



No. _____

Court of Appeal
of the
State of California
First Appellate District, Division _____

**WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK and NORTH
CONGREGATION OF JEHOVAH'S WITNESSES, RED BLUFF, CALIFORNIA,**

Petitioner,

vs.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF NAPA**
Respondent.

TIM W., JULIANNE WIMBERLEY GUTIERREZ AND JOSHUA WIMBERLEY
Real Parties In Interest

Judicial Council Coordination Proceeding No. 4374
Coordinated With Napa County Superior Court Case No. 26-22191 (Lead Case)

**PETITION FOR WRIT OF MANDATE; VERIFICATION OF ROBERT J.
SCHNACK AND MEMORANDUM OF
POINTS AND AUTHORITIES**

From the Order of the Napa Superior Court Granting Real Parties in Interest's Motion to
Compel Production of Documents (September 29, 2005)
The Honorable Raymond A. Guadagni, Judge

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**PETITION FOR WRIT OF MANDATE AND/OR
PROHIBITION OR OTHER APPROPRIATE RELIEF**

AUTHENTICITY OF EXHIBITS

1. All exhibits accompanying this petition are true copies of original documents on file with respondent court, except for the following: Exhibit E, which are true copies of the privilege logs furnished by the Church Defendants to plaintiffs. Exhibit J, which is a true copy of the original reporter's transcript of the hearing on August 31, 2005 on plaintiffs' Motion to Compel. Exhibit L which are true copies of the non-binding case law cited in the Memorandum of Points and Authorities, filed concurrently herewith. The exhibits are incorporated herein by reference as though fully set forth in this petition. The exhibits are paginated consecutively from page 1 through page 458 and page references in this petition are to the consecutive pagination.

**BENEFICIAL INTEREST OF PETITIONERS; CAPACITIES
OF RESPONDENT AND REAL PARTIES IN INTEREST**

2. Petitioners Watchtower Bible & Tract Society of New York, Inc. and North Congregation of Jehovah's Witnesses, Red Bluff, California, Inc. (collectively "Church Defendants") are defendants in two actions now pending in Tehama County Superior Court and entitled *Tim W. v. Watchtower New York, et al.*, Case No. 52594, and *Wimberley-Gutierrez v. Watchtower New York, et al.*, Case No. 52598, which are collectively referred to herein as "Track I Cases." The Track I Cases were earlier coordinated with other cases in Judicial Council Coordination Proceeding No. 4374, including the so-called lead case pending in respondent Napa County Superior Court entitled *Charissa W. v. Watchtower New York, et al.*, Case No.

26-22191. (Exh. K, pp. 407-08.) Plaintiffs in the Track I Cases are named herein as the real parties in interest.

CHRONOLOGY OF PERTINENT EVENTS

3. These Track I Cases arise from the alleged sexual abuse by co-defendant James Henderson in *Tim W.* that occurred more than 10 years ago and co-defendant Alvin Heard in *Wimberley* that occurred more than 24 years ago.

4. On July 24, 2003, Plaintiffs filed separate civil complaints against the Church Defendants asserting claims arising from allegations that the Church Defendants failed to report and/or disclose their knowledge of child abuse allegedly committed by James Henderson and Alvin Heard. (Exh. A, p. 5.)

5. On January 13, 2005, Plaintiffs propounded document requests to the Church Defendants seeking, *inter alia*, documents and information related to confidential spiritual communications that penitents Henderson and Heard had separately with clergy within a Jehovah's Witness congregation. (Exh. A, p. 5.)

6. On April 5, 2005, the Church Defendants objected to certain of Plaintiffs' document requests on the grounds that the responsive documents are protected from disclosure by the penitent-clergy privilege and the attorney-client privilege. (Exh. A, p. 5.)

7. On July 29, 2005, Plaintiffs filed a motion to compel responses to their requests for production of documents, arguing that the documents sought are not protected by either the penitent-clergy or attorney-client privileges. (Exh. A, pp. 1-246.)

8. On August 19, 2005, the Church Defendants filed their opposition to the motion to compel, asserting the requested documents

were protected from disclosure based on privilege and constitutional grounds. (Exh. B, pp. 247-300.)

9. The documents at issue in the underlying motion to compel relate to spiritual communications between penitent James Henderson and ordained elders of the Jehovah's Witnesses, and spiritual communications between penitent Alvin heard and ordained elders of the Jehovah's Witnesses. (See, Exh. E, pp. 331-40.)

10 On September 29, 2005, the trial court granted, in part, Plaintiffs' motion to compel and ordered the Church Defendants to produce all documents for which they previously asserted the penitent-clergy privilege. The trial court also ordered the Church Defendants to produce a privilege log with respect to all documents for which they asserted the attorney-client privilege, reserving Plaintiffs' right to challenge the log. (Exh. F.)

