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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.

REPLY BRIEF OF PETITIONER IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This case has now become rather simple: it is just a dialog between Ivy Hill and the Court, rather than a three-way conversation. This is so because DHS does not oppose any of the material facts. Further, DHS takes no position on the merits; it expressly says so in its brief. Thus, in terms of the essential question here—Are the Ivy Hill elders "clergymen" under the CPSL?—the Court need only decide the dispute with Ivy Hill's proffered facts and arguments. Any contrary positions from DHS are waived.

What does remain from DHS is a demand that this Court revisit its Memorandum Opinion regarding standing and indispensable parties. Yet that Opinion remains sound, and has been, in any event, bolstered by a recent Supreme Court decision. Finally, as a last ditch attempt to avoid the merits, DHS now claims this case is time-barred. But that defense, like the now re-hashed ones, is without support under law. Accordingly, the Court should immediately grant Ivy Hill's Motion for Summary Judgment and enter declarations in Ivy Hill's favor as set forth in the Motion.[1]

[1] In its response brief, DHS characterizes Ivy Hill's motion for summary judgment under Rule of Civil Procedure 1035.2 as one for summary relief under

II. ARGUMENT

A. Neither the facts nor the law stated in Ivy Hill's Motion and Brief are disputed by DHS.

As the Court wades into DHS's few remaining arguments, the Court should immediately note that no facts or law on the merits are in dispute.

As to the facts, no dispute exists because DHS did not oppose a single paragraph in Ivy Hill's statement of material facts by filing a

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Appellate Rule 1532(b). *See* DHS br. at 6. DHS appears to argue a party in an original jurisdiction matter before the Commonwealth Court cannot seek summary judgment. *See id.* (citing *Summit Sch., Inc. v. Dep't of Educ.*, 108 A.3d 192 (Pa. Cmwlth. 2015)). However, insofar as DHS is in fact claiming as such (and insofar as the footnote in *Summit School* purports to support that position, *see* 108 A.3d at 193 n.1), that argument is contrary to multiple decisions of this Court, which have proceeded under Rule 1035.2. *See, e.g.*, *Com. by Kane v. New Foundations, Inc.*, 182 A.3d 1059, 1065 n.3 (Pa. Cmwlth. 2018); *Underground Storage Tank Indemnification Fund v. Morris & Clemm, PC*, 107 A.3d 269, 272 n.7 (Pa. Cmwlth. 2014); *Shaffer-Doan ex rel. Doan v. Dep't of Pub. Welfare*, 960 A.2d 500, 505 n.8 (Pa. Cmwlth. 2008); *Com., Dep't of Transp. v. UTP Corp.*, 847 A.2d 801, 803 (Pa. Cmwlth. 2004); *Wings Field Preservation Associates, L.P., v. Dep't of Transp.*, 776 A.2d 311, 314 n.2 (Pa. Cmwlth. 2001); *Kee v. Pennsylvania Turnpike Commn.*, 722 A.2d 1123, 1125 (Pa. Cmwlth. 1998). *See generally* Pa.R.A.P. 1517 ("Unless otherwise prescribed by these rules, the practice and procedure under this chapter relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied."); 20A West's Pa. Prac., Appellate Practice § 1532:9 ("In the context of original jurisdiction proceedings, use of an application for summary relief can also expedite disposition of the dispute. For example, if the court were to overrule preliminary objections and an application for summary relief has been listed for disposition at the same time, the court could grant immediate relief rather than waiting until the pleadings were closed to consider applications for … *summary judgment*." (emphasis added)). Hence, since summary judgment motions are permitted, the Court should rule that the pending motion is one under Rule 1035.2 and analyze it as such.

response/answer to the Motion, and even in its brief, DHS expresses only agreement with the facts stated in the Motion. *See* DHS Br. at 1-4. This silence from DHS is in spite of the Court's Order expressly commanding DHS to respond to the Motion and to separately file a brief. *See* Order Oct. 6, 2021 (DHS "is directed to file *a response* to the Motion for Summary Judgment *and a brief in support* on or before November 5, 2021." (emphasis added)). This silence is also in spite of DHS's duty to respond under the Rules of Civil Procedure. *See* Pa.R.C.P. 1035.3(a) ("[T]he adverse party may not rest upon the mere allegations or denials of the pleadings but *must file a response* within thirty days after service of the motion …"); *see also* Pa.R.C.P. 1035.3(d) ("Summary judgment may be entered against a party who does not respond.").[2] Thus, the facts are now undisputed. *See* Pa.R.C.P. 1035.3(a) ("the adverse party may not rest upon mere allegations or denials of the pleadings …"); *cf. Kochems v. Dep't of Envtl. Prot.*, 701 A.2d 281, 283

