Re:

No. 19-40

In The

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Petitioner,

v.

J.W., A MINOR,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fourth Appellate District, Division Two

TABLE OF CONTENTS

[This cover page and the Table of Contents description do not form part of the filed court documents]

No. 19-40

In The
Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Petitioner,

v.

J.W., A MINOR,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fourth Appellate District, Division Two

BRIEF IN OPPOSITION

IRWIN M. ZALKIN, ESQ.
DEVIN M. STOREY, ESQ.
THE ZALKIN LAW FIRM, P.C.
12555 High Bluff Drive, Suite 301
San Diego, CA 92130
Tel: 858-259-3011
Fax: 858-259-3015

NORMAN PINE, ESQ.
Counsel of Record
SCOTT TILLET, ESQ.
PINE PINE FREEMAN TILLETT, LLP
14156 Magnolia Blvd., Suite 200
Sherman Oaks, CA 91423
Tel: 818-379-9710
Fax: 818-981-9254
npine@pineappeals.com

Counsel for Respondent

August 2, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RELATED CASES

JW, Individually, by and through her Guardian ad Litem, TW v. Mountain View Congregation of Jehovah's Witnesses, Murrieta, California, et al., Superior Court of California for the County of Riverside, Case No. MC 1300850. Judgment entered July 15, 2016.

Watchtower Bible and Tract Society of New York, Inc. v. Superior Court of Riverside County, California, Court of Appeal for the Fourth Appellate District, Division Two, Case No. E061557. Petition denied on August 1, 2014.

Watchtower Bible and Tract Society of New York, Inc. v. Superior Court of Riverside County, California, Supreme Court of California, Case No. S220464. Petition denied on September 24, 2014.

JW, a Minor, Etc. v. Watchtower Bible and Tract Society of New York, Inc., Court of Appeal for the Fourth Appellate District, Division Two, Case No. E066555. Judgment entered December 20, 2018.

JW, a Minor, Etc. v. Watchtower Bible and Tract Society of New York, Inc., Supreme Court of California, Case No. S253669. Judgment entered on March 27, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

INTRODUCTION

A central thesis of Watchtower Bible and Tract Society of New York, Inc.'s ("Watchtower") petition is that if it, as a religious corporation, claims that a document is protected by the clergy privilege, the courts are powerless to come to a different conclusion; indeed, powerless to *even inquire* as to the viability of that claim. (Pet. at 15.) According to Watchtower, the mere act of conducting judicial proceedings related to the claim of privilege results in excessive entanglement with religion. (Pet. at 20.) This radical position is directly at odds with hundreds of years of judicial precedent adjudicating—sometimes applying and sometimes rejecting—state law claims of clergy privilege.

Applying its thesis to this case, Watchtower argues that it is constitutionally entitled to affirmatively invoke the clergy privilege and seek court rulings upholding that assertion, but simply ignore any adverse rulings. As it had done in two prior cases involving similar orders to produce documents evidencing child molestation by its members ("Molestation Files"), Watchtower employed this "heads I win, tails you lose" approach in this case. (*See*, *e.g.*, *Lopez v. Watchtower Bible and Tract Society of New York, Inc.*, 246 Cal.App.4th 566 (2016); *Padron v. Watchtower Bible and Tract Society of New York, Inc.*, 16 Cal.App.5th 1246 (2017).) It gambled that it could disrespect the judicial process and ignore court orders while the court lacked the authority to take meaningful action to correct its disobedience. It lost that gamble and was defaulted.

The First Amendment does not exist to provide religious institutions with a free pass to operate outside of the law. To the contrary, this Court has long held that the conduct of religious organizations may be regulated through neutral laws of general applicability. (*Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940) 84 L. Ed. 1213, 60 S. Ct. 900 [finding with respect to the Free Exercise Clause that conduct by a religious actor "remains subject to regulation for the protection of society"]; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531(1993) 124 L. Ed. 2d 472, 113 S. Ct. 2217 [holding that conduct may be regulated through "neutral laws of general applicability"].) These principles apply with full force to the discovery dispute underlying this case.

While the Constitutional positions taken in the petition are radical and overreaching, this Court need not delve into them before declining review because of the myriad infirmities with the petition itself, which is permeated with blatant misrepresentations and intentionally-deceptive omissions. The petition makes no attempt to explain how *any* of its questions presented were properly preserved. (U.S. Sup. Ct. R. 14(1)(g).) Indeed, the Court of Appeal decision under review ("the Opinion") did not address any of these allegedly "important" issues because none were presented to it. Nor does the petition explain why the Opinion meets any of the criteria for review identified in Rule 10. (*See* U.S. Sup. Ct. R. 10, 14(1)(h).) The failures to timely raise and preserve issues, and to comply with Rule 14, each

present an independent and adequate basis for denial of the petition. (U.S. Sup. Ct. R. 14(4).)

Given that Watchtower's answer was stricken and its default entered, appellate review is limited to a consideration of whether the Complaint adequately alleges any cause of action. (*Steven M. Garber & Associates v. Eskanderian*, 150 Cal.App.4th 813, 822–823 (2007).) Watchtower refuses to accept this procedural posture. Instead, it asks this Court to resolve factual issues on a record devoid of facts and to accept factual representations that are either demonstrably false or lacking in evidentiary support because they were never litigated at the trial court level. Watchtower's positions are inextricably fact based, and because of the default, the facts to adjudicate those claims are not before this Court.

Given Watchtower's disrespect for the legal system, penchant for violating court orders and habitual disregard for the rules of the court from which it is begging for mercy, it is not the litigant to champion any allegedly important issue before this Court. This is not a case that warrants this Court's time.

REASONS FOR DENYING THE PETITION

I. Watchtower failed to preserve any of the questions presented by its petition.

Watchtower ignored Supreme Court rules aimed at ensuring that issues presented in a petition for

certiorari are properly before the Court. For example, Supreme Court Rule 14 explicitly itemizes what information "shall" be included in a petition for certiorari. Rule 14(1)(g) ensures federal questions were "timely and properly raised" in the state court and that the Court "has jurisdiction to review the judgment." (U.S. Sup. Ct. R. 14(g).) Among other things, a petition must specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts." (U.S. Sup. Ct. R. 14(g).)

Watchtower's petition does not identify when it raised the federal questions presented herein or how it preserved them for review by this Court. The reason is obvious. Had it done so, it would be readily apparent that Watchtower had failed to timely raise or properly preserve *any* of its three questions presented. Instead, Watchtower engaged in obfuscation by omitting this requirement entirely. This conspicuous disregard of Rule 14, taken alone, justifies denying the petition. (*See* U.S. Sup. Ct. R. 14(4).)

In virtually all circumstances, this Court "adhere[s] to the rule in reviewing state court judgments . . . that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it] ha[s] been asked to review." (*Adams v. Robertson*, 520 U.S. 83, 86 (1997) 117 S.Ct. 1028, citation omitted.) Where, as here, the Opinion is silent on each of the

questions presented, this Court will assume that the issues were "not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question[s]" presented. (*Ibid.*, citation and quotation omitted.) Watchtower did not, and cannot, satisfy this burden.

A. Denial of certiorari as to Watchtower's first question presented is warranted because no state court has ever considered or ruled on the issue.

In substance, Watchtower's first question presented asks whether the First and Fourteenth Amendments limit a court's ability to adjudicate a claim that a religious entity was negligent in hiring or supervising an employee or agent who foreseeably commits a tort. Watchtower did not seek or obtain any ruling on this issue in the trial court. Although it had the opportunity to raise this issue in the Court of Appeal following the entry of its default, Watchtower made a calculated decision not to. Instead, it claimed, as a pure matter of state law, that JW had not sufficiently alleged proximate cause.

After the Court of Appeal published the Opinion, Watchtower filed a frivolous petition for rehearing in the Court of Appeal where, *for the first time*, it belatedly attempted to inject this First Amendment issue into the case. Both the petition for rehearing and a subsequently-filed petition for review with the Supreme

Court of California were denied. No California court ever considered or ruled upon Watchtower's first question presented. Thus, denial of certiorari is warranted. (*See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) 112 S.Ct. 1522 [denying certiorari when the Constitutional issue was first raised in a discretionary petition because denial expressed no view of the merits and therefore no state court addressed the claim]; *Singh v. Lipworth*, 132 Cal.App.4th 40, 43 fn. 1 (2005) [issues raised for the first time on rehearing are waived].)

B. Watchtower abandoned its second question presented—that the First Amendment precluded enforcement of the subject discovery request—by voluntarily choosing not to pursue any First Amendment claims in the California Court of Appeal.

The second question presented asserts that the *trial court* violated the First and Fourteenth Amendments by rejecting Watchtower's assertion of the California clergy privilege. Specifically, Watchtower argues that by finding that it had failed to show that the Molestation Files were entitled to blanket protection by the California clergy privilege, the trial court effectively established a state preference for one-on-one penitential communications over other models, such as the multiple elder method used by Jehovah's Witnesses. (Pet. at 16–17.) Citing the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),

it also claims that the trial court violated privacy rights of third parties when it ordered Watchtower to produce the Molestation Files. (Pet. at 18–19.)

But Watchtower abandoned any claim that the trial court erred by ordering production of the Molestation Files by declining to present the issue to the Court of Appeal. Moreover, it never cited HIPAA at any time prior to the filing of its petition for certiorari. Since this issue was not decided by, or presented to, the Court of Appeal, the issue has not been preserved. (*See Adams*, *supra*, 520 U.S. at p. 86, 117 S.Ct. 1028.)

C. Watchtower asks this Court to simultaneously be both the court of first impression and the court of last resort on the Seventh Amendment issue raised in the petition.

Watchtower's third question presented ponders whether the Seventh Amendment's guarantee of the right to a trial by jury applies to the states and argues that a terminating sanction resulting in a defendant's default would violate this guarantee. This is Watchtower's most blatant failure to timely raise an issue. Watchtower never mentioned this argument in *any* state court at *any* time.

II. Watchtower's failure to comply with Supreme Court Rule 10 similarly justifies denial of the petition.

The petition also ignores Rule 10, which identifies three categories of decisions that may justify review. (U.S. Sup. Ct. R. 10; 14(1)(h).) And for good reason: none warrants granting the petition. Subdivisions (a) and (b) are inapplicable because the Opinion was not issued by a United States Court of Appeals or a state court of last resort. (U.S. Sup. Ct. R. 10(a), (b).) That leaves only subdivision (c), which provides that: "a state court or a United States court of appeals *has decided* an important question of federal law that has not been, but should be, settled by this Court, or *has decided* an important federal question in a way that conflicts with relevant decisions of this Court." (U.S. Sup. Ct. R. 10(c), emphasis added.)