11 On October 24, 2005, the trial court granted the Church Defendant's motion to stay execution of order to produce documents until such time that a writ can be filed and ruled upon by the Court of Appeal. (Exh. G.)

12. On November 22, 2005, the trial court entered its stipulated order extending the time for the filing of the instant writ to April 28, 2006. (Exh. H.) On May 1, 2006, the trial court entered a further stipulated order extending the time for the filing of the instant writ up to and including June 30, 2006. (Exh. I.)

BASIS FOR RELIEF

13. The issue presented in this writ petition is whether the trial court erred in granting the motion to compel. In granting the motion, the trial court abused its discretion because disclosure of the

requested documents is prohibited by (1) the penitent-clergy privilege, (2) the First Amendment of the United States Constitution, and (3) the free exercise clause in both the federal and the California constitution.

ABSENCE OF OTHER REMEDIES

14. Interlocutory review is the only adequate remedy for the trial court's order compelling the Church Defendants to produce potentially privileged documents since "once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure." (*Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516.)

PRAAYER

Petitioners/Church Defendants pray that this Court:

1. Issue an alternative writ directing respondent superior court set aside and vacate its order of September 29, 2005, granting Plaintiffs' motion to compel, or show cause why it should not be ordered to do so, and upon return of the alternative writ, issue a peremptory writ of mandate and/or probation or such other extraordinary relief as is warranted, directing respondent superior court to set aside and vacate its order of September 29, 2005, granting

Plaintiffs' motion to compel, and to enter a new and different order denying the motion;

2. Award Petitioners/Church Defendants their costs pursuant to Rule 56.4 of the California Rules of Court; and
3. Grant such other relief as may be just and proper.

Dated: 06-28-06

Respectfully submitted,

BULLVANT HOUSER BAILEY PC

By: 

Robert J. Schnack

Attorneys for the Church Defendants

VERIFICATION

I, Robert J. Schnack, declare as follows:

1. I am one of the attorneys for the petitioners herein. I have read the foregoing Petition For Writ Of Mandate/Prohibition Or Other Extraordinary Relief and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioners, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on June 28, 2006, at Sacramento, California.



Robert J. Schnack

MEMORANDUM OF POINTS & AUTHORITIES

I. WRIT OF MANDATE IS NECESSARY

A. The issue is whether confidential spiritual communications by a penitent to a “judicial committee” of ordained Jehovah’s Witness elders are protected by the penitent-clergy privilege.

1. Overview of penitent-clergy privilege

A penitent has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication. (Evid. Code § 1033.) Similarly, a member of the clergy has an independent privilege to refuse to disclose a penitential communication if he or she claims the privilege. (Evid. Code § 1034.) A penitent is defined simply as “a person who has made a penitential communication to a clergyman.” (Evid. Code § 1031.) A “penitential communication” is defined as a communication made (1) in confidence, (2) in the presence of no third persons so far as the penitent is aware, (3) to a member of the clergy who, incident to the tenets of his or her religious denomination, is authorized or accustomed to hear such communications and (4) has a duty to keep such communications secret. (Evid. Code § 1032.)

There is no requirement that the communication “have as its purpose the confession of a ‘flawed act’ to ‘receive religious consolation and guidance in return’ in order to be privileged.” (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1518.) Rather, the privilege applies to any communication that fits the statutory description. (See Cal. Law Revision Com. com., West’s Ann. Cal.Evid. Code (2006) foll. §§1032.) (statute extends protection of privilege beyond just “confessions”.)

2. Overview of clergy for the Jehovah's Witnesses

Congregations of Jehovah's Witnesses are not led by a priest or pastor but instead by appointed lay clergy called elders.

Congregations of Jehovah's Witnesses are provided spiritual oversight on a local level by a small group of elders recognized as ordained ministers and ordained elders. (See Exh B, pp. 285-86, 292, 297.) Elders are not automatically appointed to serve in a congregation. Rather, they must first meet strict Scriptural qualifications as outlined in the Bible and must also be recommended and approved by current congregation elders, an elder serving as circuit overseer, and the Service Department at the U.S. Branch Office Jehovah's. (See Exh. B, pp. 285-86.) Once an individual is approved and appointed to serve as a congregation elder, a letter from the Branch Office is read to the congregation and the individual is officially vested with ministerial authority and is ordained as an elder. (See Breaux Affidavit ¶ 6.) All elders of the Red Bluff congregation are and were at all times relevant to these cases ordained ministers and spiritual leaders of those congregations. (See Exh. B, p. 287.)