[2] Even under DHS's theory that this matter is solely governed by the Rules of Appellate Procedure, *see supra* note 1, a formal answer was still warranted both by the Court's October 6 Order and Appellate Rule 123(b). In fact, when Ivy Hill filed an application in this matter on May 22, 2020 that was expressly styled as one for summary relief under Appellate Rule 1532(b), DHS filed a standalone response and a separate brief. *See* DHS Answer to Petitioner's Application for Summary Relief (July 31, 2020); DHS Brief in Opposition to Petitioner's Application for Summary Relief (Oct. 2, 2020).

(Pa. Cmwlth. 1997) (on appeal, affirming grant of summary judgment where non-movant failed to respond to motion before administrative board).

Further, not only are the facts undisputed, the *merits* of Ivy Hill's arguments regarding its right to relief under the two Counts in the Petition for Review are also undisputed. This is the case because DHS did not lodge a single argument in rebuttal to Ivy Hill's merits positions in the Summary Judgment Brief. In fact, DHS expressly states that it "does not take a position" on the merits. *See* DHS Br. at 5; *see also* DHS Br. at 8 ("there is no evidence that the Department actively opposes Petitioner's legal opinion as to whether or not their elders are members of the clergy"). What DHS does instead is to rely entirely on purported legal defenses on other grounds. *See* DHS Br. at 6-19. In light of this, the Court should rule that DHS waived any challenge on the merits by electing not to oppose any of Ivy Hill's arguments, and electing instead to pursue only other positions. *See Harber Philadelphia Ctr. City Off. Ltd. v. LPCI Ltd. Partn.*, 764 A.2d 1100, 1105 (Pa. Super. 2000) ("Our application of the summary judgment rules in [*Payton v. Pennsylvania Sling Co.*, 710 A.2d 1221, 1226 (Pa. Super. 1998)] establishes the

critical importance to the non-moving party of the defense to summary judgment he or she chooses to advance. A decision to pursue one argument over another carries the certain consequence of waiver for those arguments that could have been raised but were not."); *see also* *Walsh v. Borczon*, 881 A.2d 1, 6 (Pa. Super. 2005) (favorably relying upon and analyzing *Harber*).[3]

Against the foregoing, the Court can appropriately dispatch the limited opposition to summary judgment from DHS and promptly rule in Ivy Hill's favor.

B. The Court has already resolved DHS's so-called "jurisdiction" defense, and, regardless, the defense is without merit.

1. The Court has already rejected DHS's "jurisdiction" challenge.

DHS's chief argument in opposition to summary judgment is couched as a "jurisdiction" challenge, *see* DHS Br. at 7, but it is just a warmed-over version of its already rejected standing and indispensable party challenges from the preliminary objections. The Court, *en banc*, already rejected those defenses as a matter of law. *See* Memorandum

[3] "In general, Superior Court decisions are not binding on this Court, but they offer persuasive precedent where they address analogous issues." *Lerch v. Unempl. Compen. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Cmwlth. 2018).

Opinion at 8-17, 18-21 (June 17, 2021). The Court's *en banc* ruling was sound, just, and based on circumstances that *largely* remain unchanged; thus, the same result—denial—should occur at the summary judgment phase of the proceedings.

The emphasis in the foregoing is on "largely" because in the intervening months since this Court issued its Memorandum Opinion, one of the chief cases relied upon by the Court has now been *affirmed* by the Pennsylvania Supreme Court. *See Firearm Owners Against Crime v. Papenfuse*, No. 29 MAP 2020, 2021 WL 4890413 (Pa. Oct. 20, 2021). Thus, if anything, the Court's rationale for rejecting DHS's procedural challenges (newly labeled as "jurisdictional" challenges) has only been strengthened. If the Court agrees with the foregoing, then none of the argument that follows in this section is material and the Court can, instead, briefly review and reject the statute of limitations challenge.

