutory provisions should be declared unconstitutional based on an impermissible denominational preference. Regardless of which grounds the Court adopts, trial in this matter is not warranted as only questions of law are presented in light of the undisputed material facts.

A. Elders are entitled to invoke the clergymen privilege, and the exception to reporting under the CPSL, because they are "clergymen" under Section 5943 of the Judicial Code.

Applying settled precepts of statutory interpretation, the Ivy Hill elders are clergymen, as that term is used in Section 5943. Specifically, as developed below, the elders' status as clergymen is supported by not only the plain language of the statute, but also the tools of statutory construction used for ascertaining legislative intent. This means Ivy Hill is entitled to summary judgment on count one of the Petition for Review.

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

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

Turning to the dictionary meaning of the term, Webster's Third New International Dictionary defines a "clergyman" as "a member of the clergy." *Clergyman*, *Webster's Third New International Dictionary, Unabridged* (cited with favor by *People v. Thodos*, 49 N.E.3d 62, 67 n.4

(Ill. App. Ct. 2015)).[3] In turn, "clergy" is defined in the same dictionary as, *inter alia*, "a body of religious officials or functionaries prepared and authorized to conduct religious services and attend to other religious duties."[4] Similarly, while Webster's Collegiate Dictionary also provides an identical definition for "clergyman" (*i.e.*, "a member of the clergy"),[5] that dictionary defines "clergy" as "a group ordained to perform pastoral or sacerdotal functions in a Christian church."[6] [7] In turn, while "sacerdotal" is defined as "of or relating to priests or a priesthood,"[8] "pastoral," is defined as "of or relating to spiritual care or guidance especially of a congregation."[9]

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

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

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

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

[7] *Ordain*, *Webster's Collegiate Dictionary* ("to invest officially (as by the laying on of hands) with ministerial or priestly authority[.]"), *available at* https://unabridged.merriam-webster.com/collegiate/ordain; *see also Ordain*, *The Merriam-Webster Dictionary* (New Edition 2004) ("to admit to the ministry or priesthood by the ritual of a church").

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

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

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

Examined against the foregoing, the functions performed by Jehovah's Witnesses elders satisfy the definitional criteria for clergymen. With respect to the definition of clergy offered in Webster's Third, all elders are trained (*i.e.*, "prepared") and authorized to conduct religious services and attend to a number of other religious duties. (**SMF ¶¶ 32-42**.) Specifically, as it relates to their training, in keeping with the tenets of the faith of Jehovah's Witnesses, the elders of Ivy Hill must satisfy certain Scriptural criteria, prior to their

appointment, (**SMF ¶ 37**), and continue to undergo a rigorous ecclesiastical training process thereafter. (**SMF ¶ 41**.) Furthermore, as it relates to their religious duties and the services they are authorized to perform, based on established doctrines of Jehovah's Witnesses, elders are responsible for, *inter alia*: overseeing and leading the regular meetings held to strengthen the faith of congregation members and others in attendance; officiating funerals; and solemnizing marriages. (**SMF ¶ 42**.) Similarly, given that the provision of spiritual care and guidance to the congregation is their chief function, the elders, as ministers of the gospel, easily satisfy Webster's Collegiate Dictionary's definition of clergyman. (**SMF ¶ 43**.)

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

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

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

certain religious denominations to an inferior status. *See id.* at 558-59; *see also id.* at 561 (per, Yates, J.).

Authority from other jurisdictions also supports the conclusion that elders are clergymen. Indeed, appellate courts in at least three states have afforded elders clergymen status under their respective privilege statutes. *See, e.g.*, *Nunez v. Watchtower Bible & Tract Soc. of New York*, 455 P.3d 829 (Mont. 2020); *McFarland v. W. Congregation of Jehovah's Witnesses*, 60 N.E.3d 39 (Ohio Ct. App. 2016); *see also Elliott v. State*, 49 So.3d 795 (Fla. Dist. Ct. App. 2010) (parties agreed elders were clergy, without issue being decided expressly).[10]

Furthermore, cautioning that an overly narrow interpretation would raise serious constitutional concerns and create practical difficulties, a "leading treatise,"[11] which the Pennsylvania Supreme Court references regularly to resolve difficult questions of law, outlines

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

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

various methods of interpreting "clergyman" in this context, and that treatise ultimately concludes that "the functions of a clergyman are three: (1) teaching; (2) preaching; (3) liturgical leadership." Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 (1st ed.). Viewed differently, a person qualifies as a clergyman if he is granted a "recognized leadership role within the sect," and is responsible for "spiritual counselling." *Id.* (quoting 2 Louisell & Mueller, Federal Evidence, at 835 (1985)). The Jehovah's Witnesses elders easily satisfy teaching, preaching, leadership, and counselling criteria. (**SMF ¶¶ 12, 33-34, 36, 42-43**.)

In sum, mindful that "[d]ifferent societies require from their ministers different degrees of service," *Guardians of the Poor*, 5 Binn at 560, the most cogent definition gleaned from the above authorities is that a "clergyman" is an individual recognized by the adherents of a particular faith as a spiritual leader, who is conferred with a certain degree of responsibility and oversight. Again, elders' duties and responsibilities easily satisfy these criteria. (**SMF ¶ 42**.)

Against this backdrop—and affording the requisite deference to the bona fide religious doctrines of Jehovah's Witnesses as required by

the Federal and State Constitutions[12]—elders satisfy the statutory definition of clergymen, and members of the clergy, under Section 5943 and the CPSL.

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

As set forth above, based on the plain language of Section 5943, elders are clergymen and, thus, discerning legislative intent is unnecessary. *See Warrantech Consumer Products Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346, 354 (Pa. 2014) (citing 1 Pa.C.S. § 1921(c)). Nevertheless, to the extent this Court finds the

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[12] In keeping with the First Amendment to the United States Constitution and Article I, Section 3 of Pennsylvania Constitution, in "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law[,]" the religion's own interpretations are controlling. *Poesnecker v. Ricchio*, 631 A.2d 1097, 1102 (Pa. Cmwlth. 1993) (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)); *see also Presbytery of Beaver–Butler v. Middlesex*, 489 A.2d 1317, 1320 (Pa. 1985); *Zernosky v. Kluchinsky*, 122 A. 262, 263 (Pa. 1923); *Henderson v. Hunter*, 59 Pa. 335, 343 (1868).

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

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

statute ambiguous, application of the various tools of statutory construction yields the same result: namely, that the definition of "clergymen" subsumes elders. With regard to the General Assembly's intent, which is the cornerstone of statutory interpretation,[13] the historic underpinnings of the clergymen privilege, as well as the legislative history surrounding its enactment, plainly reflect a legislative intent to encourage confidential communication for the purpose of spiritual guidance and protect it from compelled disclosure.