The petition's most glaring deficiency vis-a-vis Rule 10 is that the Opinion did not *decide* any of the questions presented and therefore voiced no opinion on any undecided but "important question of federal law." Instead, the trial court struck Watchtower's Answer to the Complaint and entered its default after Watchtower refused to comply with its discovery order requiring it to produce documents that would have shown Watchtower's awareness of, and indifference to, a rampant organizational epidemic of child molestation. (Record 0254, 3439.) The petition's failure to satisfy any of the grounds for review specified in Rule 10 is an independent basis for denying review.

III. Given its consistent history of disrespect for the legal system and disregard of adverse rulings, Watchtower is the wrong litigant to champion any issue before this Court.

This Court has a grave responsibility to direct its limited resources at safeguarding the integrity of the judicial process and directing the evolution of the law. It is difficult to envision a party less deserving than Watchtower to be trusted to litigate any allegedly important issue before this Court. In case-after-case, Watchtower has shown a remarkable disregard for the authority of the courts and flouted the rules that all other litigants are required to follow.

For example, in *Lopez*, *supra*, 246 Cal.App.4th 566, the plaintiff brought an action alleging Watchtower negligently hired, retained and supervised a Jehovah's Witness member who molested the plaintiff. (*Id.* at p. 573.) After being ordered to produce the Molestation Files, Watchtower affirmatively sought appellate intervention, but its petitions for writ of mandate and review were denied. (*Id.* at pp. 576, 584.) With no legal avenue remaining to challenge the discovery order, Watchtower ignored the court's authority and simply refused to produce the documents, claiming the trial court was wrong. (*Id.* at pp. 586–587.) On appeal of the resulting terminating sanctions order, the court rejected Watchtower's arguments, affirmed the document production order and found that "[t]here is no question that Watchtower willfully failed to comply

with the document production order" making lesser sanctions appropriate on remand. (*Id.* at p. 605.)

Less than two years later, the same appellate court was required to again consider Watchtower's blatant disobedience of a discovery order. (*Padron*, *supra*, 16 Cal.App.5th at p. 1249 ["this is not the first time we have been asked to review a superior court's sanctions against Watchtower for discovery abuses"].) As in *Lopez*, Watchtower was ordered to produce the Molestation Files and again refused to follow those orders, claiming it was substantially justified in disobeying because the trial court was "just wrong" and the First Amendment gave it special license to disobey court orders. (*Id.* at pp. 1265, 1268–69, 1271.)

Before substantively rejecting Watchtower's arguments, the court voiced its dismay at Watchtower's litigation tactics, characterizing it as "gamesmanship." (*Id.* at p. 1269, fn. 9.) If there was any doubt about the *Padron* court's views of Watchtower's litigation tactics, it resolved them by concluding:

> Watchtower has abused the discovery process. It has zealously advocated its position and lost multiple times. Yet, it cavalierly refuses to acknowledge the consequences of these losses and the validity of the court's orders . . . the superior court has shown great patience and flexibility in dealing with a recalcitrant litigant who refuses to follow valid orders and merely reiterates losing arguments.

(*Id.* at pp. 1271–1272.) Indeed, the court stated "we find Watchtower's conduct so egregious that if it continues to defy the [discovery] order, terminating sanctions appear to be warranted and necessary." (*Id.* at p. 1265.)

Watchtower's gamesmanship has continued in this case. Once again, Watchtower was ordered to produce the Molestation Files and again it refused. (Record 1305–1308, 2271, R.T. 1–10.) As it had done in *Lopez* and *Padron*, Watchtower filed a petition for writ of mandate seeking to be excused from complying with the trial court orders. (Record 2275.) That Petition, and a subsequent Petition for Review by the Supreme Court, were denied. (Record 2325, 2685.)

Refusing still to produce the Molestation Files despite having exhausted its appellate remedies, JW filed a motion for terminating sanctions, explaining that the documents were vital to proving her negligence and intentional infliction of emotional distress claims as well as punitive damages. (Record 3281, 3303–3306, 4229, 4230.) JW also showed that lesser sanctions could not effectively replicate the missing documents. (Record 3307–3308.)

At the January 26, 2015 hearing, Judge Marquez offered a tentative ruling to give Watchtower "one last opportunity" to provide the documents. (App. C at 23a.) The Court offered Watchtower four additional days to comply, explaining: "the Court's tentative is that it is going to grant the motion and will strike the answer if the—information that has been ordered to be produced

is not produced . . . [¶] . . . The Court wanted to give you one last opportunity to comply before exercising that type of a sanction." (App. C at 23a.)

Watchtower refused the offer of more time. (WT App. E at 57a.) The court took the matter under submission for several days before granting the motion, stating "[b]ased on Watchtower's refusal to produce these documents—despite looming terminating sanctions that would strike Watchtower's Answer—the imposition of lesser sanctions (like monetary sanctions) is insufficient to obtain compliance." (WT App. E at 57a.) After striking Watchtower's Answer, the trial court entered its default on March 23, 2015. (Record 3439.)

Even before this Court, Watchtower has shown little regard for the rules. It ignored Supreme Court Rules governing the content of a petition for certiorari, seeks review of issues it did not timely raise below or preserve, and improperly argues the merits of JW's action, which are substantively and procedurally barred by the default judgment entered against it. (*See Steven M. Garber & Associates*, *supra*, 150 Cal.App.4th at p. 823 ["[t]he *judgment by default* is said to 'confess' the material facts alleged by the plaintiff. . . ."].)

When a party opportunistically seeks aid from a reviewing court while secretly harboring the intention that any unfavorable ruling will be ignored—as Watchtower has repeatedly done in this case and others—the integrity of the judicial system is compromised. (*In re L.J.*, 216 Cal.App.4th 1125, 1136 (2013) [appeal may be

dismissed when a party "has signaled by his conduct that he will only accept a decision in his favor"].) Watchtower is the last party that should be permitted to carry the torch on behalf of proponents of its side of the allegedly-important issues for which it has sought review. This Court's valuable time, limited resources, and the interests of fairness and fair play demand better.

IV. Watchtower's default created a factual void resulting in a record insufficient to allow this Court to review and rule upon the questions presented.

Not only is Watchtower the wrong litigant to champion any cause before this Court, this is the wrong case to adjudicate the issues presented for review. By refusing to comply with the discovery order and allowing its default to be taken, Watchtower *admitted* all of the allegations in the Complaint. (*Steven M. Garber & Associates*, *supra*, 150 Cal.App.4th at pp. 822–823; *Carlsen v. Koivumaki*, 227 Cal.App.4th 879, 898 (2014) [under California law, entry of default admits all allegations of the complaint and "*no further proof of liability is required*."].) Reviewing those allegations in the light most favorable to JW, the court's duty was to determine whether the Complaint adequately alleged any cause of action. (*Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal.App.4th 1547, 1557 (1996) [complaint reviewed "to determine whether it alleges facts sufficient to state a right to

relief under *any* legal theory"], emphasis added.) The petition refuses to acknowledge the procedural posture.

Rather than examining the Complaint's sufficiency, Watchtower builds its petition around factual contentions that are both contrary to the admitted allegations of the Complaint and unsupported by the record. For example, Watchtower argues that the March 1997 letter it sent to all U.S. congregations of Jehovah's Witnesses requesting the Molestation Files was intended to ensure compliance with biblical requirements. (Record 1858-1860.) However, it previously acknowledged that the reports were a necessary step to avoid future legal liability, recognizing that:

> [t]hose who are appointed to privileges of service, such as elders and ministerial servants, are put in a position of trust. One who is extended privileges in the congregation is judged by others as being worthy of trust. This includes being more liberal in leaving children in their care and oversight. The congregation would be left unprotected if we prematurely appointed someone who was a child abuser as a ministerial servant or an elder. In addition, court officials and lawyers will hold responsible any organization that knowingly appoints former child abusers to positions of trust, if one of these, thereafter, commits a further act of child abuse. This could result in costly lawsuits . . .

(Record 4935.)

The same is true for Watchtower's (1) attempt to abdicate its responsibility for the affairs of Jehovah's Witness congregations in 2001, (2) claim that it had no prior notice that Simental posed a danger to children, and (3) contention that Simental was not its agent at the time of the abuse, each of which is directly at odds with the allegations in the Complaint.[1] (Record 0157, 0165, 0167–0168.) Because Watchtower allowed its default to be entered, there is no factual record from which to resolve the alleged factual inconsistencies upon which Watchtower's arguments turn. (*Steven M. Garber & Associates*, *supra*, 150 Cal.App.4th at p. 823.) However, even if Watchtower could cite something to support its factual contentions, it would be meaningless as Watchtower's default precludes any such challenge to the facts alleged in the Complaint.

Watchtower also failed to precure a physically adequate record. Many pages are so lightly printed as to be wholly or partially illegible or, at a minimum, very

---

[1] These contentions are also unsupported by the record, which contains no evidence to contradict Watchtower's admission that it had responsibility for supervising congregational affairs in 2006. The evidence in the prove-up packet affirmatively refutes Watchtower's claim that it was unaware of Simental's dangerous propensities. (Record 4636-4639.) There is no evidence from which to evaluate Simental's status as a baptized publisher, ministerial servant or other agent of Watchtower at the time of the molestation. Watchtower Exhibit F, which purports to show that Simental was deleted as an elder prior to his molestation of JW is both silent on whether he had been reappointed prior to the molestation, and was not part of the record below. Nor does the record support Watchtower's contention that it was uninvolved with the slumber party.

difficult to read. (*See*, *e.g.*, Record 4711-4726, 4728, 4632, 4735-4737, 4739-4748, 4786, 4792-4827, 4939, 4972, 4975-4976, 5204-5208.) It is manifestly unjust for Watchtower to make representations about the lack of evidence on certain issues, and then supply a record with nearly 80 pages of illegible documents comprised largely of the elders' investigation of Simental's actions and what was known about his dangerous propensities. (*See* Pet. at 3, 13.)