2. DHS's "jurisdiction" defenses lacks merit.

Notwithstanding the Court's prior ruling on the same "jurisdiction" challenges, the challenges should also be rejected on their merits.

(a) Given the elders' legal obligation to speak to DHS under the CPSL, DHS's silence about the contours of that duty makes the parties "antagonistic."

Regarding DHS's "antagonism" argument, *see* DHS Br. at 7-11, DHS is conflating its apparent indifference to Ivy Hill's claims with a lack of adversity. That is, DHS alleges it has no dispute with Ivy Hill because DHS, for some as-yet unexplained reason, does not care whether Ivy Hill's elders are clergymen under the CPSL. *See* DHS Br. at 5; *see also* DHS Brief in Support of Prelim. Obj. at 14 (Sept. 18, 2020) ("[W]hether an elder at Ivy Hill, or any mandatory report for that matter, fails to report a suspected instance of child abuse ***is of no consequence to the Department***." (emphasis added)). Ironically, it is this indifference, expressed by DHS's steadfast refusal to opine on the central question posed (Who are "clergymen" under the CPSL?) that is creating the controversy. In other words, a controversy exits between the parties precisely because DHS—the only entity under law to whom a mandated report ***must speak*** to avoid criminal sanction, 23 Pa.C.S. § 6313(a)(1); § 6319(a)(1); § 6319(a)(4)—will not itself utter a single syllable to resolve the legal ambiguity.

Moreover, this continued silence by DHS is in spite of its clear critical role under the CPSL, which makes DHS the sole appropriate adverse party for this dispute. For instance, DHS admits that it is "the Commonwealth agency charged with ***administering and overseeing*** the implementation of the CPSL." DHS Br. at 2 (emphasis added); SMF ¶ 81. It further admits that it has the power to issue regulations under the CPSL, DHS Br. at 3 (emphasis added); SMF ¶ 82(a), which is seemingly an admission that it could clarify any ambiguities in the statute—if it wanted to.[4] *Cf. D.M. v. Dep't of Pub. Welfare*, 122 A.3d 1151, 1159-62 (Pa. Cmwlth. 2015) (discussing reasonableness of then-DPW, now-DHS, regulation under the CPSL, which filled statutory silence on issue of procedure). Notably, to effectuate prior versions of the CPSL, DHS in fact did issue regulations regarding mandatory

[4] The Court should recall also that DHS filed a preliminary objection claiming Ivy Hill had failed to exhaust administrative remedies. *See* DHS Prelim. Obj. ¶¶ 50-67 (July 31, 2020). Yet even after the Court rejected that theory in the Memorandum Opinion, DHS has *still refused* to provide an answer to the question it claimed Ivy Hill could ask, somehow, administratively. What is more, DHS revealed in discovery that "[i]f an individual were to contact Respondent seeking to learn the meaning of [among other things, the words members of the clergy, clergyman, minster], Respondent, its agents and employees, would state that they cannot provide guidance or legal advice and would recommend the individual speak with legal counsel." DHS Supplemental Interrogatory Answers, at Answer 7 (attached to Motion as Ex. W); SMF ¶ 85. In other words, while DHS told this Court Ivy Hill could just ask for an answer to its CPSL question, DHS has now revealed that even if asked, it won't help.

reporting and the clergymen privilege. *See* 55 Pa. Code § 3490.14 ("Except with respect to confidential communications made to an ordained member of the clergy which are protected under 42 Pa.C.S. § 5943 (relating to confidential communications to clergymen), privileged communication between a required reporter and the person's patient or client does not apply to situations involving child abuse and may not constitute grounds for failure to report as required by this chapter.") (amended July 3, 1999).