The congregation elders are responsible for the spiritual development and spiritual teaching of the members of the congregation, as well as for pastoral care. (See Exh. B, pp. 273-74, 286, 292, 297.) Elders frequently provide spiritual counsel and advice to members of the congregation concerning highly confidential personal and spiritual matters. (See Exh. B, p. 287.) According to the religious beliefs and practices of Jehovah's Witnesses, congregation

elders are expected to keep confessions and other spiritual communications confidential. (See Exh. B, pp. 274, 280-81, 287-88, 293-94, 298-99.)

From time to time, congregation elders, including those in Red Bluff, communicated with elders serving in the Branch Office's Service Department, as well as with elders serving as circuit overseers and district overseers, in order to receive spiritual guidance and advice as to how to apply the religious doctrine and procedures of Jehovah's Witnesses to issues concerning the congregation and its members. (See Exh. B, p. 287.) All such spiritual communications between congregation elders and the Branch Office Service Department, circuit overseer or district overseer must be kept strictly confidential under the religious tenets and teachings of Jehovah's Witnesses. (See Exh. B, p. 287.)

Congregation elders are also responsible for conducting "judicial investigations" where a member of the congregation is accused of a serious wrongdoing or sin. (See Exh. B, pp. 274-87.) The goal of a judicial investigation, which is conducted by two elders, is to ensure that the congregation remains spiritually and morally clean, and the elders endeavor to provide spiritual counseling and assistance to those who may have erred, with the hope of helping them to regain their spirituality and relationship with God. (See Exh. B, pp. 274, 287.) At times after a judicial investigation, a "judicial committee" consisting of three or more elders will be formed and will determine whether a person accused of sin should be ecclesiastically disciplined, based on Jehovah's Witnesses' understanding of the Bible. (See Exh. B, pp. 275, 287.) The "judicial committee" consists

of three or more elders because Jehovah's Witnesses believe that men are imperfect and, therefore, three elders can provide more full and complete spiritual counseling and guidance based on a broader range of experience and knowledge than can a single elder alone. (*See Exh. B, p. 275.*) Pursuant to the beliefs, tenets and teachings of Jehovah's Witnesses, all spiritual communications taking place during a "judicial investigation" and during a "judicial committee" are extremely private and strictly confidential. (*See Exh B., pp. 275, 288.*)

Where a serious sin is involved, the "judicial committee", in line with teachings of the Bible, may recommend religious discipline, called reproof (which can be private or public) or disfellowshipping. (*See Exh. B, pp. 274-75.*) When a member is subject to public reproof or disfellowshipping, an announcement is made during a congregation meeting simply to the effect that "[name] has been reproofed" or "[name] is no longer one of Jehovah's Witnesses." (*See Id.*) If a member suffers disfellowshipping, the "judicial committee" forwards a document to the Service Department in New York with only the name of the disfellowshipped person, the date of disfellowshipping, and a brief description of the Scriptural reason for disfellowshipping. However, the information on the card does not reveal the contents of the penitent's communications to the "judicial committee." (*See Id.*)

The confidentiality of spiritual communications between members of the congregation and elders is a foundational element of the religious beliefs and teachings of Jehovah's Witnesses. (*See Exh. B, pp. 274, 281, 287-88, 292-94, 297-99.*) Jehovah's Witnesses recognize the Bible's admonition to confess one's sins to God and

believe that there is a great benefit from speaking to congregation elders regarding such confidential spiritual matters. (See Exh. B, pp. 287-88.) As such, Jehovah's Witnesses encourage those who need spiritual assistance to approach the congregation elders and convey to them whatever information may be necessary to provide such spiritual assistance. (See Exh. B, pp. 288, 292, 297.)

Because open and free communication between congregation members and elders is required to provide spiritual guidance under the religious beliefs and practices of Jehovah's Witnesses, emphasis is placed on privacy and strict confidentiality. (See Exh B, pp.75, 281, 288, 293-94, 298-99.) The confidentiality requirements with respect to such church communications are explained in official church literature and publications. (See Exh B., pp. 288, 293-94, 298-99) Congregants expect that all spiritual communications with congregation elders will remain strictly confidential. (See Exh B., pp. 288, 293-94, 298-99.) Further, revealing confidential spiritual communications would call into question an elder's qualifications and could result in his removal as an elder in the congregation. (See Exh. B, pp. 286, 293, 298.) Moreover, if an elder was compelled to disclose confidential information, his credibility and effectiveness as an elder, as well as the credibility and effectiveness of other elders in the congregation, would be adversely affected and compromised, since congregants would not trust and rely that personal problems and information they disclose would not be revealed and used against them in a court action. (See Exh. B, p. 288.) In fact, defendant James Henderson has specifically stated that he would not have sought

church guidance had he believed that his communications with elders were not confidential. (*See* Exh. B, p. 276.)