To illuminate this, as it pertains to the overarching object of the statute, which is one of the principal considerations here,[14] a news account following the enactment of the original statute confirms that protecting confidential communications with clergymen was considered paramount. *See* 1 Pa.C.S. § 1921(c)(7) (instructing courts to examine, *inter alia*, the legislative history in discerning intent). Indeed, the day after the statute's enactment, it was reported that Governor Lawrence noted "that clergymen have rarely, if ever been required to divulge confidential information. But he said the act spells out their immunity."

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[13] *See* 1 Pa.C.S. § 1921(a); *Com. v. Hoke*, 962 A.2d 664, 667 (Pa. 2009) ("Our task in interpreting a statute is to ascertain and effectuate the intention of the General Assembly.").

[14] 1 Pa.C.S. § 1921(c)(1)-(4).

See Clergymen Protected, New Law Helps Ministers Guard Confidence, The York Dispatch, at 1 (Oct. 15, 1959).[15] That statutory immunity codified a common-law tradition that existed even before 1959,[16] under which the importance of the clergyman's privilege was already recognized. *See In re Shaeffer's Estate*, 52 Dauphin Co. Reports 45 (1942) (attached hereto as Appendix 2).

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

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[15] *Available at* https://www.newspapers.com/newspage/614361760/ and attached hereto as Appendix 1.

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

incorporate and adopt the broad interpretation in *Guardians of the Poor* outlined above.

Similarly, the floor debates on amendments to the CPSL further reflect the General Assembly's intent to maintain a robust and multi-faith-encompassing privilege under Section 5943. *See* Pa.H.R. Legis. J. at 1852 (remarks of Representative Brown regarding the importance of the privilege).[17] As noted by Representative Brown, prior to the incorporation of the privilege into the CPSL, the protection afforded by Section 5943 was understood broadly to encompass *all faiths* and their clergymen:

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

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

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

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

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

The exception to the clergymen privilege in Section 5943, which makes the privilege unavailable to clergymen or ministers who are "members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers[,]" 42 Pa.C.S. § 5943 (hereinafter, the Exception Clause), is inapplicable for two discrete reasons.[18] *First*, Jehovah's Witnesses are not "a religious organization,"

[18] Although the exception also prohibits so-called "self-ordained" clergymen or ministers from invoking the privilege, the elders are not "self-ordained," and any assertion to the contrary would be unsustainable. Indeed, the Ivy Hill elders were appointed to their position only after a specific process controlled by the existing body of elders and the circuit overseer, and only after meeting Scriptural requirements that took years to satisfy. (**SMF ¶¶ 35-40**.) Further, even just becoming a baptized publisher—a prerequisite to becoming an elder—requires a person to receive express approval from the body of elders; i.e., one cannot even

but rather a "regularly established church." *Second*, Jehovah's Witnesses do not deem all members, other than the leader thereof, clergymen or ministers.

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

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

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

Turning to the relevant statutory language, while the general protection afforded by Section 5943 applies to any "clergyman … or minister of the gospel of any regularly established church ***or*** religious organization," the Exception Clause ***only*** references "religious

unilaterally choose to become baptized as a Jehovah's Witness, let alone "self-ordain" as an elder. (**SMF ¶ 10**.)

organizations." 42 Pa.C.S. § 5943 (emphasis added). Given that the General Assembly "is presumed to understand that different terms mean different things," *PECO Energy Co. v. Com. of Pa.*, 919 A.2d 188, 191 (Pa. 2007), the plain language of Section 5943 reflects a legislative intent to ascribe distinct meanings to the phrases "regularly established church" and "religious organization." *Accord Cent. Westmoreland Career & Tech. Ctr. Educ. Ass'n, PSEA/NEA v. Penn-Trafford Sch. Dist.*, 131 A.3d 971, 976 (Pa. 2016) (citing *Com. v. Elliott*, 50 A.3d 1284, 1290 (Pa. 2012)). That presumption is particularly strong here because the differential treatment between an "established church" and a "religious organization" is reflected in both statutes and caselaw, with both phrases having acquired discrete legal meanings. *See, e.g.*, *PECO Energy*, 919 A.2d at 191 (holding that where a statute referred to "cost … as reflected on the books of account" it was fair to assume the General Assembly intended that "books of account" be interpreted in accordance with the meaning it had been given in other contexts).

The most prominent example of that distinction is the Marriage Law—enacted six years before the clergymen privilege was first

codified[19]—which establishes separate rules for marriages solemnized by "regularly established churches" and those performed by "religious organizations." Specifically, under Section 1503(a)(6), any "minister, priest or rabbi of any regularly established church or congregation" is authorized to "solemnize marriages between persons that produce a marriage license"—irrespective of the religious affiliation of the individuals involved. 23 Pa.C.S. § 1503(a)(6).[20] Importantly, however, in an ensuing subsection, titled "religious organizations," the statute separately permits religious societies and organizations to perform marriages in accordance with their own rules and customs, but only if at least one of the persons is a member of that organization or society. *Id.* at § 1503(b) ("Every religious society, religious institution or religious organization in this Commonwealth may join persons together in marriage when at least one of the persons is a member of the society, institution or organization, according to the rules and customs of the society, institution or organization.").

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

[20] Notably, Charles Duncan, an elder at Ivy Hill, has solemnized several marriages under the Marriage Act as a "minister." (**SMF ¶ 66**.)

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

(b) Under Federal law, because Jehovah's Witnesses have an established congregation and provide regular religious services, they are a "regularly established church."

Turning, initially, to the federal caselaw, the most developed exposition of the difference between churches and religious organizations is found in decisions arising under the Internal Revenue Code, which provides certain benefits to "churches" that are not available to "religious organizations." Specifically, churches—unlike "religious organizations"—are exempt from, *inter alia*, "annual informational filings." *Spiritual Outreach Soc. v. C.I.R.*, 927 F.2d 335, 337 n.2 (8th Cir. 1991) (describing the benefits afforded to "churches,"

but not available to "religious organizations"). Adopting a fourteen-factor test promulgated by the Internal Revenue Service,[21] federal courts have distilled the inquiry to a consideration of the most salient factors for determining whether an entity is a "church," or a "religious organization." *Id.* As relayed by the Eighth Circuit Court of Appeals, of "central import" to the assessment are: "the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code[.]" *Id.* at 339.