DHS's role is even more important than just administering, and potentially issuing regulations under, the current CPSL, making it even clearer that DHS is indeed adverse to Ivy Hill for purposes of this action. On that front, as previously pointed out to this Court at the preliminary objections stage, under the CPSL, DHS is the only Commonwealth agency to whom a mandatory reporter is *required* to make a report of child abuse. *See* 23 Pa.C.S. § 6313(a)(1) ("A mandated reporter *shall immediately make an oral report* of suspected child abuse *to the department* via the Statewide toll-free telephone number under section 6332 (relating to establishment of Statewide toll-free telephone number) or a written report using electronic technologies under section

6305 (relating to electronic reporting)." (emphasis added)). It is the failure to speak to DHS that subjects a mandated reporter to potential or actual criminal sanction. *See* 23 Pa.C.S. § 6319(a)(1) ("A person or official required by this chapter to report a case of suspected child abuse or to make a referral to the appropriate authorities commits an offense if the person or official willfully fails to do so."). Further, only if the mandated reporter speaks to DHS is the reporter *guaranteed* to be immune from criminal prosecution; a report to anyone else is subject to an additional layer of scrutiny regarding whether the report was in "good faith." *See* 23 Pa.C.S. § 6319(a)(4) ("A report of suspected child abuse to law enforcement or the appropriate county agency by a mandated reporter, made in lieu of a report *to the department*, shall not constitute an offense under this subsection, *provided that the report was made in a good faith effort* to comply with the requirements of this chapter." (emphasis added)).

In the end, it is the statutory requirement to speak, or not, to DHS under the CPSL that is at issue in this pre-enforcement challenge, and DHS is the appropriate, and only, party necessary in a declaratory relief action of this type. *Cf. C.S. v. Com., Dep't of Human Servs.*, 184 A.3d

600 (Pa. Cmwlth. 2018) (declaratory relief action concerning provisions of CPSL where the Department's Bureau of Hearings and Appeals was the only respondent). In fact, because of the specific statutory requirement to speak to DHS and no one else, and because of DHS's steadfast refusal to advise Ivy Hill if it must speak to DHS in circumstances implicating 23 Pa.C.S. § 6311.1(b)(1), there is very much antagonism between these parties (and these parties alone). DHS's argument to the contrary utterly ignores its critical role in the statutory regime, and as such, the argument should be rejected.

(b) DHS's power to conduct criminal investigations is irrelevant.

DHS's latest maneuver to avoid the central merits is to argue that because it does not perform abuse investigations under the CPSL, therefore, it is not the proper party to this declaratory relief action seeking clarification of who must report to DHS under the CPSL. *See* DHS Br. at 11-14. This argument finds no support in law.

In fact, the argument is foreclosed entirely by *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). In that matter, the statutory provision challenged by the petitioner-doctor concerned only rights to receive certain potentially confidential information during the practice

of medicine. *See id.* at 923. But the statutory provision at issue, 58 Pa.C.S. § 3222.1(b)(10)-(11), did not involve an enforcement mechanism by any of the named Commonwealth respondents; to the contrary, enforcement, if any, would have seemingly come from private parties. *See id.* at 923-24. Hence, *Robinson Township* alone destroys DHS's claim that a department's enforcement authority under a statutory regime determines who is a proper respondent in a pre-enforcement challenge. Frankly, even the sole Commonwealth Court case relied upon by DHS to support its claim, *Public Advocate v. Brunwasser*, 22 A.3d 261 (Pa. Cmwlth. 2011); DHS Br. at 12, 14, is in complete accord with the *Robinson Township* analysis, since the case states that appropriate declaratory relief action respondents only include "those public officers who play a role in creating the challenged regulation or ordinance and/***or*** enforcing the challenged ordinance." *Id.* at 274 (emphasis added).

By way of further rebuttal, the Court should look also to the Supreme Court's decision in *Commonwealth, Office of the Governor v. Donahue*, 98 A.3d 1223 (Pa. 2014). In that matter, the Supreme Court found the Office of the Governor had standing to bring a declaratory

relief claim against the Office of Open Records concerning an interpretation of the Right-to-Know Law. *See id.* at 1229-30. But as was the case in the statutory regime in the *Robinson Township* matter, under the RTKL the Office of Open Records has no enforcement authority over Commonwealth agencies. The OOR can only interpret the law and adjudicate, through final determinations, which records are public records during administrative appeals. *See* 65 P.S. § 67.1101(b). Enforcement of any such final determinations, however, lies in courts through an action by *the requester* under a mandamus claim. *See Capinski v. Upper Pottsgrove Twp.*, 164 A.3d 601, 609 (Pa. Cmwlth. 2017) ("In sum, mandamus is the action to file where the requester has not appealed the final determination to a court for a merits review and seeks compliance with a final determination of the Office of Open Records."). This statutory regime, however, did not affect the Supreme Court's conclusion that the Governor could pursue relief against the OOR for declaratory judgment.