Jehovah's Witnesses do not believe that the confidentiality of spiritual communications they may have with congregation elders is limited to confessions. (*See* Exh. B, p. 288.) Such confidentiality extends to all communication of a spiritual nature in a variety of life situations including those that take place in the course of "judicial investigations" and "judicial committee" meetings. (*See* Exh. B, pp. 275, 281, 288.) Additionally, based upon Scripture and church tradition, such confidentiality requirements also extend to congregation files, notes, papers, reports, minutes or other documents prepared in conjunction with, or as a result of, confidential church communications. (*See* Exh. B, pp. 274, 294, 299.)

3. Issues presented for review

This petition presents three issues, which are fundamental, not only to the underlying case, but also potentially to numerous other cases pending throughout the state and based on similar claims. First, did the trial court err when it granted Plaintiffs' motion to compel based on its ruling that the investigatory purpose of the judicial committee negated the penitent-clergy privilege? Second, did the trial court err in ruling that the judicial committee was under no duty to keep communications confidential, and therefore, the privilege is inapplicable? Finally, does the trial court's order compelling disclosure of confidential church documents violate the establishment clause of the First Amendment to the federal constitution, the free exercise clauses of the federal or California constitutions, or both?

B. Writ of mandate is essential and necessary.

1. A writ of mandate is the only adequate remedy available.

A writ of mandate must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc. § 1086.) Generally, writ review of discovery rulings is allowed when (1) the issues presented are of first impression and of general importance, (2) an order denying discovery denies a fair opportunity to a party to litigate its case, or (3) an order compelling discovery would violate a privilege. (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 886-87, quoting *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1061.) “Interlocutory review by writ is the only adequate remedy where a court orders production of documents which may be subject to a privilege, ‘since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure.’” (*Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516.)

The trial court’s order compels the production of documents that the Church Defendants have asserted are protected from disclosure by the penitent-clergy privilege. Thus, a writ of mandate is appropriate and necessary, and interlocutory review is the only adequate remedy.

¹ [citations omitted.]

2. The issue will not go away.

Counsel for plaintiffs have filed a number of lawsuits in multiple venues against the various congregations of Jehovah's Witnesses and other religious entities that support their work. If the court compels the disclosure of confidential, privileged, and sensitive materials in these Track I Cases, the impact potentially will be felt not only in this proceeding but in other venues as well. As with other Jehovah's Witnesses congregations, the Church Defendants desire to keep confidential and privileged the materials regarding internal ecclesiastical affairs.

II. THE PENITENT-CLERGY PRIVILEGE BARS COMPELLED DISCLOSURE OF DOCUMENTS RELATED TO SPIRITUAL COMMUNICATIONS BETWEEN PENITENTS AND JUDICIAL COMMITTEE

Under California law, three requirements must be met for the penitent-clergy privilege to apply to a communication: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his/her religious discipline or practice is authorized or accustomed to hear such communications; and, (3) such clergy must have a duty under the tenets or discipline of his/her church to keep such communications secret. (Evid. Code § 1032; see *People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362-63.) Communications between penitent and clergy are presumed to have been made in confidence. (Evid. Code § 917.) Thus, Plaintiffs bear the burden of establishing that the subject communications were not intended to remain confidential.

In the instant case, it is undisputed that the judicial committee elders to whom Heard and Henderson confided qualify as “member[s] of clergy” as defined in section 1030 of the Evidence Code. Thus, the questions remaining are (1) whether penitents Heard and Henderson intended their communications to be made in confidence, and (2) whether the elders were required by the religious doctrine of Jehovah’s Witness to keep said communications secret. For the reasons set forth below, the Church Defendants urge the Court to answer both questions affirmatively.

A. Penitents Heard and Henderson intended their spiritual communications to the judicial committee to be confidential

By definition, a penitential communication must be “made in confidence, in the presence of no third person so far as the penitent was aware.” (Evid. Code § 1032.) The privilege has been held not to apply in instances where the communication was not made with a reasonable expectation of privacy, the communication was made for a secular purpose, the receiver of the communication was acting in a secular capacity, or religious tenets did not require the clergy member to keep the subject communications secret. (*People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362-63 (defendant sought advice on how to avoid secular consequences of her criminal conduct rather than spiritual counseling); *People v. Johnson* (1969) 270 Cal.App.2d 204, 207-08 (communication was not made in confidence nor in the course of the required relationship and no evidence was presented that minister was authorized or accustomed to hear such communications or that he had a duty to keep such communications secret); *United States v. Webb* (9th Cir. 1980) 615 F.2d 828 (communication made in

presence of officer in addition to prison chaplain was not confidential); *United States v. Luther* (9th Cir. 1973) 481 F.2d 429, 432 (privilege did not apply to data in church financial records sought by Internal Revenue Service and which did not contain any communications from congregants seeking spiritual guidance of counseling); *People v. Thompson* (1982) 133 Cal.App.3d 419, 425-27 (minister was acting in secular capacity when hired by company as ethics officer to improve sales and there was no expectation of confidentiality in the communication).)