It would be unfair to future defendants to permit Watchtower to proceed before this Court to champion issues such as the connection required for a religious organization to be held liable for the acts of those under its control. Any opinion from this Court could set insurmountable precedent for future litigants with more developed factual records who have not defaulted by disobeying valid discovery orders.

Alternatively, any opinion by this Court would be *sui generis*. By defaulting, Watchtower has abandoned any arguments respecting what it means to be an elder, ministerial servant, or baptized publisher, and whether any of those titles create an agency relationship for purposes of institutional knowledge claims. (*Steven M. Garber & Associates*, *supra*, 150 Cal.App.4th at p. 823 ["the entry of the default barred appellants from advancing contentions on the merits"].) If a religious organization other than Jehovah's Witness was faced with similar claims of child molestation and institutional knowledge, any opinion from this Court would not provide guidance respecting whether those affiliated with the organization held titles sufficient to

create the necessary agency relationship to hold the organization liable for the assailant's conduct. This Court's limited resources are not best served through resolution of unique circumstances that cannot be used as guidance by future litigants.

CONCLUSION

The petition should be denied.

Respectfully submitted,

IRWIN M. ZALKIN, ESQ.
DEVIN M. STOREY, ESQ.
THE ZALKIN LAW FIRM, P.C.
12555 High Bluff Drive,
Suite 301
San Diego, CA 92130
Tel: 858-259-3011

NORMAN PINE, ESQ.
Counsel of Record
SCOTT TILLET, ESQ.
PINE PINE FREEMAN
TILLETT, LLP
14156 Magnolia Blvd.,
Suite 200
Sherman Oaks, CA 91423
Tel: 818-379-9710
npine@pineappeals.com

Counsel for Respondent

No. 19-40

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Petitioner,

v.

J. W., A MINOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

REPLY BRIEF

PAUL D. POLIDORO
Counsel of Record
JOEL M. TAYLOR
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000
ppolidor@jw.org

Counsel for Petitioner

290638

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's statement pursuant to Rule 29.6 was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

STATUTES AND OTHER AUTHORITIES

Respondent does not dispute the existence of an intolerable, decades-long conflict among United States courts of appeals and state high courts as to whether the First Amendment proscribes tort claims against a church for negligent hiring/retention of clergy. Nor does Respondent deny that California awarded $4 million for the negligent hiring/retention of clergy. Rather, Respondent incorrectly contends that this case is not the vehicle to address this circuit and state court split. This case is the right vehicle to resolve this split as it implicates fundamental federal constitutional rights and privacy rights of non-parties. The Petition should be granted.

I. There are no procedural impediments barring review.

California expanded a cause of action that is the subject of constitutional dispute in federal and state courts throughout this country. California also deprived Watchtower of a jury trial by issuing terminating sanctions because Petitioner endeavored to protect citizens' religious confessional and secular privacy rights. Watchtower consistently asserted the violation of Jehovah's Witnesses' federal constitutional rights involved in these issues in the lower courts, the denial of which are properly before this Court.

A. The issues were preserved for review.

Respondent argues that the petition should be denied because (1) these issues are not preserved for this Court's review, (2) no state court has ever considered or ruled on the federal constitutional issues, and (3) Watchtower failed to comply with Supreme Court Rule 14.1(g). (Opp. 3-7) These contentions are meritless.

1. The important federal constitutional issues are properly preserved.

Respondent contends that Watchtower abandoned and/or "failed to timely raise or properly preserve *any* of its three questions presented." (Opp. 4, 6-7) (italics in original). The record belies these claims.

From day one, federal constitutional issues were before the California courts. In its affirmative defenses, Watchtower's Answer asserted that the First Amendment barred the causes of action. (Record 178) Watchtower moved to strike allegations in the complaint that are prohibited by the First Amendment. (Record 3518-3522; 3261-3263) Watchtower also objected to a demand for documents—including those that were the subject of terminating sanctions—on First Amendment grounds and relied on *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). (Record 341, 367; *see also* Record 4263-4267)

After the trial court rejected Watchtower's constitutional objections, Watchtower reasserted them before the California Court of Appeals in its Petition for Writ of Mandate & Request for Immediate Stay. (App. C, 18a; Record 2288-2289, 2296-2297, 2301-2302, 2307-2316) Specifically, Watchtower asserted violation of the Establishment Clause and relied upon the *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). (App. C, 18a; Record 2307-2312) Petitioner also asserted violation of the Free Exercise Clause and relied upon *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). (App. C, 18a; Record 2312-2313) Petitioner also asserted the

violation of third-party privacy rights. (Record 2314-2316) After considering and commenting on Watchtower's constitutionally based arguments, the California Court of Appeal denied the Writ. (App. C, 18a-19a; Record 2325) Then Watchtower presented its First Amendment and third-party privacy arguments to the California Supreme Court. (App. C, 19a; Record 2493-2497, 2504-2516) By summarily denying the Writ, California again failed to protect First Amendment and privacy rights. (App. C, 19a; Record 2685)

Thereafter, the trial court reiterated its order for Watchtower to disclose inter-faith communications. (Reporter's Transcript on Appeal 83-84, 88-89) Because, as a matter of religious belief, Watchtower conscientiously refused to break the confidentiality of confessions and violate the privacy rights of individuals not involved in this case, the trial court issued terminating sanctions. (App. C, 25a-26a; Record 4701) When Watchtower appealed to the California Court of Appeal, it again reasserted its First Amendment penitential communication privilege and privacy arguments. (App. C, 40a-41a) In support of these arguments, Watchtower attached to its opening brief an excerpt of a transcript to the trial court advancing these important federal constitutional issues:

> Your Honor, they've brought a lawsuit against a church and a religion. And the role that our government, back to the Constitution, has assigned to religions, churches …
>
> All these records that you're ordering produced here today, many of them are the relatives of these victims that went to the ministers,

> pouring their hearts out to them, and their private notes and the ministers themselves had to get counseling for ministers because this is something they're not familiar with. This is a rare occurrence. And all of their private thoughts and private notes of people struggling after the fact, after it's all over, of trying to get some consolation, and that's what is being turned over.
>
> And the role of the Church in trying to fulfill that purpose assigned by the government is gutted when people know that their thoughts and what they struggle with is going to be distributed in a court of law and read like this.

(Watchtower's Brief in California Court of Appeal 104-105)

Since Respondent's brief to the California Court of Appeal conceded that the trial court overruled "Watchtower's objections based on privilege, privacy, relevance and the First Amendment," it is disingenuous for Respondent to now argue that these same important federal constitutional issues were not before that court. (Plaintiff's Brief in California Court of Appeal 29) Furthermore, as Watchtower highlighted in its reply brief to the California Court of Appeal, the Supreme Court "do[es] not presume acquiescence in the loss of fundamental rights." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186 (1972). (Watchtower's Reply Brief in California Court of Appeal 14)

In its opinion, the California Court of Appeal acknowledged Petitioner's affirmative defenses. (App.

C, 10a) It also acknowledged that Watchtower's previous petition for writ of mandate asserted that "the trial court violated the Establishment Clause and Free Exercise Clause of the United States Constitution." (App. C, 18a) Additionally, it acknowledged that "a terminating sanction … eliminates a party's fundamental right to a trial, thus implicating due process rights." (App. C, 43a) (citations omitted). Nonetheless, the Court of Appeal failed to comply with federal constitutional protections.

As the California Court of Appeal's opinion relied on a newly published decision that neither party had opportunity to comment on during briefing, Watchtower filed a motion for rehearing that addressed this new decision and reasserted its argument that holding Watchtower liable violated the First Amendment. (App. B, 2a; App. C, 32a; Watchtower's Petition for Rehearing 4-7) Watchtower also raised these federal constitutional issues in its Petition for Review that was summarily denied by the California Supreme Court. (App. A, 1a; Watchtower's Petition for Review 34-43)

2. California's court of last resort considered important federal questions that Watchtower presented.

Respondent incorrectly argues that the petition should be denied because "the Opinion did not *decide* any of the questions presented and therefore voiced no opinion on any undecided but 'important question of federal law.'" (Opp. 8) (italics in original). While the California Court of Appeal opinion did not expressly address the federal constitutional issues, its refusal to enforce constitutional protections is implicit in all of its decisions.

The California court of last resort acknowledged that Watchtower raised federal constitutional issues in this case. (App. C, 13a, 18a) As set forth above, Petitioner consistently asserted federal constitutional rights in this litigation. Therefore, since these issues were presented to the state court, they are properly reviewable by this court. *See Street v. New York*, 394 U.S. 576, 584 (1969) ("[I]f the record as a whole shows either expressly or by clear intendment" that the constitutional infirmity was "brought to the attention of the state court" "the claim is to be regarded as having been adequately presented.") (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Martinez v. California*, 444 U.S. 277, 282 n.6 (1980).

3. Watchtower complied with Rule 14.

Respondent maintains that the petition should be denied for failure to comply with Rule 14. (Opp. 2, 4) Petitioner notes that the Clerk has not returned the petition for failure to comply with this rule. *See* U.S. Sup. Ct. R. 14.5. Furthermore, the information discussed above addresses Respondent's contentions. However, if the petition is deemed deficient under this rule, Petitioner respectfully requests the opportunity to submit a corrected petition in accord with Rule 14.5.

B. This case warrants review under Rule 10.

Respondent incorrectly contends that Supreme Court Rule 10 is not satisfied because the decision was not made by a state court of last resort and the opinion did not decide an important question of federal law. (Opp. 8)

"Final judgments or decrees rendered by the highest court of a State" involving federal constitutional violations are reviewable by the Supreme Court. 28 U.S.C. § 1257. When the highest state court denies discretionary review, the judgment of the intermediate court is reviewable by this Court. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-160 (1954) ("when the jurisdiction was declined [by the state supreme court] the Court of Appeal was shown to be the highest Court of the State in which a decision could be had") (quoting *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923)); *see*, *e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 526 (1992) (appeal from decision by the California Court of Appeal after California Supreme Court denied review); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 921-923 (2011) (appeal from decision by the North Carolina Court of Appeals after North Carolina Supreme Court denied discretionary review).