An alternative method for distinguishing a "church" from other forms of religious organizations used in the context of the Internal Revenue Code is the "associational test." As summarized by the District Court for the District of Columbia, "[t]he means by which an avowedly religious purpose is accomplished separates a 'church' from other forms

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

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

Religious organizations, on the other hand, are best understood as associations that—despite their generally religious nature—do not espouse a distinct doctrine or belief system. *See Tax Guide for Churches and Religious Organizations*, at 1 (describing religious organizations as "nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion"). In addition, a common distinguishing factor of a religious organization is that its members can (and often do) belong to other religious sects that are regularly established churches. *Spiritual Outreach Soc.*, 927 F.2d at 338 (holding that a religious organization where the regular attendees were congregants in other

churches, the ministers were guest ministers from other churches, and no system of religious education for the young was present was not a "church"); *see also Found. of Human Understanding v. United States*, 614 F.3d 1383, 1390 (Fed. Cir. 2010) (holding that a religious organization was not a church where the in-person services it conducted were incidental to its central purpose and where the entity lacked an established community of service); *Chapman v. C.I.R.*, 48 T.C. 358, 363 (1967) (holding that a group of missionary dentists was not a church because it drew its membership from various denominations).

Applying these guideposts, Ivy Hill (and Jehovah's Witnesses) is a regularly established church, rather than a "religious organization." Examining each of the 14 factors under the federal tax guidelines, *see supra*, Ivy Hill easily satisfies the first twelve. *See Tax Guide for Churches and Religious Organizations*, at 33. Specifically, Jehovah's Witnesses, like the believers at Ivy Hill, have: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization

of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; and (12) regular religious services. (**SMF ¶¶ 1-76**.) Furthermore, although Jehovah's Witnesses do not have "Sunday schools for religious instruction of the young[,]" the rejection of any activities that separate children from their parents is a specific doctrine of their faith. (**SMF ¶¶ 26-27**.) Similarly, while Jehovah's Witnesses do not have distinct "schools for the preparation of ministry[,]" all elders are trained and must undergo Scriptural studies. (**SMF ¶¶ 37, 41**.) Thus, in totality, Ivy Hill overwhelmingly satisfies the criteria of being a "church" versus a "religious organization."

(c) Under Pennsylvania law, because Jehovah's Witnesses have a clear belief system and an established congregation that gathers regularly for prayer, they are a "regularly established church."

Furthermore, the above definitions squarely comport with Pennsylvania law. Returning once again to the Marriage Act, courts that have had the opportunity to expound upon the meaning of a "church" under that statute have emphasized the existence of a clear belief system and a regular congregation. *See, e.g.*, *O'Neill v. O'Neill*,

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

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

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

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

Id. at 6; *accord In re Her-Bell, Inc.*, 107 A.2d 572, 574 (Pa. Super. 1954) (explaining that a church is a place of worship where people join together for the stated purpose of worship); *see also Mullen v. Erie Cty. Comm'rs*, 85 Pa. 288, 292 (1877) (holding that a statute exempting churches from certain taxes required a showing of regular public worship); *Master et al. v. Machen et al.*, 35 Pa. D. & C. 657, 664 (C.P. Phila. 1938) (noting that "churches are established for the promulgation of faith under the regulations of definite religious organizations").[22]

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

Although these cases from Pennsylvania's appellate courts were decided in the context of property, the fundamental principle remains the same: a religious organization or a religious purpose can take many forms, but a "church" is more narrowly construed to denote a congregation regularly gathering together for public worship. *See Mount Zion New Life Ctr. v. Bd. of Assessment & Revision of Taxes & Appeals*, 503 A.2d 1065, 1069 (Pa. Cmwlth. 1986) (explaining that "the mere existence of an established schedule" is not controlling, but rather, the lynchpin is "the intent of individuals to join together in worship, with the worshipers' establishment of a schedule being a manifestation of that intent"). Moreover, the Superior Court has specifically applied this framework to Jehovah's Witnesses, despite the fact that under the tenets of their faith, they do not expressly refer to any particular building as a church. *See Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit*, 130 A.2d 240, 243 (Pa. Super. 1957) (recognizing and treating Jehovah's Witnesses as a church). (**SMF ¶¶ 28-29**.)

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

Applying these precepts here, Ivy Hill also easily meets the criteria under state law, since its congregants regularly gather for the stated purpose of worshipping in accordance with the teachings and traditions of Jehovah's Witnesses. (**SMF ¶¶ 21-24, 30**.)

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

2. The exception to Section 5943 is inapplicable to Ivy Hill because Jehovah's Witnesses do not deem all members other than the leader thereof clergymen or ministers.

Even if this Court finds that Ivy Hill and Jehovah's Witnesses are a "religious organization" under Section 5943, the conclusion that all members of Jehovah's Witnesses "are deemed clergymen or ministers" under the Exception Clause is unsustainable factually.

To illuminate, the Exception Clause does not apply to Jehovah's Witnesses because they do not deem all members other than their "leader" as ministers or clergymen in a *statutory* sense. While all

baptized members of the congregation are denominated as "ministers of Jehovah God," that nomenclature signifies a religious principle that all members have a *religious* duty to spread God's word and does not confer any leadership responsibilities relative to the member's congregation. (**SMF ¶¶ 11-12**.) Instead, the functions associated with the ordinary definitions of clergymen and ministers are specifically vested in the elders of each congregation. (**SMF ¶¶ 12, 32-56**.) Indeed, permitting theological nomenclature to *constrain*—or, for that matter, expand—the secular/legal meaning of a statutory term would plainly run afoul of constitutional principles of deference and the concomitant prohibition against judicial entanglement in religious matters. *See supra* footnote 12.

In this connection, the United States Supreme Court's decision in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), provides substantial guidance. Assessing a ministerial exception under a federal employment statute, the Supreme Court roundly rejected the notion that the titles used by a particular religion are determinative. *See id.* at 2064. In addition to highlighting the practical difficulties in such an approach, the Court emphasized that "[r]equiring the use of the

title would constitute impermissible discrimination[.]" *Id.* In this regard, noting that for Muslims, who also reject a distinct clerical class,[23] "an inquiry into whether imams or other leaders bear a title equivalent to 'minister' can present a troubling choice between denying a central pillar of Islam—i.e., the equality of all believers—and risking loss of ministerial exception protections." *Id.* (internal quotation marks omitted). In the end, the Court held that the function performed, rather than the title, was controlling and concluded:

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

Id.; *see also Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring).