None of those circumstances is present here. Rather, as demonstrated by declarations from clergy as well as their own, penitents Henderson and Heard each intended that their spiritual communications to the judicial committee elders remain confidential, which communications the elders were duty-bound to respect in accordance with the religious tenets and beliefs of Jehovah's Witnesses. Henderson's and Heard's purpose in making their separate communications and in participating in the "judicial committee" proceedings in the first place was to seek spiritual guidance and counseling – again, in accordance with the religious beliefs and tenets of Jehovah's Witnesses. (See, Exh. B, pp. 276, 281.)

1. That the judicial committee is comprised of three or more elders should not vitiate the privilege.

A disclosure does not waive a privilege if the disclosure itself is privileged. (Evid. Code § 912(c).) It is undisputed that each of the elders who form a judicial committee qualifies as a "member of clergy" under section 1032 of the Evidence Code. Thus, there is no question that the privilege would apply had penitents Heard and

Henderson made their spiritual communications to each of these elders individually and on separate occasions. To hold that the privilege is voided simply because an otherwise protected penitential communication is made to multiple authorized clergy members in a single setting – particularly where, as here, it was done in accordance with the religious beliefs and tenets of one’s religion – is to choose form over substance and thereby vitiate the purpose underlying the privilege.

As explained above, where a member of the congregation is accused of serious wrongdoing or sin, the tenets of Jehovah’s Witnesses authorize two elders to conduct an investigation. The goal of the investigation and any subsequent judicial committee comprised of three or more elders is to ensure that the congregation remains spiritually and morally clean and to allow the elders to provide spiritual guidance and counseling to the accused member. Any spiritual communications made during the investigation or during the judicial committee proceedings are extremely private and kept in the strictest confidence by the participating elders. It is with these assurances and expectations of confidentiality and spiritual guidance that penitents such as Heard and Henderson willingly participate in an investigation and with a judicial committee.

No reported case interpreting California law has addressed whether the presence of more than one *clergy* member during a confidential, spiritual communication by a penitent destroys the penitent-clergy privilege. Likewise, no court has addressed whether a spiritual communication by a penitent to a “judicial committee” formed under the tenets and discipline of the Jehovah’s Witnesses

qualifies as a protected penitential communication under California law. Absent such authority, it is practical to look at decisions from other jurisdictions who have interpreted similar, or even stricter, penitential communication statutes. For instance, interpreting a similar yet narrower state statute,² the Washington Supreme Court held that a communication made in the presence of a third person destroys the privilege *unless* that third person is necessary for the communication or is another clergy member. (*State v. Martin* (1999) 975 P.2d 1020, 1028.) Likewise, the Third Circuit has held that the presence of third persons who are “essential to and in furtherance of the communication” does not void the penitent-clergy privilege under Rule 501 of the Federal Rules of Evidence. (*In re Grand Jury* (3d Cir. 1990) 918 F.2d 374, 384.)

Another Washington case, *Jane Doe v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, *supra* (hereafter “*Jane Doe*”), is analogous to the facts and issues presented in these Track I Cases. At issue in *Jane Doe* was the disclosure of church documents relating to the Mormon Church’s disciplinary action concerning a church member’s alleged sexual abuse of his two daughters. Under church doctrine, when a church member is accused of a serious transgression, a “stake disciplinary council” must intervene and help the church member repent and re-establish a

² Under Washington law, the penitent-clergy privilege protects communications which are (1) made to a clergy member, (2) as a confession in the course of discipline enjoined by the church, and (3) confidential. (RCWA 5.60.060(3); *Jane Doe v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints* (Wash. 2004) 90 P.3d 1147, 1150.)

covenant with God. (*Id.* at 1149-50.) The accused member confesses his sin to the disciplinary council which is comprised entirely of ordained presidents, bishops, and other ordained church members. The disciplinary council then determines the appropriate discipline to be administered, which can vary from probation to disfellowshipping to excommunication. (*Id.* at 1150.) When the discipline results in disfellowshipping or excommunication, church procedures require that a summary of the disciplinary proceedings be prepared and sent to the church's headquarters in Utah. (*Id.* at 1150.) The court held that the summary of the disciplinary proceeding was protected from disclosure by the clergy-penitent privilege based on its findings that (1) the disciplinary councils are ecclesiastical in nature, and (2) each participant on the council is ordained as clergy. Furthermore, because the presence of all participants in the disciplinary council was necessary for the communication to occur, the presence of a third party during the communication did not vitiate the privilege. (*Id.* at 1152-53.)