Here, by affirming the multi-million dollar judgment predicated on the unconstitutional theory of negligent hiring/retention of clergy, the California Court of Appeal violated Petitioner's First Amendment rights. (App. C, 5a) Since the California Supreme Court summarily denied review, the California Court of Appeal became the state court of last resort. (App. A, 1a)

Furthermore, the California Court of Appeal's opinion conflicts with the decisions of the United States courts of appeals for the Third and Seventh Circuits and high courts of four states holding that the First Amendment bars such claims. (Pet. 9-11) By so ruling, the California Court of Appeal—the state court of last resort in this case—"decided an important federal question in a way

that conflicts with the decision of another state court of last resort or of a United States court of appeal" and "decided an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. R. 10(b) and (c). Thus, this petition complies with Rule 10(b) and (c) and is properly subject to review.

II. Watchtower is the ideal litigant to champion federal constitutional rights.

Respondent impugns Watchtower as "the wrong litigant to champion any issue before this Court" because "[i]t is difficult to envision a party less deserving than Watchtower to be trusted to litigate any allegedly important issue before this Court." (Opp. 9) Jehovah's Witnesses' decades-long history of advancing seminal First Amendment issues belies this claim.

This Court's resolution of conflicts resulting from Jehovah's Witnesses' adherence to their Bible-trained consciences has resulted in freedoms for all Americans. These freedoms cut a large swath across First Amendment jurisprudence. They include the freedom to:

- Distribute handbills in public places *Schneider v. State of New Jersey*, 308 U.S. 147 (1939)

- Not be compelled to salute the flag *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

- Distribute literature door to door *Martin v. City of Struthers*, 319 U.S. 141 (1943)

- Canvass without paying a license tax *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)

- Engage in religious speech in public parks *Fowler v. Rhode Island*, 345 U.S. 67 (1953)

- Refuse state required ideological message on car license plate *Wooley v. Maynard*, 430 U.S. 705 (1977)

- Refuse to produce armaments for religious reasons without being denied unemployment compensation benefits *Thomas v. Review Board*, 450 U.S. 707 (1981)

- Engage in core First Amendment speech without first obtaining a government license *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, Ohio*, 536 U.S. 150 (2002)

As a result of the efforts of Jehovah's Witnesses, the Free Exercise Clause of the First Amendment was incorporated into the Fourteenth Amendment and is applicable to the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

As highlighted in the cases cited by Respondent, Watchtower has assiduously fought to maintain the privacy rights of congregants. (Opp. 9-11) This included the identities of child abuse victims. California showed little regard for these privacy rights. (App. C, 41a) In stark contrast, last month the United States Court of Appeals for the Eighth Circuit took a step toward protecting the constitutional right to privacy of victims of child sexual

abuse. *Dillard v. City of Springdale, Arkansas*, 930 F.3d 935 (8th Cir. 2019) (holding "that the right of minor victims of sexual abuse not to have their identities and the details of their abuse revealed to the public was clearly established"). Here, this Court has the opportunity to accord citizens throughout the United States their rights of privacy.

III. There is no factual void that prevents review.

Respondent argues that "this is the wrong case to adjudicate the issues presented for review" because the "default created a factual void." (Opp. 13) This argument fails as Respondent concedes:

Fact: California awarded Respondent $4 million. (App. D, 54a)

Fact: California entered terminating sanctions because Watchtower protected intra-faith communications containing confidential confessions and sensitive private information regarding congregants throughout the United States. (App. E, 55a-57a; Record 4260-4261)

Fact: Watchtower never had a jury trial. (App. D, 52a)

Fact: California predicated liability against a church for negligent hiring/retention of clergy. (App. C, 35a-38a)

Fact: United States circuit courts of appeal and state high courts are irrevocably split as to

whether liability can be assessed against a church for negligent hiring/retention of clergy. (Pet. 9-11)

Thus, contrary to Respondent's contentions, the record before this Court presents an opportunity to resolve this long standing conflict among the lower courts involving an important question of federal law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Paul D. Polidoro
Counsel of Record
Joel M. Taylor
Legal Department
Watchtower Bible and Tract Society of New York, Inc.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000
ppolidor@jw.org

Counsel for Petitioner

No.

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Petitioner,

v.

J. W., A MINOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR A WRIT OF CERTIORARI

PAUL D. POLIDORO
Counsel of Record
JOEL M. TAYLOR
LEGAL DEPARTMENT
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000
ppolidor@jw.org

Counsel for Petitioner

288149

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

For decades this Court has safeguarded the First Amendment rights of freedom of religion, speech, and press from state infringement. Jehovah's Witnesses again find their First Amendment rights under attack and again seek protection.

Here, Petitioner Watchtower sought to protect confidential, intra-faith communications among clergy (elders) regarding Bible-based religious appointment processes, some of which included congregants' penitential confessions and all of which impacted privacy rights of non-parties. California targeted the faith of Jehovah's Witnesses and impermissibly intruded upon matters of church governance, religious doctrine, and religious practice when it ordered Watchtower to produce these intra-faith communications. Without a trial, California imposed on Watchtower an unprecedented theory of liability for a congregant's criminal conduct during non-church activity (a Saturday afternoon pool party at a private home).

The questions presented are:

1. Did California violate the First and Fourteenth Amendments when it held the former national offices of Jehovah's Witnesses (Watchtower) responsible for the criminal act of a congregant during non-church activity?

2. Did California violate the First and Fourteenth Amendments when it ordered Watchtower to produce intra-faith communications regarding

Bible-based religious appointment processes and thereafter punished Watchtower for protecting the privacy rights of non-parties?

3. Whether the Seventh Amendment's guarantee of the right of trial by jury is incorporated against the States under the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Watchtower Bible and Tract Society of New York, Inc., is the sole petitioner. Watchtower was the defendant-appellant in the California Court of Appeal. Three other legal entities (Mountain View Congregation of Jehovah's Witnesses, Murrieta, California; French Valley Congregation of Jehovah's Witnesses, Murrieta, California, Inc.; and Christian Congregation of Jehovah's Witnesses) were defendants in the trial court but Plaintiff dismissed them. Plaintiff is identified by the pseudonym J.W. and was represented by her father as Guardian Ad Litem.

CORPORATE DISCLOSURE STATEMENT

Watchtower Bible and Tract Society of New York, Inc. is a 501(c)(3) non-profit corporation organized under the laws of the State of New York with offices in Patterson, New York. Its primary purpose is religious, and its primary goal is and has been to support the religious activities of Jehovah's Witnesses in the United States. Watchtower was the national office formerly involved in the affairs of the congregations prior to March 2001 ("former national office"). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Table of Contents

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

PETITION FOR WRIT OF CERTIORARI

Watchtower Bible and Tract Society of New York, Inc., Petitioner, respectfully petitions for a writ of certiorari to review California's judgment in this case.

OPINIONS BELOW

The December 10, 2018, Opinion of the Fourth Appellate District for the Court of Appeal of the State of California is published at 29 Cal.App.5th 1142 and reproduced at App. C, 3a-51a. The Court of Appeal's Order of December 31, 2018, denying petitioner's Petition for Rehearing was not published, and it is reproduced at App. B, 2a. The Supreme Court of California's Order of March 27, 2019, denying petitioner's Petition for Review and request for an order directing de-publication of the Court of Appeal's Opinion (Case No. S253669) is not reported, and it is reproduced at App. A, 1a. The relevant orders of the California Superior Court are unreported, and those orders are reproduced at App. D, 52a-App. E, 57a.

STATEMENT OF JURISDICTION

The order of the Supreme Court of California was filed March 27, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]"

The Seventh Amendment to the Constitution of the United States provides in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]"

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a congregant who abused the child of a co-congregant in a family swimming pool during a private, non-church-related party in Southern California, resulting in a multi-million dollar judgment against Watchtower without a trial. Why was Watchtower punished by the California courts? Because it conscientiously refused to break the confidentiality of confession and violate the privacy rights of individuals not involved in this case by producing intra-faith communications among clergy (elders) regarding Bible-based religious appointment processes.

Jehovah's Witnesses abhor child abuse. It is a serious sin. It is a horrible crime. Watchtower and Jehovah's Witnesses care deeply about all victims of child abuse, including this Plaintiff who may continue to long suffer the effects of this horrendous crime. But the fault in this

case lies solely with the perpetrator, Gilbert Simental, not with Watchtower.

Watchtower had no notice that Simental posed a danger to children, and Plaintiff offered no evidence to the contrary. (Record 2464-2465)[1] Moreover, some five years prior to the abuse, Watchtower was no longer the national office involved in the affairs of congregations of Jehovah's Witnesses in the United States. As of 2001, Christian Congregation of Jehovah's Witnesses (CCJW), a corporation Plaintiff voluntarily dismissed, was the entity involved in the affairs of congregations. (App. SA, 1-5)

Seven years after the crime, Plaintiff sued Watchtower, CCJW, Mountain View Congregation of Jehovah's Witnesses (Mountain View Congregation), and French Valley Congregation of Jehovah's Witnesses (French Valley Congregation). (Record 0155-0175) Watchtower had no contractual, legal, or financial relationships with French Valley Congregation or with Mountain View Congregation (the congregation with which Plaintiff and Simental worshiped). Watchtower's principal activities include providing religious office and residential facilities (primarily in New York), and printing and publishing religious literature.

The First Amended Complaint alleged that on July 15, 2006, a pool party was held at the home of Gilbert Simental. Plaintiff states that Simental wrongly touched her while she was in the pool with other guests and members of his family. Watchtower never owned the

1. "Record" refers to pages in Appellant's Appendix on file with the California Court of Appeal that are not reproduced in the Appendix filed with this Court.

Simental residence. Simental was never an employee of Watchtower. (Record 2471)

During the course of the court proceedings, Plaintiff admitted that Simental was not an elder[2] in the congregation at the time of the abuse. (Record 2398, 2404, 2413-2414, 4998, 5055) Despite knowing that Simental was simply a congregant at the time of abuse, the Complaint asserted that he was an elder in an attempt to create some form of organizational liability for the crime committed at a private gathering wholly unrelated to congregation (church) activities. Simental had previously served as an elder in the Mountain View Congregation. But eight months before Plaintiff's abuse he was terminated (deleted) from his role as an elder (for reasons unrelated to child abuse), and the congregation was informed by an announcement that he no longer served as an elder. (App. F, 58a; Record 2398, 2464)

The Scriptural qualifications for elders are set forth at *1 Timothy 3:1-13*; *Titus 1:5-9*; *James 3:17*, *18*; and *1 Peter 5:2*, *3* (*e.g.*, they must be irreprehensible, sound in mind, free from accusation, righteous, and self-controlled). Accordingly, the January 1, 1997, issue of *The Watchtower* contained an article entitled "Let Us Abhor What Is Wicked" that provided religious direction to Jehovah's Witnesses regarding appointment processes. It explained that those who engage in the sin of child abuse do not meet the Scriptural qualifications to hold ecclesiastical positions in the congregation.