Indeed, federal decisions interpreting the Military Selective Services Act, *see* 50 U.S.C. § 3801, *et seq.*, have also adopted a similar

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

approach that elevates substance over pure nomenclature. By way of necessary background, that statute generally requires all adult males between the ages of eighteen and twenty-six to register for training and service in the Armed Forces, but exempts "[r]egular or duly ordained ministers of religion." 50 U.S.C. § 3806(g)(1). In addition to providing a definition of "duly ordained minister of religion" and "regular minister of religion"—which, notably, are largely in accord with the ordinary definition of clergyman discussed *supra*—the statute also clarifies that the term "regular or duly ordained minister of religion" does not include a person who either: (1) "irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization;" or (2) "may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a bona fide vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization." 50 U.S.C. § 3814(g).

Examining the application of this ministerial exemption, federal courts have held that the theological nomenclature of "ministers" in the

faith of Jehovah's Witnesses is not controlling; rather, the definition of a minister under the law turns on the substance—not form—of the leadership duties performed by the person seeking an exemption. A contrary interpretation, these Courts have held, would improperly deprive all adherents of that religion from statutory protections and privileges available to clergymen of all faiths. For instance, in *United States v. Hurt*, 244 F.2d 46 (3d Cir. 1957), the Third Circuit Court of appeals reversed the trial court's refusal to grant one of Jehovah's Witnesses who was a "company servant" (i.e., an elder) a ministerial exemption under the statute.[24] Specifically, the Court found it immaterial that "all adherents are ordained as ministers when they are baptized" because the lynchpin of the exemption is the specific function performed by the person. As cogently relayed by that panel, one whose duties are consistent with the function performed by ministers, "cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith[,]" since such a construct "would leave a congregation without a

[24] "Company servant" is the former title for an elder. (**IVYHILL02048** (*Watchtower*, Sept. 1, 1983; Duncan Ex. F).)

cleric." *Id.*; *see also Pate v. United States*, 243 F.2d 99, 103 (5th Cir. 1957) ("As appellant correctly declares in his brief, the real trouble here is, as it has been in many other cases, that the local board has tried to fit and mold an ordained pioneer minister of Jehovah's Witnesses into the orthodox straight-jacket of ministers of an orthodox church, in the face of the fact that it is impossible to fit the garments of orthodoxy on a pioneer minister of Jehovah's Witnesses, and that by their footless effort to do so, the local board erred to the prejudice of defendant and to the denial of rights accorded him by the act and regulations.").

Thus, the phrase "minister" should *not* be interpreted and applied based on the theological nomenclature of Jehovah's Witnesses, but rather, must be interpreted and applied in accordance with its ordinary *statutory* and caselaw usage.[25] *Accord Guardians of the Poor*, 5 Binn. at 560 ("I would leave it to each society to regulate its own clergy; and until the legislature shall think proper to express its will to the contrary, I shall be for extending equal privilege to the mitred bishop and the unadorned friend."). Hence, the term "minister," in a statutory, secular sense, is an individual who is recognized by the adherents of a

[25] *See generally Treaster*, 242 A.2d at 255.

given religion as one who is authorized to take the lead and conferred a certain degree of spiritual responsibility and oversight. With Ivy Hill, only elders have spiritual responsibility and oversight, while ordinary rank-and-file baptized publishers, though called ordained ministers of Jehovah God, do not. (**SMF ¶¶ 11-12**.)

Finally, and notably, if the Exception Clause is interpreted to mean it applies to any faith that has persons other than the leader thereof who are called "ministers," then the clergymen privilege does not apply to Catholicism or Judaism. *See Our Lady of Guadalupe*, 140 S.Ct. at 2064 ("'A brief submitted by Jewish organizations makes the point that 'Judaism has many 'ministers,' that is, 'the term 'minister' encompasses an extensive breadth of religious functionaries in Judaism.'"); United States Conference of Catholic Bishops, *Extraordinary Ministers of Holy Communion at Mass* (describing role of Extraordinary Ministers of Holy Communion).[26] This would be an absurd interpretation. *Cf. Stewart*, 690 A.2d at 288; 1 Pa.C.S. § 1922(1).

[26] A*vailable at* https://www.usccb.org/prayer-and-worship/the-mass/order-of-mass/liturgy-of-the-eucharist/extraordinary-ministers-of-holy-communion-at-mass.

In sum, because Jehovah's Witnesses do not "deem" all baptized members as spiritual leaders—despite Witnesses' deeply-held religious belief that all baptized congregants have a duty to spread the gospel and, thus, are ministers upon baptism—this Court should conclude that the Exception Clause does **not** apply factually.

C. In the alternative, if the Court finds the Exception Clause applies to Jehovah's Witnesses, the Clause should be declared unconstitutional and severed from the statute.

The most sensible approach to the present dispute is to construe the Exception Clause's reference to "ministers" in accordance with the ordinary usage of that term, thereby averting a constitutional question altogether. However, to the extent this Court concludes that the *only* reasonable interpretation of the exception to the clergymen privilege is that elders are excluded from the protections it affords, Section 5943 must be declared unconstitutional. Under this interpretation, Section 5943, as written, violates the prohibition against granting denominational preferences under the First and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 3, of the Pennsylvania States Constitution. *See generally Larson v. Valente*, 456 U.S. 228, 242-46 (1982).

1. The Exception Clause violates the Federal Constitution.

With regard to the Federal Constitution, the First Amendment to the United States Constitution prohibits discrimination against a particular denomination or religious sect. *See Larson*, 456 U.S. at 246. Moreover, because "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another[,]" such statutory schemes are subject to the strict scrutiny standard of review, rather the more forgiving "*Lemon* test" applied in other Establishment Clause cases. *See Larson*, 456 U.S. at 252 ((citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Accordingly, when a law is either facially discriminatory or "discriminatory in impact,"[27] its constitutionality is adjudged under a strict scrutiny standard, which requires the state to establish that the law is: (a) necessary to advance a compelling governmental interest; and (b) narrowly tailored to further that purpose. *See Larson*, 456 U.S. at 252.

[27] *Meltzer v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 577 F.2d 311, 318 (5th Cir. 1978) (noting that, in determining whether the prohibition against denominational preferences has been violated, courts apply "a non-discriminatory impact principle that requires state action to be neither facially discriminatory nor discriminatory in impact").

Against this backdrop, if Section 5943's Exception Clause categorically precludes the application of the clergymen privilege to communications between elders and congregants, it violates the Establishment Clause of the First Amendment. As a preliminary matter, the discriminatory impact is self-evident under any construct that would categorically bar the elders from asserting the privilege because of the tenets of their faith, since it would single out a specific religion for unfavorable treatment. In this regard, while limitations pertaining to ordination are not uncommon, it is notable that a comprehensive survey of similar provisions in other jurisdictions reveals that Section 5943 is unique in excluding "members of religious organizations in which members other than the leader thereof are deemed clergyman or ministers."