Similar to the Mormon Church in *Jane Doe*, the religious doctrine of Jehovah's Witnesses mandates that two elders investigate allegations of serious wrongdoing or sin and that, if formed, a judicial committee of three or more elders determine, whether an accused member is repentant and subject to ecclesiastical discipline. That judicial committees consist of three or more elders is based upon the beliefs of Jehovah's Witnesses that men are imperfect and that three elders can provide more full and complete spiritual counseling and guidance based on their collective experience and knowledge than can a single elder alone. Therefore, under the Jehovah's Witness doctrine,

the presence of multiple clergy members is essential to and in furtherance of the penitent's communication.

The decision in *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 (hereafter "*Roman Catholic Archbishop*"), upon which Plaintiffs rely, is distinguishable and unavailing. In that case, the court ruled that the penitent-clergy privilege was inapplicable to protect communications by a Catholic priest in the presence of a "vicar for clergy" and a bishop because the Catholic tenets or doctrine do not require that such persons be present during those communications. In contrast, the Jehovah's Witnesses religion mandates the presence of three or more elders when the communication regards allegations of serious wrongdoing or sin, which includes child sexual abuse. When analyzing the penitent-clergy privilege, such doctrinal differences among religions should be respected rather than ignored.³

Second, *Roman Catholic Archbishop* is equally inapplicable because it concerned testimony and evidence to be presented to a grand jury in a criminal proceeding. Disclosure was required in that instance, the court held, "because the government had a compelling interest in prosecuting child molesters." In contrast, these Track I Cases are *civil* actions and not criminal prosecutions of child molesters. Indeed, in its investigation of child abuse allegations

³ Other jurisdictions have recognized the need to respect doctrinal differences among religions when analyzing the privilege. (See, e.g., *Jane Doe, supra*, 90 P.3d at 1152, citing *State v. MacKinnon* (Mont. 1998) 957 P.2d 23, 28, and *Scott v. Hammock* (Utah 1994) 870 P.2d 947, 956.)

against Henderson, the State (through the local police and the district attorney's office) respected the elders' religious duty to not reveal information that they had learned via confidential communications made during the course of the judicial committee's internal proceedings with regard to those allegations. If, in its criminal investigation of Henderson, the State did not believe it necessary to compel the same confidential communications at issue here, it is difficult to argue that the State now has some higher compelling interest in the instant civil actions for money damages.

2. The trial court erred in finding that the judicial committee's purpose voided the privilege.

The trial court erred when it ruled that the privilege did not apply to the requested documents based on its finding that the “[j]udicial [c]ommittee’s purpose is to investigate sins for which disfellowship is a potential penalty.” (Exh. F, p. 342.) First, there is no requirement under California law that the communication be initiated by the penitent or that it “have as its purpose the confession of a ‘flawed act’ to ‘receive religious consolation and guidance in return’ in order to be privileged.” (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1518.) Rather, the privilege applies to any communication that fits the statutory description. (Cal. Law Revision Com. Com., West’s Ann. Cal. Evid. Code (2006) §1032. (Statute extends protection of privilege beyond just “confessions”).) Second, even if, *arguendo*, investigation and discipline were one of the reasons for forming a judicial committee, the most important purpose of a judicial committee is to provide spiritual counseling and assistance to those who may have erred and to help them regain their spirituality

and relationship with Jehovah God. (*See*, Exh. B, pp. 274, 287). The investigatory function of the judicial committee does not detract from or lessen its role of providing spiritual counseling and guidance.

B. The tenets and discipline of the Jehovah's Witnesses require the judicial committee elders to keep the communications of penitents Heard and Henderson secret.

Congregational elders are required by the tenets of their faith to keep confessions and other spiritual communications confidential. (Exh. B, pp. 286-288, 293-94, 298-99.) Similarly, Jehovah's Witnesses doctrine requires that all intra-faith communications between congregational elders and elders serving in the Branch Office's Service Department, as well as with elders serving as circuit and district overseers, be kept in the strictest confidence. As well, communications taking place during a "judicial investigation" and during "judicial committee" meetings are considered to be extremely private and strictly confidential. The confidentiality requirements of such church communications are explained in church literature and publications. Revealing confidential spiritual communications would call into question an elder's qualifications and could result in his removal as an elder in the congregation.