In the end, DHS again downplays its vital role under the CPSL by attempting to point to certain roles that it does not play. But those other responsibilities under the law do not foreclose this Court from

opining on whether Ivy Hill must speak to DHS, the key entity in any enforcement action that may be taken by others.

(c) Ivy Hill is not seeking "validation" of a "defense" to a potential "lawsuit," but rather is seeking critical clarification of an as-yet unexamined law.

DHS's final "jurisdiction"-based objection is founded on a mischaracterization of the relief sought in the Petition for Review, and is an argument DHS previously raised in its preliminary objections (DHS Brief in Support of Prelim. Obj. at 19-23). Specifically, DHS incorrectly argues Ivy Hill is seeking a declaration as to "the validity of a defense to a potential future lawsuit," *see* DHS Br. at 15, which thus purportedly means it is seeking an improper advisory opinion. That argument does not withstand scrutiny.

To illustrate, DHS places undue reliance on *Osram v. Sylvania Products, Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846 (Pa. Super. 2004), to claim declaratory relief is unavailable here. Yet an examination of *Osram*, and the Pennsylvania Supreme Court case upon which the decision relies, shows the principle stated therein is completely inapplicable. Indeed, *Osram* reflects the basic idea that a declaratory relief action cannot be heard where it seeks to resolve

affirmative defenses when a competing, related civil action has been filed or is imminent. *See* 845 A.2d at 848-49. The decision in *Osram* is based on the Supreme Court's holding in *Commonwealth, Department of General Services v. Frank Briscoe Company, Inc.*, 466 A.2d 1336 (Pa. 1983). *See Osram*, 845 A.2d at 848 (citing *Frank Briscoe*). In *Frank Briscoe*, the Supreme Court described the same basic principle as follows:

> Because it is manifestly apparent that the Department's request for declaratory relief in counts X and XI of its complaint was in reality simply an attempt to establish in advance the validity of an affirmative defense to be used to defeat the contractors' breach of contract actions currently pending in the Board of Claims, declaratory relief was properly denied.

Frank Briscoe, 466 A.2d at 1340-41. Relying on *Frank Briscoe*, this Court too has recognized that the rule stated therein is about the prevention of competing proceedings, where other litigation claims or enforcement proceedings are either about to be filed, or are already filed. *See GGNSC Clarion LP v. Kane*, 131 A.3d 1062, 1069 (Pa. Cmwlth. 2016), *aff'd*, 152 A.3d 983 (Pa. 2016).

The foregoing principle is inapplicable in this dispute. The Petition for Review was not filed to head off any pending or imminent

civil action by another party, such as was the case in all of the matters above. To the contrary, Ivy Hill filed the action to give its elders necessary clarity on the scope of a mandatory reporting provision under the CPSL, as that provision intersects with the exercise of sincerely held religious beliefs. The relief demanded in the Petition for Review, and in the Motion for Summary Judgment, is necessary to permit the elders to comply with a *criminal* law, not to defeat some pending or forthcoming civil action (or "lawsuit" as DHS repeatedly describes it, *see* DHS brief at 14, 15, 17). This type of claim for declaratory relief regarding the lawfulness of a mandatory reporting law, carrying criminal sanctions for non-compliance, is *exactly* the type of claim that this Court and the Supreme Court allowed to proceed in *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 513-14 (Pa. Cmwlth. 2019), *aff'd*, 2021 WL 4890413 (Pa. Oct. 20, 2021). Accordingly, DHS's argument should be rejected.

C. Ivy Hill's claims are not barred by any statute of limitations.

DHS's claim that Ivy Hill's *two* claims (DHS submits briefing as if Ivy Hill has only raised one claim for relief) are somehow barred by the

statute of limitations, *see* DHS Br. at 17-19, is unmeritorious for at least five reasons.