Indeed, that peculiar exception has been highlighted by various scholars for its discriminatory impact—and, perhaps, *intent*—relative to Jehovah's Witnesses. *See* Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 (1st ed.) (singling out the exception in Section 5943, and noting that "[w]riters who favor such a restriction have sometimes been more candid in admitting that the aim

is to deny the privilege to Jehovah's Witnesses").[28] [29] For instance, one leading treatise presents substantial authority for the proposition that Section 5943's exception was seemingly borne out of prejudice against Jehovah's Witnesses and cautions that "[t]hose who think it possible to deny the privilege to Jehovah's Witnesses do not consider whether or not this amounts to a judicial intervention into the internal

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

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

Even more recent decisions in this Commonwealth have treated the religion with a level of suspicion rarely found in published opinions. *See Com. ex rel. Lebowitz v. Lebowitz*, 307 A.2d 442, 443 (Pa. Super. 1973) ("It is possible to sympathize with the husband's bitterness and frustration because of his wife's interest in what he considered a strange cult[.]").

organization of religions that presents problems under the First Amendment." Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 n.123 (1st ed.).[30]

In light of the *prima facie* showing of Section 5943's discriminatory impact—if not outright discriminatory intent—the statute is subject to strict scrutiny. In this respect, it is not at all clear what compelling governmental interest the Exception Clause advances, since any *legitimate* interest the government may have in keeping the privilege within its proper bounds is advanced by *Stewart*'s four-prong test.[31] Relatedly, while the statute may, in fact, be narrowly tailored to

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[30] Several examples of the prejudice faced by Jehovah's Witnesses in the decades immediately preceding Pennsylvania's enactment of the Exception Clause in 1959 is set forth in Chuck Smith, *War Fever and Religious Fervor: The Firing of Jehovah's Witnesses Glassworkers in West Virginia and Administrative Protection of Religious Liberty*, 43 Am. J. Leg. Hist. 133 (1999), which describes workplace discrimination faced by Witnesses during World War II based on their perceived "unpatriotic behavior."

[31] Again, the Wright & Miller treatise offers a cogent rejoinder in this regard:

> The only attempt to justify exclusion of Jehovah's Witnesses from the penitent's privilege that we have found speaks vaguely of 'overbreadth' and proclaims that to include 'the whole membership of long-established sects when all such members are designated as 'ministers' would mean that '[f]ar too much would be swept within the privilege.'
>
> It is not clear what is meant by 'overbreadth' or how much of the penitent's privilege would be enough. We assume the authors do not mean that we have too many religions to be able to afford the privilege for all of them. One assumes, therefore, they mean that to extend the privilege to Jehovah's Witnesses would cost too much in lost evidence.

discriminate against a specific religion—i.e., Jehovah's Witnesses—it is in no way tailored to achieve a compelling legitimate interest. Notably, various federal and state courts have previously cautioned that delimiting the clergymen privilege to certain chosen denominations raises serious First Amendment concerns. *See In re Grand Jury Investigation*, 918 F.2d 374, 385 n.14 (3d Cir. 1990) ("[T]he prospect of restricting the privilege to Roman Catholic penitential communications raises serious first amendment concerns."); *see also Cox v. Miller*, 296 F.3d 89, 107-111 (2d Cir. 2002); *State v. Martin*, 975 P.2d 1020, 1028

> Let us consider two hypothetical churches, each with 100 members, one a Roman Catholic parish and the other a congregation of Jehovah's Witnesses. Let us further assume that in the Catholic church, everyone confesses their sins to the priest and no one says anything about their misdeeds to other members of the parish. Now assume that in the congregation of Jehovah's Witnesses, members confess their sins to all of the other members of the congregation. If the penitent's privilege applies equally to both Roman Catholics and Jehovah's Witnesses, the loss to the legal system when the sins of a penitent become relevant in litigation is exactly the same in both cases; that is, the litigants will have been denied the use of one penitential communication. The only difference is that in one case only a single person other than the penitent has knowledge of the penitential communication while in the other case there are 99 such persons. The effect on the litigant's case would be the same whether the privilege is claimed by one priest or by 99 Jehovah's Witnesses. Until someone comes up with a better argument, there seems to be no reason to deny the status of "clergyman" to a Jehovah's Witness merely because all of his coreligionists can claim that title.

Wright & Miller, *Elements of the Privilege—"Cleric"*, 26 Fed. Prac. & Proc. Evid. § 5613 (1st ed.).

(Wash. 1999); *Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994); *accord State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998); *Waters v. O'Connor*, 103 P.3d 292, 294 (Ariz. Ct. App. 2004).

In short, whatever the governmental interest may be, a statute that has the effect (if not intent) of excluding a specific religious group, while including other similarly situated faiths (including other Christian faiths) is hardly closely fitted to achieve that goal. Thus, the Exception Clause violates the Federal Constitution.

2. The Exception Clause violates the State Constitution.

The Exception Clause also violates Article I, Section 3 of the Pennsylvania Constitution, which provides:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Pa. Const. art. I, § 3.

Although the most recent decision addressing Article I, Section 3 of the Pennsylvania Constitution and its Federal counterpart suggests

that it is conterminous with the First Amendment to the United States Constitution, *see Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366 (Pa. 1974), that decision was rendered prior to the Pennsylvania Supreme Court's landmark ruling in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), which held that the Pennsylvania Constitution may afford greater protections than its Federal counterpart when individual liberties are involved.

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

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

Id. at 893.

Turning to the *Edmunds* analysis, application of the first factor alone brings the heightened protection afforded under the State Constitution into focus, since the State Constitution, among other

things, expressly proscribes laws granting denominational preferences—a prohibition which is only implicit in its Federal counterpart. *See* Pa. Const. art. I, § 3 (providing that "no preference shall ever be given by law to any religious establishments or modes of worship"). Those enhanced protections are also underscored by other provisions in the State Constitution. For instance, unlike provisions in the Federal Constitution relating to the armed forces, Article III, Section 16 of the State Constitution, which provides for the creation of the National Guard, expressly exempts individuals who harbor religious objections from military service. *See* Pa. Const. art. III, § 16. Accordingly, the State Constitution is decisively more forceful than its Federal counterpart in pronouncing that religious liberties must be scrupulously protected.

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

> The minds of *William Penn* and his followers would have revolted at the idea of an established church. *Liberty to all, but preference to none;* this has been our principle, and this our practice. But although we have had no established

> church, yet we have not been wanting in that respect, nor niggards of those privileges, which seem proper for the clergy of *all religious denominations*.

Id. at 558-560 (emphasis in original) (per Tilghman, J.); *see also id.* at 561 (per Yates, J.).