In support of its order compelling discovery, the trial court also held that the penitent-clergy privilege did not apply because the evidence established that the judicial committee "was under no duty to keep the communications private" and that it "was required to communicate information it obtained regarding potential cases of child molestation to the Watchtower Society Headquarters." (Exhibit F, p. 342.). The evidence relied upon by the trial court consists of two

letters not relevant in time and which were sent by defendant Watchtower New York to all bodies of elders throughout the United States. Those “body of elders letters” were dated March 14, 1997 and July 20, 1998, respectively, and provided direction to the elders regarding the communication of certain information to the U.S. Branch Office of Jehovah’s Witnesses relating to those accused of committing child abuse. (See Exh. A, pp. 209-15.) However, the alleged abuse committed by defendant Heard ended in 1981, more than 15 years before the first body of elders letter referenced above was issued. Similarly, defendant Henderson was disfellowshipped from the Red Bluff congregation in 1994, more than two years before the first body of elders letter referenced above was issued. Thus, the trial court’s reliance on these two non-relevant documents is misplaced.

Even if, *arguendo*, the two body of elders letters are found to be relevant in time, the elders’ compliance with the instructions contained therein does not automatically result in a breach of their duty to keep penitential communications – whether made to an individual elder or a judicial committee – secret and confidential. The body of elders letters instruct elders to report the following information: (1) whether the member accused of child abuse has been disfellowshipped, reprovved, counseled, or otherwise addressed; (2) if the accused member has moved to another congregation, the identity of the congregation to which he or she has moved; and (3) whether said congregation has been advised of the accused member’s past child abuse conduct and, if so, the date of said advisement. Nothing in the two body of elder letters instructs or advises elders to reveal

either the contents of confidential penitential communications or the explicit details of the accusations. Therefore, nothing in the two letters prevents the judicial committee elders from complying with the reporting instructions *and* maintaining the confidentiality of the communications made during the judicial investigation and/or judicial committee proceedings.

III. THE TRIAL COURT'S ORDER VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The establishment clause in the First Amendment to the federal constitution provides that, “Congress shall make no law respecting an establishment of religion” Among other things, the U.S. Supreme Court has held that this clause prohibits the government’s excessive entanglement with religion. (*See Lemon v. Kurtzman* (1971) 403 U.S. 602, 621-24.) Under the established clause, every religion is guaranteed the same rights and protections. These protections apply equally to state judiciary proceedings. The U.S. Supreme Court has decisively settled that the First Amendment’s mandate that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof has been made wholly applicable to the states by the Fourteenth Amendment . . . in a series of cases, the court has repeatedly reaffirmed the doctrine” (*Abington School District v. Schemp* (1963) 374 U.S. 203, 216.) This extension of the First Amendment to the states applies to judicial as well as legislative action. (*NAACP v. Alabama ex rel. Patterson* (1958) 357 U.S. 449, 463.) “The Fourteenth Amendment, as now applied to the states, protects the citizens against the state itself and all of its creatures.” (*West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624,

637.) “Judicial action is to be regarded as action of the state for the purposes of the Fourteenth Amendment [and] is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state’s common law policy.” (*Shelley v. Kramer* (1948) 334 U.S. 1, 15, 20.)

By denying the right conferred in the rule of privilege on the basis of a distinction between an elder or a judicial committee of Jehovah’s Witnesses and ministers of other religions, or on the bases of the differences between Jehovah’s Witnesses’ pastoral procedures and those of other religions, the trial court has essentially established “acceptable” religious practices in violation of the federal and state constitutional prohibitions of excessive governmental entanglement with religion. As explained above, the tenets and religious beliefs of Jehovah’s Witnesses doctrine establish the requirement that three or more elders receive and investigate penitent communications regarding allegations of serious transgression or sin. (Exh. B, pp. 274, 287.) This religious practice is rooted in religious doctrine of Jehovah’s Witnesses and based upon the belief that men are imperfect and that the collective knowledge and experience of multiple elders will provide more full and complete spiritual counseling and guidance than that of a single elder alone. The multiple elders requirement is no less fundamental or sacred to the Jehovah’s Witnesses faith and religious practice than the relationship between a penitent and a single clergy member found in other religions. As such, the trial court’s refusal to apply the penitent-clergy privilege to the religious practices and procedures of the Jehovah’s Witnesses is an unconstitutional, and thus impermissible, entanglement with religion.