1. No statute of limitations applies to Ivy Hill's Petition for Review since it is only seeking equitable relief.

In Pennsylvania, "claims for equitable relief are not subject to statutes of limitations." *Lake v. Hankin Group*, 79 A.3d 748, 756 (Pa. Cmwlth. 2013).[5] Declaratory judgment actions have been described as "sui generis," since they are not "either strictly legal or equitable[.]" *See Enright v. Hoyt Wire Cloth Co.*, 66 Pa. D. & C.2d 239 (C.P. Lancaster 1974) (quotations removed). This Court has noted that such actions "follow the practice and procedure of an action in equity." *Betsy King LPGA Classic, Inc. v. Township of Richmond*, 739 A.2d 612, 613 (Pa. Cmwlth. 1999).[6] And while certain declaratory judgment actions seek

[5] *See also* 42 Pa.C.S. § 5501(c) (Judicial Code chapter concerning limitation of time, stating: "Equitable matters.--Nothing in this chapter shall modify the principles of waiver, laches and estoppel and similar principles heretofore applicable in equitable matters.").

[6] In *Brimmeier v. Pennsylvania Turnpike Commission.*, 147 A.3d 954 (Pa. Cmwlth. 2016), *aff'd*, 161 A.3d 253 (Pa. 2017), this Court appeared to recognize a distinction between declaratory actions seeking legal relief versus ones, as is the case here, seeking only equitable relief. *Id.* at 966 ("Therefore, although Brimmeier may intend to be seeking equitable relief with his declaratory judgment claim, because on the face of the Complaint, the relief is directly associated with money damages arising from his purported tort claims, the declaratory judgment claim is not properly before this Court.").

effectively legal relief, and are thus deemed subject to a limitations period, *see, e.g., Green v. Pennsylvania Property and Casualty Ins. Guaranty Assoc.*, 158 A.3d 653, 658-60 (Pa. Super. 2017), or are filed as a way to circumvent an otherwise applicable specific statutory regime, *see Glendon Civic Ass'n v. Borough of Glendon*, 572 A.2d 852, 854 (Pa. Cmwlth. 1990), that logic should not apply to actions seeking solely equitable relief and not filed in an attempt to avoid otherwise relevant law.

In fact, insofar as *Green* and *Glendon Civic* and related cases could be read to hold broadly that *all* declaratory relief actions are subject to a statute of limitations, that reading ignores the context in which those cases (and the ones they relied upon) were decided. Indeed, a close inspection of these cases shows they were decided within factual contexts unlike the one at bar, where strictly equitable relief is sought and no ruling leads to potential monetary consequences under a contract (*Green*) or to circumvention of a well-articulated statutory scheme (*Glendon Civic*). Finally, while it is the case that 42 Pa.C.S. § 7538 states that declaratory relief actions are subject to limitations periods set forth in Chapter 55 of Title 42, the Court should note that

Section 5501(c) of Chapter 55 provides that "[n]othing in this chapter shall modify the principles of waiver, laches and estoppel and similar principles heretofore applicable in equitable matters." 42 Pa.C.S. § 5501(c).

Applied here, Ivy Hill is not seeking legal remedies or attempting to evade a comprehensive statutory scheme that would otherwise apply to its claims, rather it is only seeking declarations concerning rights under the CPSL (Count I) and/or under the Federal and State Constitutions (Count II). Such relief sounds in equity, and thus, in terms of timeliness, could only be subject to a laches challenge, *see United Nat. Ins. Co. v. J.H. France Refractories Co.*, 668 A.2d 120, 125 (Pa. 1995), which is an affirmative defense not pleaded by DHS in its new matter. *See* Pa.R.C.P. 1030(a); DHS Answer and New Matter ¶¶ 88-93 (attached to Motion as Ex. V).[7]

In light of the foregoing, a statute of limitations does not apply to Ivy Hill's equity-based claims.

[7] Because laches was not pleaded in DHS's new matter, the defense is waived. *See* Pa.R.C.P. 1032(a); *In re Estate of Trowbridge*, 920 A.2d 901 (Pa. Cmwlth. 2007).

2. Even if a limitations period applies to Ivy Hill's claims, DHS's rationale for applying it based on a 1998 letter from the Watchtower Bible and Tract Society, Inc. is faulty.

DHS's argument that this matter is barred based on a 1998 letter is legally and factually insufficient for several reasons. *See* DHS Br. at 18. To begin, Watchtower Bible and Tract Society, Inc. and Ivy Hill are legally distinct entities, which DHS has not challenged. *See* Ivy Hill Answers to Interrogatories, at 6, Answer 7 (attached to Motion as Ex. Y); SMF ¶ 86.[8] Thus, it is unclear why notice to Watchtower would somehow be notice to the legally distinct and separate Ivy Hill. And, notably, DHS presented no record to this Court showing when the 1998 letter was even made known to Ivy Hill and its elders; while the letter is attached as an exhibit to Ivy Hill's Petition for Review, the most the Court can reasonably infer from that is that Ivy Hill knew about it by May 20, 2020.