The caselaw aside, the history of Pennsylvania's founding also reflects a paramount concern for protecting the religious liberties of minority groups and faiths that are regarded as "non-mainstream." *See* Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81, 137 (2001) ("Throughout Pennsylvania's colonial and constitutional history, freedom of conscience for majority and minority faiths was secured equally.")

As to the third *Edmunds* factor, it does not appear that any clergymen privilege statute has been assessed under a state constitutional provision; however, at least ***eleven*** states have held that their respective state constitutions provide greater religious liberties than the Federal Constitution.[32] As noted by one commentator, "[t]he

[32] *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Davis v. Church of*

jurisprudence of other states whose constitutions resemble the text of Pennsylvania's charters, or whose history parallels the Commonwealth's abundant protection of minority faiths, have overwhelmingly supported strict scrutiny of neutral laws of general applicability that burden religion." Gildin, *Coda to William Penn's Overture*, 4 U. Pa. J. Const. L. at 140.

As for the fourth factor, the General Assembly, as noted above, has already expressed a policy preference for protecting confidential communications and any factors unique to Pennsylvania—such as the religious liberties at the very foundation of the Commonwealth, *see generally id.*[33]—militate in favor of zealously guarding against violations of religious liberties.

Thus, in sum, the Pennsylvania Constitution provides even more protections for religious liberties than does its Federal counterpart. And

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Jesus Christ of Latter Day Saints, 852 P.2d 640 (Mont. 1993); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *In re Browning*, 476 S.E.2d 465 (N.C. Ct. App. 1996); *State v. Evans*, 796 P.2d 178 (Kan. Ct. App. 1990).

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

under those *heightened* protections, the Exception Clause is unconstitutional for at least the reasons discussed *supra* regarding the violations of the Federal Constitution. Thus, Ivy Hill is entitled to summary judgment on count two.

3. Because the Exception Clause is unconstitutional, it should be severed.

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

> No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, [**SEVERED**] 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.

This is the appropriate remedy here, in light of the constitutional violations described above.

VII. CONCLUSION

Because the Ivy Hill elders are clergymen under Section 5943 of the Judicial Code and are not members of a religious organization that deems all members other than "the leader" ministers, this Court should enter an order declaring that the elders are entitled to the invoke the clergymen privilege statute. This would also mean, when it is triggered, the exception to mandatory reporting in the CPSL would also apply to elders at Ivy Hill. If this Court finds the elders of Ivy Hill are precluded from invoking the privilege because of the exception to Section 5943, that clause should be declared unconstitutional and severed.

Therefore, for all of the foregoing reasons, summary judgment should be entered in favor of Ivy Hill and against DHS.

Respectfully submitted,

Dated: September 21, 2021

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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 13,939 words, exclusive of the cover page, tables, and the signature block.

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Appendix 1

CLERGYMEN PROTECTED

New Law Helps Ministers Guard Confidences

HARRISBURG, Oct. 15, AP—A new law just signed by Governor Lawrence affirms the right of clergymen to refuse to testify concerning any information given them in confidence.

The governor noted that clergymen have rarely, if ever, been required to divulge confidential information. But he said the act spells out their immunity.

Another bill signed by the governor will exclude the registration of station wagons as commercial vehicles no matter for what purpose they are used and set a $12 registration fee. The normal passenger car fee is $10.

Previously, a station wagon could be registered either as a passenger or commercial vehicle.

The bill is designed to eliminate different legal requirements, such as speed limits, which previously applied to station wagons depending on how they were registered.

Appendix 2

ground shall be considered as a public playground). The measurement shall be made from a point on the curb or street line directly opposite the property line of such playground nearest the fixed point on the same or the other street. However, when there is no school yard or ground, the measurement shall be made as hereinbefore stated.

In the event the respective buildings are situate on different streets, then the measurements shall be made in an air line from the fixed point on the one street to the line of the intersection of the two streets nearest the other building or playground, and thence in an air line on the other street to the point established thereon in the manner hereinbefore stated.

All measurements shall be made along public streets, roads or highways."

This court, by Wickersham, J., in the case of Klugh's License, 36 D. & C. 190, held that the Board's Rule for Measurement was reasonable and affirmed the Board's order refusing a retail liquor license to the applicant therein, whose property was within three hundred feet of a church as measured in accordance with the provisions of the said rule.

Testimony on the appeal was taken de novo by the court and inter alia discloses that the premises for which the transfer of license is requested is situate at the northwest corner of North and Susquehanna Streets, and the distance measured in accordance with the Board's rule from the curb opposite the entrance to the premises sought to be licensed, to the nearest end of the church building, is less than three hundred (300) feet. The pastor of the church and several of its members testified that a license at the corner of North and Susquehanna Streets is objectionable because of its proximity to the church, and the use of Susquehanna Street by members of the church and its organizations in going to and returning from the church building.

The testimony also discloses that the appellant is a man of good repute and has invested approximately sixteen thousand dollars ($16,000.00) in the premises proposed to be licensed; that the operation of the premises for the sale of malt and brewed beverages would in no way interfere with the church, its organizations or its members, nor with the school or playground nearby.

There is, however, only one question involved in the present appeal and that is, did the Board abuse its discretion in the refusal to approve the transfer to the new location. The discretion of the Board as shown in section 6(b) of the Beverage License Law, supra, is rather broad, and since the Board is given power under the said act to make rules and regulations, the Board has the authority to make such reasonable rules and regulations for the measurement of the distance existing between a premises proposed to be licensed and a church or playground, etc., as it may deem reasonably necessary.

There being no objection to the rule of measurement, and the said rule and authority of the board already having been passed upon in the Klugh case, supra, we can see no reason at this time to change the position of this court.

The Legislature having passed the act giving the Board authority to make rules and regulations concerning the operation of the act, and having said that no license shall be granted to a premises within three hundred (300) feet of a church or playground, etc., the court is powerless to change the legal authority vested in the said board.

This matter comes to us de novo and we have the power in our discretion to grant or refuse this application. Discretion is defined to be:

"Freedom to decide or to act according to one's own judgment; unrestrained exercise of choice or will. At will; according to one's judgment or pleasure."

And so using the term discretion, we conclude, because of the proximity of the premises of the appellant to the church property, the transfer of the license should not be permitted.

Wherefore we are of the opinion that the transfer of the license should be refused and the appeal dismissed.

And now, December 1, 1941, upon due consideration, it is hereby ordered, adjudged and decreed that the transfer of the license prayed for is hereby refused and the appeal is dismissed.

IN THE MATTER OF THE ESTATE OF IDA E. SCHAEFFER, DECEASED.

Decedent's estates—Right of husband to share in estate of wife—Desertion or non-support by husband—Burden of proof.