---

2. Elders in the faith of Jehovah's Witnesses meet Scriptural qualifications and discharge Bible-based responsibilities such as teaching, providing pastoral care, and set an example in spreading the good news of God's Kingdom, for which Jehovah's Witnesses are well known.

Thereafter, in March 1997, Watchtower undertook ecclesiastical measures to ensure that all United States congregations complied with this Scriptural position on ecclesiastical appointments in the congregation. It communicated with elders in over 10,000 congregations nationwide. (Record 0455-0457) The intra-faith communications Watchtower received from elders in response contained information protected by the confidentiality of confession and sensitive, private information regarding the spiritual health of congregants.

California ordered Watchtower to disclose these nationwide responses. Watchtower complied with all orders to produce all documents it had about the perpetrator. However, Watchtower resisted disclosing intra-faith communications wholly unrelated to this case because they are confidential under the religious beliefs and practices of Jehovah's Witnesses. As a result, California issued terminating sanctions against Watchtower.

Thereafter, Plaintiff voluntarily dismissed all other defendants. (App. SA, 1-5; Record 4329, 4334). Prior to the court entering judgment against Watchtower, Plaintiff contradicted the Complaint and admitted that Simental was not an elder (clergy) when he abused her. (Record 4998, 5026, 5048) Plaintiff's theories of liability, negligent hiring/retention, are predicated on his clergy position, which did not exist. Knowing this, California nonetheless affirmed a $4 million judgment against Watchtower.

Watchtower did nothing to shield Simental from paying for his crimes. Unlike Watchtower, Simental had a jury trial. He was convicted and remains in prison. Plaintiff never sued him.

REASONS FOR GRANTING THE PETITION

California established a bewildering duty, applicable all day every day, for the former national office of Jehovah's Witnesses located in New York (Watchtower), to supervise in perpetuity all congregants, even in their own homes and even when there is no prior notice that an individual congregant poses a danger. No secular standard imposes such an onerous duty. The burden California places on religions to bear responsibility for criminal acts a congregant commits during non-church activities cannot be overstated. The remarkable and predictable result of that ruling will have devastating policy implications for all organizations. Simply put, the need for this Court's intervention is of critical importance.

In addition, courts throughout the United States inconsistently apply the First Amendment's protection against tort claims for negligent hiring/retention of clergy. Fundamental constitutional protections should not be contingent on geography.

California went beyond this split of authority and extended the theory of negligent hiring to a former elder. It also intruded into the religious sphere by examining matters of religious governance, destroying the confidentiality of confession by compelling production of intra-faith communications and eliminating the privacy rights of citizens throughout the United States.

Rather than allowing Watchtower the opportunity to adjudicate this case on its merits, California punished it. The state valued a mendacious complaint more than the United States Constitution.

I. California violated the First and Fourteenth Amendments when it expanded tort concepts to include liability for the criminal act of a congregant during non-church activity.

Federal circuit courts of appeals and the highest courts of several states are split on whether the First Amendment forbids tort liability flowing from the appointment/retention of clergy. California went one step further by creating an unprecedented duty to supervise a congregant at a Saturday afternoon, private pool party at his home.

A. The First Amendment forbids civil courts from interfering with matters of church structure and governance.

Watchtower does not here challenge the constitutionality of claims governed by employment law in a religious setting. Indeed, this Court addressed wrongful termination in *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) and concluded that there may be some justiciable claims related to the employment of ministers. However, even then:

> [r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.

Id. at 188. This Court said in *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929): "[T]he appointment [to the chaplaincy] is a canonical act." In the present case, California applied employment law to canonical acts and intruded into internal church governance.

The First Amendment is premised on the notion that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)). To that end, both Religion Clauses—the Establishment Clause and the Free Exercise Clause—work together to protect the autonomy of religious organizations and avoid excessive entanglement of secular and religious authorities. Based on these reinforcing First Amendment protections, civil courts have long abstained from interfering with the internal affairs of religious organizations.

Despite an unbroken line of First Amendment cases establishing and reaffirming religious autonomy, California failed to accept what this Court has made abundantly clear. The Constitution protects the "free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952). Here, Simental was removed from church "hierarchy" (ecclesiastical structure). Despite this ecclesiastical decision, California held Watchtower responsible as though Simental was still an elder, even though he was not one at the time he abused Plaintiff.

1. High state and federal circuit courts are hopelessly divided on whether the First Amendment proscribes third-party tort claims against a church for negligent hiring/retention of clergy.

California penalized Watchtower for a religious appointment it did not even make by applying a theory of negligent hiring/retention. In doing so, California added another dimension to the existing split of authority among the federal circuits and the states as to whether the First Amendment bars such tort claims.

As to the spilt among the federal circuit courts of appeal, the Third and Seventh Circuits have held that the First Amendment bars negligent hiring/retention claims against religious institutions. *Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006) (holding First Amendment barred claims for civil conspiracy and negligent supervision and retention); *Dausch v. Rykse*, 52 F.3d 1425, 1427-29 (7th Cir. 1994) (per curiam) (holding First Amendment barred a claim brought by parishioner for negligent hiring and supervision against pastor and church for sexual contact that occurred during counseling session, although other claims were permitted to proceed).

In contrast, the Second and Fifth Circuits have allowed such tort claims thereby diminishing First Amendment protections. *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 430-32 (2d Cir. 1999) (holding First Amendment did not bar breach of fiduciary duty claim brought by former parishioner against diocese); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-38 (5th Cir. 1998) (holding First Amendment did not bar

claims for malpractice and breach of fiduciary duty against minister for having sexual relationship with plaintiffs as part of marriage counseling).

This split of authority at the federal level has caused disarray among the district courts. *See e.g.*, *Ehrens v. Lutheran Church-Mo. Synod*, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); *Ayon v. Gourley*, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999); *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991); *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F. Supp. 2d 139 (D. Conn. 2003); *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd in part, vacated in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66 (D. Conn. 1995); *Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 WL 1826231 (D. Neb. Apr. 22, 2015); *MacDonald v. Grace Church Seattle*, No. C05-0747C, 2006 WL 1009283 (W.D. Wash. Apr. 14, 2006).

A similar split exists among the state high courts. Maine, Missouri, Washington, and Wisconsin respect the First Amendment's protection of religious autonomy and disallow such tort claims against religious institutions. *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357 (Wash. 2012); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441 (Me. 1997); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 302 (Wis. 1995).

In contrast, Colorado, Florida, Ohio, Mississippi, and Tennessee allow such tort claims. *Moses v. Diocese of*

Colorado, 863 P.2d 310 (Colo. 1993); *Malicki v. Doe*, 814 So.2d 347 (Fla. 2002); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213 (Miss. 2005); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436 (Tenn. 2012).

The Florida Supreme Court has well expressed the critical need for the Court to provide guidance: "The question unanswered thus far by the United States Supreme Court is how far the religious autonomy principle … may be extended to bar the adjudication of a third-party tort claim that calls into question a religious institution's acts or omissions." *Malicki*, 814 So.2d at 357. The Court should grant certiorari to answer this question and provide the needed direction to all federal and state courts.

2. California's analytical gymnastics in ascribing clergy status to a mere congregant was predicated upon conflation of separate entities and attenuated factors that burden religion.

The facts here are far attenuated from those instances in which an individual holds a clergy position at the time he commits a criminal act. Simental's appointment as an elder by CCJW was terminated by CCJW eight months before the events giving rise to Plaintiff's claim. Despite this, California imposed a duty upon Watchtower to supervise Simental, a congregant, during his personal activities at his home simply because of a past religious appointment. In the process, California ignored the fact that Simental's appointment was made by a different legal entity (CCJW), that neither Watchtower nor CCJW had notice that Simental was a danger to children, and that the decision created a duty into perpetuity.

California disregarded the fact that Simental was not an elder at the time of the abuse and was not deterred in punishing Watchtower. California overcame Plaintiff's admission by conflating legal entities and ignoring the legal effect of Simental's post-termination status.

a. California's conflation of legal entities used by Jehovah's Witnesses violated the Establishment Clause.

California eviscerated a religion's right to establish its own ecclesiastical structure through the use of multiple legal entities. *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 724 (1976) (The "First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for … government."). In this case, Plaintiff sued four distinct legal entities. However, after Plaintiff voluntarily dismissed three, California held Watchtower legally responsible for all.

California ignored the fact that Watchtower's role as the national office ended in 2001. Watchtower was not involved with activities of local congregations at times relevant to this case. Plaintiff acknowledged that CCJW supported the congregations in place of Watchtower. Notwithstanding, California held Watchtower liable for a religious appointment CCJW made. It also ascribed liability to Watchtower after CCJW was voluntarily dismissed from the case.

If the four defendants in this case had all been part of a secular corporate structure, the court would have recognized the legal boundaries of each. At a minimum,

religious organizations are entitled to the same protections as secular organizations. But California failed to recognize the organizational structure of Jehovah's Witnesses and held Watchtower responsible for the actions of multiple entities that support the faith.

b. California's shocking expansion of negligent hiring/retention to include former clergy places a burden on religion in violation of the Free Exercise Clause.

Even had Simental not been terminated (he had been) and even had Watchtower been on notice that he was dangerous (Plaintiff offered no evidence of notice), any duty to supervise would be limited to his ecclesiastical activity. California's creation of the unprecedented duty to supervise a *former* elder during his *personal* activities unconstitutionally burdens religion.

Watchtower repeatedly highlighted the absence of any connection between its religious activities and the social function where the criminal act occurred. Watchtower also repeatedly argued that it had no relationship with either the Plaintiff or Simental and thus owed no duty to protect Plaintiff or supervise Simental. Yet California imposed liability based upon the theory of CCJW's negligent hiring/supervision because Watchtower did not comply with an Order for disclosure of nationwide intra-faith communications among elders, even though Watchtower's disclosure of those communications would not have given rise to a negligent hiring claim, or any other claim, against Watchtower.