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[8] Ivy Hill Answers to Interrogatories, at 6, Answer 7 (emphasis added):

> Watchtower Bible and Tract Society of New York, Inc. (WTNY) is one of several, not-for-profit corporations that have been established in the United States to facilitate the worship of Jehovah's Witnesses. …. ***However, WTNY is legally distinct from Ivy Hill, which is independently established***.

Furthermore, since the time of the 1998 letter, there were several material changes to the CPSL, most notably throughout 2014, that supplanted any concerns therein. *See* Acts 32, 33, 44, and 153 of 2014.[9] One of those changes, caused by Act 33 of 2014, greatly expanded the definition of mandatory reporters, including by more fully enumerating religious leaders subject to reporting. *Compare* Act of Dec. 16, 1994, P.L. 1292, No. 151, § 3 (adding "member of the clergy" as a person required to report),[10] *with* Act of Apr. 15, 2014, P.L. 417, No. 33, § 2 (adding a "clergyman, priest, rabbi, minister, Christian Science practitioner, religious healer or spiritual leader of any regularly established church or other religious organization" as mandated reporters). Another change, caused by Act 32 of 2014, modified the exceptions to mandatory reporting to create the very section at issue here, 23 Pa.C.S. § 6311.1. *Compare* Act of Nov. 29, 2006, P.L. 1581, No.

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[9] Act of Apr. 15, 2014, P.L. 414, No. 32, *available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=32.

Act of Apr. 15, 2014, P.L. 417, No. 33, *available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=33.

Act of May 14, 2014, P.L. 645, No. 44, *available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=44.

Act of Oct. 22, 2014, P.L. 2529, No. 153, *available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=153.

[10] Act of Dec. 16, 1994, P.L. 1292, No. 151, a*vailable at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=1994&sessInd=0&act=151.

179, § 3 (modifying exception to reporting for confidential communications made to a member of the clergy),[11] *with* Act of Apr. 15, 2014, P.L. 414, No. 32, § 2 (creating 23 Pa.C.S. § 6311.1). Thus, the concerns that existed under the statutory regime in effect in 1998 were certainly changed after the 2014 amendments, further attenuating the connection between the 1998 Watchtower letter and the present dispute for purposes of notice and the running of any limitations period.

3. The statute of limitations challenge based on the 2014 changes to the CPSL is waived.

DHS claims this matter is also barred because of the 2014 changes to the CPSL, *see* DHS Br. at 18-19, but that issue is not before the Court because DHS waived it by not pleading the defense in its new matter. To explain, in new matter a party "must plead the material facts on which an affirmative defense is based. Material facts are those facts essential to support the claim raised in the matter." 5 Standard Pennsylvania Practice 2d § 26:53 (Manner of pleading new matter); *see also Lee v. Denner*, 76 Pa. D. & C.4th 181, 191 (C.P. Monroe 2005) ("The Rules of Civil Procedure are in place to ensure that a new matter not

[11] Act of Nov. 29, 2006, P.L. 1581, No. 179, *available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2006&sessInd=0&act=179.

only gives the opposing party notice of any affirmative defenses, but also makes clear the grounds upon which it rests by including a summary of the facts essential to support that defense."). Here, in its brief, DHS asks this Court to apply a statute of limitations affirmative defense on two factual grounds: one based on the 1998 letter (discussed above), and another based on Act 32 of 2014. *See* DHS Br. at 18-19. However, in its new matter, DHS *only* raised the 1998 letter as the basis for applying a statute of limitations: "*To the extent that Petitioner has identified that it has been seeking a resolution to this matter since, at the earliest 1998 (see Pet. Ex. A)*, Respondent asserts that Petitioner is outside of the applicable statute of limitations period to bring this action. *See* 42 Pa. C.S.A. § 5527(b)." DHS Answer and New Matter ¶ 89 (emphasis added) (attached to Motion as Ex. V).[12] Thus, the newfound, but un-pleaded, limitations defense based on Act 32 of 2014 is not before the Court due to DHS's failure to lodge it as part of its new matter. Further, to allow DHS to pursue the defense where it was not raised at a point where it could be examined in discovery would cause

[12] 42 Pa.C.S. § 5527(b): "Other civil action or proceeding.--Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years."

prejudice to Ivy Hill. Hence, the challenge should be deemed waived. *See* Pa.R.C.P. 1032(a); *Trowbridge*, 920 A.2d at 906.