1. In a codicil to her will, a decedent, who died on Jan. 25, 1939, charged her husband with having wilfully and maliciously deserted her since July 23, 1936. The record indicated, inter alia: that the parties had been separated for a period of at least one year prior to the wife's death; that the husband paid to the wife $22.50 per month under a Court order made on August 10, 1936, there being no arrearages as of December 31, 1938; that the wife frequently, in the presence of other persons, cursed her husband, called him unpleasant names, and accused him of being out with other women; but that the husband's witnesses testified to facts which justified him in withdrawing from the home, without being guilty of desertion. **Held,** that since the record does not indicate a separation which was wilful and malicious, and it appears that the husband did not wilfully neglect or refuse to provide for his

wife for one year or upwards previous to her death, he is entitled to take against her will, and share in her estate.

2. The fact that the husband made the support payments under order of Court rather than voluntarily does not make him guilty of wilful neglect or refusal to provide for his wife.

3. Testimony by a minister was admissable and was not a confidential communication, where it related to conferences between the parties, requests by the wife that he use his influence to get the husband to return, and various complaints by the wife about the husband's going out with other women. The statements were not penitential in character, and were not made to the minister in his professional character by one seeking spiritual advice.

4. The burden of proving a wilful and malicious desertion is upon the one who asserts it.

Orphans' Court. No. 93 of 1939.

David S. Kohn for the husband.

Paul G. Smith, of Nauman, Smith & Hurlock, for the accountant.

Paul A. Kunkel for legatees.

Huette F. Dowling, guardian ad litem for minors.

RICHARDS, P. J., November 24, 1941.—When the first and partial account in this case came before us, we discovered that a codicil to decedent's will charged her husband with desertion and provided that he should receive nothing from her estate. Notwithstanding this, the husband had filed an election to take under the intestate laws. We felt obliged to look into the matter in order to determine if the husband had forfeited his rights. A hearing was had after notice to all the interested parties. The matter is now before us for decision.

The codicil provided as follows:

"My husband, Francis L. Schaeffer, having wilfully and maliciously deserted me and absented himself from our home without any just or reasonable cause, and such wilful and malicious desertion having continued since July 23, 1936, it is my will that he shall receive nothing from my estate and shall not share therein in any particular."

The testatrix died on Jan. 25, 1939. The alleged desertion, therefore, covered a period of about two and one half years. Counsel for the husband stated of record that the parties had been separated for a period of at least one year prior to the wife's death, but denied that such separation constituted a wilful and malicious desertion.

The Intestate Act of 1917, P. L. 429, paragraph 5, (20 P. S. 41) provides as follows:

"No husband who shall have, for one year or upwards previous to the death of his wife, wilfully neglected or refused to provide for his wife, or shall have for that period or upwards wilfully and maliciously deserted her, shall have the right to claim any title or interest in her real or personal estate, under the provisions of this Act."

There has been filed of record a stipulation that the husband paid to the decedent $22.50 per month under order of court made on Aug. 10, 1936, at No. 398 June Sessions, 1935. There were no arrearages as of December 31, 1938 and the decedent died on Jan. 25, 1939.

It is therefore clear that the husband did not wilfully neglect or refuse to provide for his wife for one year or upwards previous to her death. The fact that he paid under court order rather than voluntarily we think makes no difference.

The only remaining question is whether or not he had wilfully or maliciously deserted her for that period.

The evidence may be summarized as follows:

Mrs. Edna Gregg testified that she was a neighbor. She never heard anyone who was more foul mouthed than Mrs. Schaeffer. She talked terrible to him and cursed him. She called him an old whore and old stallion. When the husband came home she would fight with him right away and say that he had been out with another woman. This subject was the only and constant ground of complaint. The accusations were spoken loud enough to be overheard by school children and others. At one time the wife said she would not care if they would bring her husband home dead. The husband looked bad and was nervous. He never talked back or abused his wife. The witness never knew of any conduct by the husband which would justify the complaints.

The Rev. Jacob Rudisill was called as a witness to testify about his efforts to effect a reconciliation. His testimony was objected to as a confidential communication. We overrule this objection because we do not deem it to be confidential within the meaning of the law. The statements were not penitential in character and were not made to Dr. Rudisill in his professional character while seeking spiritual advice; See In re Swenson, 237 N. W. 589. Also some of this testimony was not based upon communications but upon personal observation.

He testified of conferences between the parties and requests by Mrs. Schaeffer that he use his influence to get her husband to return. The wife complained about the husband running around. She stated that the husband instead of coming home from work would stop to see another woman. After the separation, she requested Dr. Rudisill to urge her husband

to come back and she would not annoy him as she had in the past. The husband did finally come back but it was not long until the same thing occurred again. She would call to inquire if her husband was in church, and in fact, he usually was. This witness stated that the wife had a complex or weakness in this respect and that he had no evidence whatever that there was any truth in it.

Alderman Bowman testified that the wife made many complaints about her husband running around with another woman. Alderman Hallman likewise enumerated frequent complaints by the wife that the husband was running after that God damn whore, that former wife of his. He testified that the wife said she would call the husband's boss to see what time he quit work and if he was not home in fifteen minutes, she knew he was lying around with that woman. He likewise said the husband was nervous and that he had never seen him with another woman.

Constable Grimes said that the wife constantly complained of the husband's infidelity and said he was spending his money on another woman. She also said she didn't care whether he left her or not and then, in the same breath, would plead with him to stay.

Wm. F. Border, janitor at a school building, testified that the wife almost daily accused her husband of being out with another woman and used vulgar and profane language in addressing him.

Mrs. Margaret Baer was called as a witness in opposition to the husband's claim. She testified that the wife told her the husband would flirt with any woman. This witness saw the husband with another woman three times, once while he was living with his wife and twice after the separation. She also said she saw him at Fourth and Market Streets more than once and that he would flirt with witness. But she did not tell Mrs. Schaeffer of these occurrences. She also said that Mr. Schaeffer came to her home and talked about his wife. She also said that he would have made a date with her, the witness, had she agreed, and that he talked of another couple that were crooked. On one occasion Mr. Schaeffer walked out Market Street with her.

Claude Fisher testified that he worked in an A & P Store in 1938. The husband came to the store seven or eight times with a woman and her daughter and they bought groceries. Each paid several times, but he saw nothing wrong.

John Terry saw the husband on the street with another woman once. But he knew of no abuse by the husband to the wife or vice versa.

The husband was called in rebuttal. His testimony was objected to. We hold it to be admissible under the Act of 1931, P. L. 46.