IV. THE TRIAL COURT'S ORDER VIOLATES THE FREE EXERCISE CLAUSE UNDER THE FEDERAL AND CALIFORNIA CONSTITUTIONS

Additionally, the trial court's refusal to apply the rule of privilege to the religious practices and doctrines of Jehovah's Witnesses for confessions clearly inhibits the free exercise of religion of the Church Defendants in violation of the free exercise clauses of the state and federal constitutions. In essence, the trial court refuses to fully extend confessional protection to Jehovah's Witnesses because they require that multiple elders be present rather than just one. Only a neutral law of general applicability may burden the right to free exercise of religion. (*Employment Division Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879-80.)

A law is not neutral towards religion if its "object ... is to infringe upon or restrict practices because of their religious motivation." (*Church of the Lukumi Babaluáya, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531.) A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." (*Id.* at 543.) A "law substantially burdens a religious belief if it 'conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562 (quoting *Thomas v. Rev. Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 717-18).) "A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly

tailored to advance that interest.” (*Church of the Lukumi Babaluaye, Inc. v. City of Hialeah, supra.*) California courts apply the strict scrutiny standard when deciding matters under the free exercise clause of the California Constitution. (*Catholic Charities of Sacramento, Inc. v. Superior Court, supra.*)

The trial court has burdened the purely religious conduct of the Church Defendants by ruling that Jehovah’s Witnesses cannot enjoy the same benefit from open and free spiritual communications with their ministers as do members of other churches, simply because of their religious beliefs. Here, the government has no compelling interest for granting the penitent-clergy privilege to religions that require a penitent confess to one minister but denying the rule of privilege to religions that require that a penitent confess to more than one minister. Because there is no compelling state interest for the court’s non-neutral judicial interpretation of the rule of privilege, the court’s order cannot withstand strict scrutiny. Therefore, the court’s order violates the constitutional right of free exercise of the Church Defendants and of Jehovah’s Witnesses and must be rejected.

V. TRIAL COURT SHOULD HAVE CONDUCTED AN *IN CAMERA* INSPECTION

An *in camera* review by the trial court may be appropriate to resolve a dispute as to whether requested documents, which contain privileged information, are discoverable. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1619-20.) Before issuing its order to compel, the trial court did not review *in camera* the documents which the Church Defendants have asserted are privileged. Rather, it held that the penitent-clergy privilege was inapplicable based on its

presumptive conclusions that the judicial committee's sole purpose was investigatory and that the judicial committee elders were not required to keep confidential the communications made during the judicial committee's investigation and/or proceeding. (Exh. F, 341-43; Exh. J. p. 365-71.) Given the importance of the penitent-clergy privilege and the irreparable harm which would result from compelled disclosure of potentially privileged documents, an *in camera* inspection of the documents in question is proper and the minimum safeguard which should be applied. Accordingly, should this Court decide not to reverse the trial court's order, then Church Defendants alternatively request that the matter be remanded and the trial court ordered to inspect the requested documents *in camera* before determining whether or not the privilege should apply.

VI. CONCLUSION

For the foregoing reasons, petitioners/Church Defendants respectfully request that the Court grant a writ of mandate as prayed and issue a decision determining the applicability of the penitent-clergy privilege to Henderson's and Heard's separate confidential communications made to a judicial committee formed in accordance with the tenets and doctrine of the Jehovah's Witnesses faith.

Dated: June 28, 2006

Respectfully submitted,

BULLIVANT HOUSER BAILEY PC



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Defendants

CERTIFICATION OF WORD COUNT

The text of this petition consists of 7830 words as counted by the Microsoft Word 2000 word-processing program used to generate the petition. (Cal. Rule of Court, rules 14(c)(1), 56(b)(6).)

DATED: June 28, 2006 Respectfully Submitted,

BULLIVANT HOUSER BAILEY PC

By 

Robert J. Schnack
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PROOF OF SERVICE

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK and
NORTH CONGREGATION OF JEHOVAH'S WITNESSES, RED BLUFF,
CALIFORNIA v. Superior Court of County of Napa

Judicial Council Coordination Proceeding No. 4374
Coordinated With Napa County Superior Court Case No. 26-22191
Court of Appeal No. _____

I am a citizen of the United States and employed in Sacramento
County. I am over the age of eighteen years and not a party to the within
entitled action. My business address is 1415 L Street, Suite 1000, Sacramento,
California 95814.

On this date, I served:

**PETITION FOR WRIT OF MANDATE; VERIFICATION OF ROBERT
J. SCHNACK; MEMORANDUM OF POINTS AND AUTHORITIES**

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I declare under penalty of perjury, according to the laws of the State of California, that the foregoing is true and correct.

Executed on June 29, 2006, at Sacramento, California.

Janet A. Schultz

4218864.1