California knew that Simental's religious appointment by CCJW ended before Plaintiff accepted the party invitation and before Simental's crime occurred. It also knew there was no connection between Watchtower's religious activities and the Saturday afternoon pool party at Simental's home. In essence, California found liability because Plaintiff and Simental met at church when Simental had formerly been an elder. By that standard, religious organizations remain liable in perpetuity for post-termination criminal acts of former clergy, whenever and wherever they commit a criminal act.

B. California's shocking expansion of negligent hiring/retention creates drastic public policy considerations that will reverberate through religious, charitable, and business communities.

To pass constitutional muster, California's expansion of negligent hiring/retention must be generally applicable to all organizations or it impermissibly targets religion in contravention of the First Amendment. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). If a religion can be required to supervise a former congregation elder during personal activities in his private home, then secular businesses, charitable organizations, and every other entity with a former agent or an employee would be required to do the same. California's expansive new duty opens the floodgate of civil litigation that will inflict an onerous financial burden on charities and commercial enterprises alike—especially for claims like this one that involve uninsurable criminal misconduct.[3]

3. Liability under these circumstances also uproots programs that provide incentives for employers to hire rehabilitated felons. Under California's standard, no employer will hire anyone with an

II. California violated the First and Fourteenth Amendments when it ordered production of nationwide communications that were wholly unrelated to Plaintiff's claims and then punished Watchtower with terminating sanctions and judgment using a constitutionally infirm theory of liability.

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) teaches that "serious First Amendment questions" follow inquiry into a church-employee relationship because the inquiry risks entanglement into matters of religion. "It is not only the conclusions that may be reached by the [court] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502. How much more so then did California's inquiry into matters of ecclesiastical governance unconnected to secular relationships violate the First Amendment.

In 1997, when Watchtower was still involved in the affairs of congregations, it undertook ecclesiastical measures to ensure that elders (clergy) met the Scriptural qualifications set forth at *1 Timothy 3:1-13*; *Titus 1:5-9*; *James 3:17*, *18*; and *1 Peter 5:2*, *3* (*e.g.* they must be irreprehensible, sound in mind, free from accusation, righteous, and self-controlled). It communicated with elders in over 10,000 congregations nationwide. The intra-faith communications Watchtower received from elders became the focus of California's inquiry.[4]

---

unsavory past regardless of whether rehabilitation efforts appear likely to succeed.

4. Plaintiff's counsel attempts to circumvent this ecclesiastical bar by referring to these intra-faith communications as

Watchtower was in full compliance with all orders regarding documents related to Simental. Notwithstanding, Plaintiff demanded nationwide intra-faith communications unconnected to this case. Watchtower resisted production, as many of the communications contained information protected by the confidentiality of confession. Further, Watchtower asserted the privacy rights of those individuals mentioned in the communications.

A. California refused to preserve confidentiality for the communications between Jehovah's Witnesses and their spiritual counselors.

In *Trammel v. United States*, 445 U.S. 40, 51 (1980), this Court described the seriousness of the need to preserve confidence in the communications between persons and their spiritual counselors. Most states recognize that need and extend evidentiary privilege to intra-faith communications. California's recognition is limited to protecting only intra-faith communications based upon the Catholic model of confession—one-on-one—involving one clergy member and one penitent. Cal. Evid. Code § 1034; *Roman Catholic Archbishop of Los Angeles v. Superior Court*, 131 Cal.App.4th 417 (2005). The Bible provides for multiple elders to be involved in confessional communications which are Scripturally considered subject to the confidentiality of confession. (*James 5:14-16*; *Proverbs 25:9*) California refuses to extend protection to such communications, since they do not fit its rigid model of confession. Thus, the state has created

---

"molestation files" as though they were part of an employee personnel file or risk management records. Nothing could be further from the truth.

an unconstitutional preference for a specific religious practice. A state can decide whether or not to accord protection to confessional communications, but a religion must be allowed to decide what communications are part of its confessional practices.

California even demanded disclosure of confessional communications of citizens of other states. In other states, those citizens who communicated with elders would have received protection, since states like Utah, Iowa, and Montana extend evidentiary privilege to other intra-faith communications. *Scott v. Hammock*, 870 P.2d 947 (Utah 1994) (holding the original communication between church member and lay minister was privileged and the subsequent communication to higher authority as required by the faith was also privileged); *Reutkemeier v. Nolte*, 161 N.W. 290 (Iowa 1917) (confession to pastor in the presence of three elders privileged); *State v. MacKinnon*, 957 P.2d 23 (Mont. 1988) (adopting broader interpretation of the clergy-penitent privilege as set forth in *Scott*, 870 P.2d 947); *Jane Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 90 P.3d 1147, 1153 (Wash. Ct. App. 2004) (presence of stake executive secretary at confession did not vitiate the confidentiality requirement of the clergy-penitent privilege).

By ordering this production, California abrogated the constitutional protections to which citizens of other states are entitled for their confessional communications, effectively eviscerating their religious and privacy rights protected by the First and Fourteenth Amendments.

B. California refused to preserve privacy rights for the communications between Jehovah's Witnesses and their spiritual counselors.

Americans have the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Even Justice Brandeis' prescience could not have envisioned the onslaught citizens face on their privacy rights today. By its ruling, California moves one step closer to a no-privacy zone, in that it no longer considers the deepest and most personal communications between ministers and communicants as sacrosanct.

Notably, one of Jehovah's Witnesses' firmly-held Bible-based beliefs is that those who are "spiritually sick" should seek confidential assistance from congregation elders: "Is there anyone sick among you? Let him call the elders of the congregation to him, and let them pray over him ... in the name of Jehovah ... if he has committed sins, he will be forgiven. Therefore, openly confess your sins ... so that you may be healed." *James 5:14-16*. Penitent individuals open their hearts to their spiritual shepherds, confident that the information about their spiritual health remains private. This essential privacy was invaded by California's discovery order. Rather than leaving them alone, California attempted to drag into this litigation individuals unrelated to Simental or the pool party.

Congressional enactment of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 well illustrates the respect that should be accorded sensitive personal information. 42 U.S.C. §§ 1320d to 1320d-8.

HIPAA protects records that contain private information about physical and mental health. Records reflecting matters of spiritual health should be accorded the same level of protection.

By ordering production of spiritual health information, California showed disdain for one of the most cherished rights, the right to be left alone.

III. California violated due process when it rewarded mendacity and refused adjudication on the merits.

California's tort system violates due process demands of congruence and proportionality. *See e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Due process should not allow a state to issue the "death penalty" to a religion that fought to protect the confidentiality of confession and the privacy rights of congregants in matters of spiritual health. Due process should also not allow the state to create an unprecedented duty to supervise a *former* cleric during his *personal* activities.

Watchtower does not question a court's power to sanction litigants. But the exercise of that power must be within constitutional limits. For example, the Fourth Circuit Court of Appeals explained that a court must "act cautiously when the sanction imposed is that of default judgment, which is 'the most severe in the spectrum of sanctions provided by statute or rule.'" *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 503 (4th Cir. 1977). The court's "range of discretion is more narrow" because the use of sanctions to enforce discovery rules and court orders becomes "an infringement upon a party's

right to trial by jury under the seventh amendment," runs counter to "sound public policy of deciding cases on their merits," and deprives a party of his "fair day in court." *Id.* at 503-04. Accordingly, to select the appropriate sanction, courts should consider not just non-compliance but also "'how the absence of such evidence (not produced) would impair (the other party's) ability to establish their case' and whether the non-complying party's 'conduct (in not producing documents) would deprive (the other party) of a fair trial.'" *Id.* at 505.

Addressing a court's power to issue discovery sanctions, this Court has explained that Federal Rule of Civil Procedure 37(b)(2) contains two standards—one general and one specific—that limit a court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. The requirement that a sanction be "just" represents the due process restrictions on a court's discretion. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). California Code of Civil Procedure § 2031.310(i) imposes the same limit on a court by providing that a discovery sanction must be just.

Here, the basis for terminating sanctions was infirm because it was based upon Watchtower's failure to produce nationwide intra-faith communications that did not involve Plaintiff or Simental. Even if the inquiry into religious governance had been appropriate, California became excessively entangled in religious matters when it repeatedly conducted judicial proceedings related to nationwide documents containing sensitive communications between clerics. The orders that followed

those unconstitutional proceedings violated the privacy rights of nonparties and unconstitutionally burdened the free exercise of religion. Finally, California consciously ignored reality and entered judgment against Watchtower.

A default judgment cannot properly be based upon a complaint that fails to state a cause of action against the party defaulted. As the Fifth Circuit explained, a "party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default" since "[d]efault judgments are a drastic remedy ... resorted to by courts only in extreme situations." *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001) (per curiam). This Court has long held that "[t]he judgment having been rendered on default, upon a declaration setting forth no cause of action, may be reversed on writ of error." *Cragin v. Lovell*, 109 U.S. 194, 199 (1883). A well-plead complaint "requires more than labels and conclusions … enough to raise a right to relief above the speculative level … on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Here, the allegation was not doubtful. California knew it was untrue. Thus, the multimillion dollar judgment was constitutionally infirm as it violated fundamental norms of due process.

IV. To effectively ensure that citizens obtain the liberties guaranteed under the Bill of Rights, the Seventh Amendment should be applicable to the states.

When confronted with Plaintiff's admission that Simental was *not* an elder when he abused her at his private home, California reframed Plaintiff's theory of

the case by creating an unprecedented theory of liability. To impose terminating sanctions rather than allow Watchtower to litigate, California abrogated Watchtower's right to trial by jury and in the process its ability to defend constitutionally protected religious rights.

It is hard to conceive of a safeguard more "'fundamental to our scheme of ordered liberty,' or 'deeply rooted in [our] history and tradition,'" than the right to a jury trial in civil cases. *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019) (citing *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)) (internal quotation marks omitted). "In magna carta [trial by jury] is more than once insisted on as the principal bulwark of our liberties, but especially … that no freeman shall be hurt in either his person or property" without a trial by jury. 3 William Blackstone Commentaries 350. This right was enshrined in the United States Constitution through the Seventh Amendment. Justice Story stated that

> [this] is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all persons to be essential to political and civil liberty.

3 J. Story, Commentaries on the Constitution of the United States, § 1762 (1833). It should be of no moment that this right was abrogated by a state, rather than the federal government.