He denied the accusation about flirting or trying to make a date with Mrs. Baer. He admitted shopping with a woman and her daughter. He stated he met this woman at the boarding house where he resided after leaving his wife. He denied paying for groceries, except when he went for them alone. He also denied anything improper with reference to this woman.

DISCUSSION

The burden of proving a wilful and malicious desertion is upon the one who asserts it: Schreckengaust's Est., 77 Super. Ct. 235, 237. Having shown the desertion, there is a presumption that it was wilful and malicious.

> "Where desertion is shown it is presumed to have been wilful and malicious and the burden is upon the husband to show that he had reasonable and lawful cause for it." Bealor vs. Hahn, 117 Pa. 169.

Under the circumstances of this case, we can predicate very little upon the fact that the wife sued her husband for support. The information in that case does not charge him with desertion. Any presumptions arising from the bringing of the action are overcome by the positive evidence adduced on the part of the husband.

The evidence furnished in opposition to the husband's claim does not establish a desertion. Some of it states that the husband and wife were separated, but that is as far as it goes. Its general tenor is to establish that the husband may have given some ground for the wife's complaints.

On the contrary, the husband's witnesses testified to facts, which in the opinion of this court, justified him in withdrawing from the home without being guilty of desertion. This testimony comes from credible and disinterested witnesses. The wife's accusations were almost constant. They were made within the hearing of strangers. They seem to have been without just cause. They affected the nervous condition of the husband. Even should we assume that the husband was not entirely faultless, nevertheless the wife contributed to the cause of separation: see Schreckengaust's Est., supra, page 240. Under these circumstances, his separation was not a wilful and malicious desertion. Consequently he is entitled to elect to take under the intestate laws.

DECREE.

And now, to-wit: November 24, 1941, it is ordered and decreed that the husband of the decedent did not wilfully and

maliciously desert his wife for a period of one year or upwards prior to her death and did not, for said period, refuse or fail to support her. Consequently he did not forfeit his rights in her estate and is entitled to file his election to take against her will that portion of her estate to which he is entitled under the intestate laws of the Commonwealth.

DUDLEY M. BAKER AND DAUPHIN DEPOSIT TRUST COMPANY, TRUSTEES IN THE ESTATE OF LANE S. HART, DECEASED, CATHARINE S. BAKER AND DUDLEY M. BAKER, JR. vs. JOHN FOX WEISS, CONSERVATOR OF LANE H. SPENCER, EVELYN M. SPENCER AND MARY LANE SPENCER.

DUDLEY M. BAKER AND DAUPHIN DEPOSIT TRUST COMPANY, TRUSTEES IN THE TRUST ESTABLISHED BY DEED OF TRUST OF FLORENCE H. SPENCER, DATED MARCH 31, 1938, CATHARINE S. BAKER AND DUDLEY M. BAKER, JR. vs. JOHN FOX WEISS, CONSERVATOR OF LANE H. SPENCER, EVELYN M. SPENCER AND MARY LANE SPENCER.

DUDLEY M. BAKER AND DAUPHIN DEPOSIT TRUST COMPANY, TRUSTEES IN THE TRUST ESTABLISHED BY DEED OF TRUST OF LANE H. SPENCER, DATED JULY 5, 1939, CATHARINE S. BAKER AND DUDLEY M. BAKER, JR. vs. JOHN FOX WEISS, CONSERVATOR OF LANE H. SPENCER, EVELYN M. SPENCER AND MARY LANE SPENCER.

Equity—Perpetuation of testimony—Legitimacy of child—Husband and wife—Evidence of non-access—Blood tests.

1. The trustees and certain beneficiaries in three trusts instituted proceedings in equity to perpetuate testimony relative to the legitimacy of a certain minor child who was born to the wife of one of the present beneficiaries in the trusts. Under the trust instruments, the minor or her issue would, if she is the child of the present beneficiary, be entitled to a substantial portion of the income and principal of the trusts after the death of certain beneficiaries who are now living; if the minor is not the child of the present beneficiary, neither she nor her issue would have any claim upon the trusts. The minor is represented by a guardian ad litem. The plaintiffs offered testimony indicating, inter alia, non-access by the husband during the period in question, and the results of tests made of the blood of the husband, wife and child, indicating that the minor could not be the child of the husband. **Held,** that equity has jurisdiction to perpetuate the testimony because there is not available to the plaintiffs any means whereby a present determination can be made as to the legitimacy of the child; the testimony offered was relevant and admissable.

2. A proceeding in divorce by the husband against his wife, on the ground of adultery, would not provide a remedy at law because a decision in that case would be binding only upon the parties thereto and not upon the plaintiffs in these present cases.

3. The testimony of a physician, who qualified as an expert in the field of obstetrics, to the effect that he examined the child shortly after her birth and found her to be fully developed was relevant and admissable as tending to show the period of gestation, particularly in relation to the evidence of non-access.

4. Testimony to the effect that the husband was living in Massachusetts and the wife in New Jersey, and that the wife was not present in Massachusetts from July 1938 to December 22, 1938, during all of which period the husband was in Massachusetts, was admissable, since the child was born on August 19, 1939 and the usual period of gestation is 280 days.

5. Testimony of a maid in the home of the wife to the effect that a male friend of the wife spent a night there on two occasions during the period from October 1, 1938 until a week before Christmas 1938, was admissable.

6. The presumption of legitimacy only stands until met with such evidence as makes it appear clearly and to the satisfaction of the fact finding body that sexual intercourse did not take place between the husband and wife at any time when he could have been the father of the child.

7. Testimony of two experts to the effect that the parties had voluntarily submitted to blood tests, and that the husband and wife each have Type "O" blood, but that the child has Type "B" blood, was admissable. Since Type "B" can only be derived from one of the parents, the blood tests demonstrate that someone other than the husband is the father of the child.

8. The defendants' contention that the minor must be living to claim under the several trusts and that the tests of her blood may be made when she makes such a claim, is not valid, since it is possible for her to die under circumstances where her body might not be recovered, in which case tests cannot be made and it appears, from the trust instruments, that not only she but her issue may claim under the trusts.

9. The plaintiffs are entitled to the testimony of the witnesses now available even though at some future time additional testimony may become available.

Equity. C. P. Dauphin County, Nos. 1570, 1571, 1572 Equity Docket, 1941.

Paul H. Rhoads for the plaintiffs.

John Fox Weiss, Conservator of Lane H. Spencer.

William H. Dunbar and H. John Gluskin, for Evelyn M. Spencer, Mary Lane Spencer, and Samuel A. Schreckengaust, Jr., guardian ad litem of Mary Lane Spencer.

RICHARDS, P. J., Specially Presiding, December 8, 1941.—The above captioned equitable proceedings were instituted for the purpose of perpetuating testimony relative to each trust.