4. Even if DHS's legal challenge based on Act 32 of 2014 were not waived, the argument is without factual support.

While Act 32 of 2014, which created 23 Pa.C.S. § 6311.1, was indeed signed into law on April 15, 2014 as noted by DHS, *see* DHS Br. at 18, the law was not *effective* for 60 days, or until June 14, 2014. *See* Act of Apr. 15, 2014, P.L. 414, No. 32, § 4 ("This act shall take effect in 60 days."). The Petition for Review here was filed within six years of the effective date of Act 32 (filed May 20, 2020), and because DHS alleges this matter is subject to the six-year limitations period in 42 Pa.C.S. § 5527(b), *see* DHS Br. at 17-18, the case is timely even under DHS's reasoning. Moreover, since Act 33 of 2014 was the law that greatly expanded the types of clergy subject to mandatory reporting, *see supra*, and since it was not effective until December 31, 2014, *see* Act of Apr. 15, 2014, P.L. 417, No. 33, § 6 ("This act shall take effect December 31, 2014"), this matter is more timely still under DHS's reasoning.

5. If this matter is subject to any limitations period, it is timely based on the triggering event identified in the Petition for Review that made these issues an immediate concern for the Ivy Hill elders.

As set forth in the Petition for Review, the triggering event that made the issues in this case an immediate concern for the Ivy Hill elders was the arrest of the Amish Bishop in Lancaster County. *See* Petition for Review ¶ 47; *see also* Ivy Hill Answers to Interrogatories, at 10, Answer 13 (attached to Motion as Ex. Y).[13] That arrest was published on April 22, 2020, which was the same day the charges were filed. *See* Petition for Review, Exs. B-C (attached to Motion as Ex. U). The Petition was filed less than 30 days later, on May 20, 2020. This is certainly well-within the six-year limitations period that DHS claims is applicable to this matter. Hence, this dispute is timely filed for this additional reason.

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[13] Ivy Hill Answers to Interrogatories, at 10, Answer 13:

> [B]oth Jehovah's Witnesses and Amish are followers of Christian faiths generally and both have spiritual leaders, who are seemingly referred to by different religious titles (Bishop versus elders). The Amish Bishop example set forth in the Petition for Review caused concern for the elders at Ivy Hill simply because the matter appeared to involve a confidential religious confession to a faith leader that later resulted in that faith leader being prosecuted for failing to report that confession to DHS.

Accordingly, for all for all of the reasons set forth above, this matter is not time-barred and DHS's statute of limitations challenge should be dismissed.

III. CONCLUSION

In the end, Ivy Hill's good faith request to DHS to give it guidance on how to comply with the law has been met with a resounding: "guess and check." As in: Ivy Hill's elders should "guess" if they have to speak to DHS, and they can "check" the correctness of the guess by seeing if they are arrested at a later date. Requiring law-abiding citizens to put themselves in criminal jeopardy to test whether the dictates of their religious faith comport with very serious public policy laws is simply not what Pennsylvania law demands, as the Supreme Court just affirmed in *Firearm Owners Against Crime*, 2021 WL 4890413, at *14-15.

The Ivy Hill elders should be able to—and they are able to—avail themselves of this Court's powers under the Declaratory Judgments Act to declare their rights and responsibilities vis-à-vis the unsettled areas of the CPSL. That is all they are trying to do here: get a clear answer to a question vital to their practice of faith. They should not have to guess and check if they have the answer right on their own by avoiding the

practice of their faith or risking criminal sanction; they should instead be able to get clarity from this Court through the pending Motion for Summary Judgment. And because the facts regarding the Motion are undisputed and the legal right to relief thereunder is clear, the Motion should be granted.

Accordingly, the should dismiss DHS's affirmative defenses to summary judgment, and should grant the pending Motion for Summary Judgment, and thereafter enter judgment and appropriate declarations in favor of Ivy Hill.

Respectfully submitted,

Dated: November 10, 2021

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