In this decade this Court has been incorporating the remaining provisions of the Bill of Rights that have yet to "apply with full force to both the Federal Government and the States" by the Due Process Clause of the Fourteenth Amendment. *McDonald*, 561 U.S. at 749-50 (incorporating the Second Amendment "right to keep and bear arms for the purpose of self-defense"); *Timbs*, 139 S. Ct. 682 (incorporating the Eighth Amendment's Excessive Fines Clause); *see also Ramos v. Louisiana*, 139 S. Ct. 1318 (Mem), No. 18-5924 (Mar. 18, 2019) ("Petition for writ of certiorari granted" on the question—"Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?"). Should this Court rule in favor of the Petitioner in *Ramos*, only three provisions of the Bill of Rights would remain inapplicable to the states: "[T]he Third Amendment's protection against quartering of soldiers … the Fifth Amendment's grand jury indictment requirement … [and] the Seventh Amendment right to a jury trial in civil cases." *McDonald*, 561 U.S. at 765 n.13.

These incorporations of remaining constitutional protections are a result of this Court's having "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" *Id.* Rather, this Court adopted a different approach by "decisively [holding] that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* Thus, "[e]mploying this approach, the Court overruled earlier decisions in

which it had held that particular Bill of Rights guarantees or remedies did not apply to the States." *Id.* at 766.

This Court has recognized that the right to a jury trial in civil cases has yet to be applied to the states because the "governing decision[ ] regarding … the Seventh Amendment's civil jury requirement long predate[s] the era of selective incorporation." *Id.* at 765 n.13; *see also*, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). *Bombolis* held "[t]hat the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action." *Id.* at 217. The *Bombolis* court relied upon *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833) and *Livingston v. Moore*, 32 U.S. 469 (1833), cases that pre-date the ratification of the Fourteenth Amendment, to hold "that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same." *Bombolis*, 241 U.S. at 217. *Bombolis* and its progeny should be overruled. The exalted position of the right to trial by jury in civil cases in the formation of this Nation is difficult to overstate. Incorporating this right to the states would allow this Amendment to function as a bulwark against state action targeting religious minorities, by removing fact-based decision making from functionaries and providing it to the people.

Watchtower does not contend that incorporating this amendment would bar states from imposing terminating sanctions when appropriate. Rather, applying this right to the states would establish a constitutional guardrail whenever courts act as judge, jury, and executioner in extinguishing constitutional rights to trial by jury and due process.

When California was faced with the admission that a key element of Plaintiff's theory of liability was false, it had three options: dismiss the case for failure to state a cause of action, restore the case by allowing the Plaintiff to amend her Complaint and placing the case back on track for a jury trial, or enter a multimillion dollar judgment against a national religious corporation that was endeavoring to protect religious and privacy rights. By choosing the latter, California unconstitutionally deprived Petitioner of the right to have its First Amendment-based defenses adjudicated by a jury, not terminated by the State, in violation of the Seventh and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Paul D. Polidoro
Counsel of Record
Joel M. Taylor
Legal Department
Watchtower Bible and Tract
Society of New York, Inc.
100 Watchtower Drive
Patterson, NY 12563
(845) 306-1000
ppolidor@jw.org

Counsel for Petitioner

APPENDIX

APPENDIX A — DENIAL OF PETITION IN THE SUPREME COURT OF CALIFORNIA, FILED MARCH 27, 2019

IN THE SUPREME COURT OF CALIFORNIA

S253669

En Banc

J. W., A MINOR, etc.,

Plaintiff and Respondent,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Defendant and Appellant.

Court of Appeal, Fourth Appellate District, Division Two - No. E066555

Supreme Court
filed March 27, 2019

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

/s/Cantil-Sakauye
Chief Justice

APPENDIX B — DENIAL OF REHEARING OF THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH DISTRICT, DIVISION TWO, FILED DECEMBER 31, 2018

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

E066555

J. W., A MINOR, ETC.,

Plaintiff and Respondent,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Defendant and Appellant.

(Super. Ct. No. MCC1300850)
The County of Riverside

ORDER

THE COURT

Appellant's petition for rehearing is DENIED.

MILLER
/s/_____
Acting Presiding Justice

APPENDIX C — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO, FILED DECEMBER 10, 2018

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT DIVISION TWO

E066555

J. W., A MINOR, ETC.,

Plaintiff and Respondent,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,

Defendant and Appellant.

December 10, 2018, Opinion Filed

(Super. Ct. No. MCC1300850)

APPEAL from the Superior Court of Riverside County, Thomas A. Peterson (retired judge of the Los Angeles Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.); David E. Gregory, temporary judge (pursuant to Cal. Const., art. VI, § 21); and Raquel A. Marquez, Judges. Affirmed

Appendix C

Plaintiff and respondent J.W., through her guardian ad litem, sued defendant and appellant Watchtower Bible and Tract Society of New York, Inc. (Watchtower) and others for (1) negligence; (2) negligent supervision/failure to warn; (3) negligent hiring/retention; (4) negligent failure to warn, train, or educate J.W.; (5) sexual battery; and (6) intentional infliction of emotional distress. In January 2014, J.W. filed a motion to compel further discovery responses. On February 11, the trial court granted the motion in part. The trial court's order compelled Watchtower to produce all documents Watchtower received in response to a letter sent by Watchtower to Jehovah's Witness congregations on March 14, 1997, concerning known molesters in the church (1997 Documents).

By November 2014, Watchtower had not produced the 1997 Documents, and J.W. moved for terminating sanctions. At a hearing on the sanctions motion, the trial court offered Watchtower four days to produce the 1997 Documents. Watchtower declined the offer and refused to produce the 1997 Documents. The trial court granted the motion for terminating sanctions and struck Watchtower's answer. The trial court clerk entered Watchtower's default. After considering evidence, the trial court entered judgment in favor of J.W. and awarded her $4,016,152.39.

On appeal, Watchtower raises four issues. First, Watchtower contends J.W. failed to allege proximate cause in her first amended complaint (FAC). Second, Watchtower asserts its right of due process was violated. Third, Watchtower contends terminating sanctions were excessive because lesser sanctions may have been

effective. Fourth, Watchtower contends the trial court erred by denying Watchtower's motion for relief from the terminating sanctions. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. FAC

The facts in this subsection are taken from J.W.'s FAC. Watchtower "organized, administered and directed the congregational affairs of Jehovah's Witnesses in the United States." "The organizational structure of the Jehovah's Witness Church is hierarchical in nature. The organizational head of the Religion is the Watchtower. Authority flows downward from Watchtower to the local level of the Church, which is made up of congregations. [¶] Watchtower is the head of the Jehovah's Witness Hierarchical structure. Watchtower is directed by a Governing Body, which is comprised of a fluctuating number of Elders." "Watchtower establishes processes for the discipline of members accused of wrongdoing, and receives and keeps records of determinations of disfellowship, or of reproval of individuals appointed by Watchtower and Ministerial Servants or Elders."

In the hierarchical structure, the level below Watchtower is the circuit. "Circuits are generally comprised of 20 to 22 Congregations." The next level down consists of the local congregations, which are managed by a body of elders. "Elders are the highest authority at the congregational level and direct door to door preaching activities, select potential candidates for becoming

Ministerial Servants and Elders, organize weekly church meetings, determine whether an individual is suitable for representing the church in the community by becoming a Publisher, handle finances for the local church, and determine the guilt, repentance and punishment of church members who commit serious sins.

"To be appointed as an Elder, a person must be a Ministerial Servant in good standing, or have served as an Elder in another congregation. The Body of Elders of the local church identifies potential candidates and determines whether they are suitable, and if they live their life in accordance with appropriate morals. Once a candidate has been identified by the local church, a recommendation is made to Watchtower, or later, CCJW (Christian Congregation of Jehovah's Witnesses, Inc.), who have the ultimate authority as to whether a candidate is approved and becomes an Elder."

"Congregants are encouraged to bring problems to the Elders to be resolved rather than to seek intervention from outside of the Jehovah's Witness faith. In practice, when a Congregant commits an act of wrongdoing, such as the sexual abuse of a child, that matter may be brought to an Elder to be resolved." If the alleged perpetrator confesses, or if there are two witnesses to the alleged wrongdoing, then a judicial committee will be convened.

J.W. is a female. J.W. was born in 1997. J.W. was raised as a Jehovah's Witness. In July 2006, J.W. and Gilbert

Appendix C

Simental[1] belonged to the Mountain View Congregation of Jehovah's Witnesses. Prior to July 2006, at a different congregation, Simental served as a ministerial servant and as an elder. Upon joining the Mountain View congregation, Simental served as an elder. Simental's position as an elder created access to J.W.

"On July 15, 2006, [J.W.] and three other girls were invited to a slumber party at [Simental's] home. [Simental] had a daughter near the age of [J.W.] and the other invited girls. [¶] During that afternoon, [Simental] joined the girls in a pool in the backyard. While in the pool, [Simental] sexually molested [J.W.] and another girl (Doe 1) in separate incidents. Doe 1's sister, Doe 2, had previously been molested on two occasions by [Simental]."

Doe 1 and Doe 2 told their mother about Simental molesting them. The mother contacted an elder of the congregation, and a judicial committee was convened. Simental admitted he molested Doe 2 on two occasions, and that he molested Doe 1 twice on July 15. The judicial committee reproved Simental.

The principal of Doe 1 and Doe 2's school was notified of the abuse, and s/he reported it to law enforcement. Approximately two months after July 15, J.W.'s parents received a telephone call from the Murrieta Police Department asking if Simental sexually abused J.W. J.W.'s father (Father) spoke to the elders of the Mountain View

1. J.W. spelled Simental's name as Simentel. We use the spelling from Simental's criminal case: *People v. Simental* (Aug. 10, 2009, E046303) (nonpub. opn.).

congregation who advised Father that J.W. did not have to speak with the police.

J.W. and her family began attending a different congregation—the French Valley Congregation of Jehovah's Witnesses. Unbeknownst to J.W. and her family, Simental also moved to the French Valley congregation. Approximately one year after July 2006, J.W. informed her parents of the extent of Simental's sexual touching. J.W.'s parents spoke to the police and then to the elders of the French Valley congregation. The elders came to J.W.'s home and "interrogated JW, who was approximately ten years of age, about the abuse in explicit detail. JW, and her parents, were very upset by the explicit nature of the questions asked, and the depth to which the Elders probed for information."

Father told the elders that he was thinking of requesting a restraining order against Simental. The elders told Father that he did not need to speak to the police, "and that to do so would bring reproach on the congregation." In two criminal cases, Simental was found guilty of molesting Doe 1, Doe 2, and J.W.[2]

J.W.'s first cause of action was for negligence. J.W. asserted Watchtower had a duty to protect J.W., who was entrusted to Watchtower's care by J.W.'s parents. J.W. asserted Watchtower had a duty to control Simental and prevent him from sexually molesting children. J.W. alleged

2. The criminal appellate case concerning Doe 1 and Doe 2 is *People v. Simental* (Aug. 10, 2009, E046303) (nonpub. opn.).

that Watchtower was "aware, prior to the sexual abuse of [J.W.] herein, of [Simental's] dangerous and exploitive propensities. [Watchtower was] also aware that [it] had the ability to place restrictions on [Simental's] access to children, service and preaching activities, give warnings to the congregation, and otherwise control Simental's conduct."

Further, J.W. alleged Watchtower had a duty to investigate Simental and to not employ Simental as a ministerial servant or elder. J.W. asserted Watchtower knew Simental "was likely to harm others in light of the work entrusted to him." J.W. alleged, Watchtower "knew or reasonably should have known of [Simental's] dangerous and exploitive propensities and/or that [Simental] was an unfit agent. It was foreseeable that if [Watchtower] did not adequately exercise or provide the duty of care owed to children in their care, including but not limited to [J.W.], the children entrusted to [Watchtower's] care would be vulnerable to sexual abuse by [Simental]."

J.W.'s second cause of action was for negligent supervision/failure to warn. J.W. alleged Watchtower had a duty to provide reasonable supervision of Simental, to use reasonable care in investigating Simental, and to provide adequate warning to J.W. and her family of Simental's dangerous propensities. J.W. further alleged that Watchtower knew or reasonably should have known of Simental's dangerous or exploitive propensities, and despite such knowledge failed to adequately supervise Simental. J.W. asserted Simental's position as an elder allowed him to gain access to J.W.

J.W.'s third cause of action was for negligent hiring/retention. J.W. asserted Watchtower knew or should have known of Simental's dangerous or exploitive propensities, and therefore had a duty not to hire or retain Simental as a ministerial servant or elder. J.W.'s fourth cause of action was for negligent failure to warn, train, or educate J.W. J.W. asserted Watchtower had a duty to protect her from sexual abuse by Simental.

J.W.'s fifth cause of action was for sexual battery. J.W. asserted Simental was aided in molesting J.W. "by his status as an agent of … Watchtower … . Without his position as a … Ministerial Servant and/or Elder, [Simental] could not have accomplished the harmful and offensive touching of [J.W.]" J.W.'s sixth cause of action was for intentional infliction of emotional distress. J.W. alleged Watchtower's conduct was extreme and outrageous and done in an intentional or reckless manner.

In J.W.'s prayer for relief she wrote, "[J.W.] prays for damages; punitive damages against Defendant Mountain View [Congregation of Jehovah's Witnesses, Murrieta, California]; costs; interest; statutory/civil penalties, according to law; and such other relief as the court deems appropriate and just."

B. ANSWER

Watchtower filed an answer. Watchtower alleged, what it labeled as, 12 affirmative defenses. The third affirmative defense alleged a failure to state a claim, the ninth affirmative defense alleged Watchtower did not owe

a duty to J.W., and the 11th affirmative defense alleged a lack of proximate cause.

C. MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

1. MOTION

J.W. filed a motion to compel further responses to a request for the production of documents. J.W. asserted she requested Watchtower produce various documents, and Watchtower refused citing the clergy-penitent privilege. Request for production No. 66 (RFP 66) provided, "ALL DOCUMENTS received by YOU in response to the Body of Elders letter dated March 14, 1997." In her motion to compel, J.W. explained, "On March 14, 1997, Watchtower addressed a letter to All Bodies of Elders, which required all Congregations to check their files and respond in writing to the Service Department explaining all occasions when a person who was known to have molested a child was promoted to a responsible position in the Congregation, including positions as an Elder or Ministerial Servant, among others."

J.W. argued, "Any information received by Watchtower in response to this letter … is relevant to understanding the formation of organizational policy regarding childhood sexual abuse, and is also relevant toward establishing the level of institutional knowledge of [Watchtower] regarding childhood sexual abuse, which is relevant in establishing the reasonableness of organizational policy, efforts to educate members, supervision of [J.W.] and Simental, and

other considerations concerning duty and breach. Also, [J.W.] has alleged a claim for punitive damages against Defendant Mountain View, and will consider amending to allege a claim for punitive damages against the other Defendants. [S]uch information is relevant to a punitive damage[s] claim."

J.W. asserted the clergy-penitent privilege was not applicable because the responses to the March 14, 1997, letter were made with the understanding that they would be shared with others. J.W. requested sanctions be imposed in the amount of $1,680.

2. J.W.'S SEPARATE STATEMENT

Watchtower objected to RFP 66 based upon (1) the minister-communicant privilege; (2) invasion of privacy; (3) the request not leading to admissible evidence; and (4) the request being overbroad. Further, Watchtower responded that it did not have any documents predating July 15, 2006, concerning Simental, which were sent in response to the March 14, 1997, letter.

J.W. argued that any information received by Watchtower in response to the March 14, 1997, letter would be relevant to understanding Watchtower's "organizational policy regarding childhood sexual abuse," as well as understanding Watchtower's "level of institutional knowledge … regarding childhood sexual abuse." J.W. asserted evidence of Watchtower's knowledge would be relevant to proving duty and breach, as well as a possible future claim for punitive damages.

3. OPPOSITION

Watchtower opposed J.W.'s motion to compel, arguing, "Watchtower produced a 'Privilege Log,' which identified fifteen (15) items constituting all the records responsive to [J.W.'s] search. Watchtower contends that [J.W.]'s request unreasonably exceeds the proper scope of discovery and that court ordered production of any of the records would constitute an unnecessary, unconstitutional, interference with the internal governance of a church." The privilege log related to J.W.'s request for production No. 2.

Further, Watchtower asserted the slumber party, at which J.W. was molested, was not a church sponsored event. Watchtower contended Simental was a regular congregation member in July 2006; he was not an elder. Watchtower contended it did not have any records indicating Watchtower knew, prior to July 2006, that Simental posed a risk of harm to children.

In a declaration by Watchtower's Associate General Counsel, Mario F. Moreno, he asserted attorney-client privilege applied to various documents requested by J.W. Moreno specifically identified various documents and explained why the attorney-client privilege should be applied. Moreno did not specifically identify the 1997 Documents.

4. RESPONSE

J.W. responded to Watchtower's opposition. J.W. asserted Watchtower failed to address the portion of her

motion to compel related to the 1997 Documents. J.W. contended that Watchtower's failure to oppose that portion of her motion should be treated as a concession.

5. HEARING

On February 11, 2014, the trial court, in particular Judge Peterson, held a hearing on J.W.'s motion to compel. The trial court denied J.W.'s motion in relation to specific documents that were identified as protected by the attorney-client privilege. As to all other documents/requests, the trial court granted J.W.'s motion. The minute order from the hearing reads, "Motion is granted and denied in part [¶] ruling as stated on the record." (All caps. omitted.)

D. MOTION TO SET ASIDE

1. MOTION

Watchtower filed a motion to set aside the trial court's order compelling Watchtower to produce the 1997 Documents, or, in the alternative to issue a protective order. Watchtower asserted, "This particular aspect of the Court's order, however, was entered without opposing argument by Watchtower as a result of [the] mistake and excusable neglect of Watchtower's counsel Calvin Rouse and Rocky Copley." Watchtower asserted it objected to RFP 66, but did not address RFP 66 in its opposition to the motion to compel because it did not understand that the motion included RFP 66. Watchtower asserted its confusion was due to (1) four separate motions having been

filed, and (2) the motion to compel focusing primarily on issues other than RFP 66.

Watchtower requested leave to file an amended opposition. Watchtower asserted RFP 66 was overbroad; the 1997 Documents were protected by attorney-client privilege; and that it would take approximately 19 years to go through the 14,000 congregation files to produce the 1997 Documents.

2. OPPOSITION

J.W. opposed Watchtower's motion to set aside the order compelling production of the 1997 Documents. J.W. asserted Watchtower could not have been confused about RFP 66 being part of the motion to compel because a section of the motion expressly discussed the 1997 Documents, and a section of J.W.'s reply specifically discussed Watchtower's failure to address RFP 66 in its opposition. Thus, J.W. reasoned that RFP 66 was explicitly mentioned as part of the motion, and, therefore, it was not an excusable mistake that Watchtower failed to oppose the motion to compel as it related to RFP 66.

In regard to the production of the 1997 Documents being too burdensome, J.W. asserted Watchtower's person most knowledgeable testified that the records had been scanned into a computer system and that the text was searchable. J.W. asserted it was not an undue burden to search a computer system. As to the alternative request for a protective order, J.W. asserted Watchtower's request was too late and lacked merit. J.W. requested sanctions be imposed in the amount of $6,480.

3. RESPONSE

Watchtower responded to J.W.'s opposition. Watchtower conceded that RFP 66 was part of J.W.'s motion to compel, but asserted it was its attorneys' excusable neglect that caused Watchtower's failure to oppose that portion of the motion. Watchtower contended (1) it objected to RFP 66, and, thus, there was no explanation, other than oversight, for counsel's failure to oppose RFP 66 within the motion to compel; (2) counsel was working on four separate motions to compel; and (3) the motions were confusing to the trial court and J.W.'s counsel as well.

Watchtower conceded the files were electronic, but that an elder would still need "to review more than 14,000 congregations' files to determine if the hundreds of pages in each file were relevant. … That is because the sin of child abuse is often time described by elders who write to the Service Department by the Scriptural description of the specific sinful act, such as 'porneia', 'fornication', 'loose conduct', or 'uncleanness.' A search of the term 'child abuse' would not produce the documents requested." Watchtower contended the search would be further complicated by different states' definitions of child abuse because what is identified as child abuse in one state may not qualify as child abuse in California. Watchtower asserted its request for a protective order was timely. Watchtower requested the trial court deny J.W.'s request for sanctions.

4. REPLY

J.W. filed a reply. J.W. asserted expert testimony reflected it "'could take as little as two days and as long as two months'" to retrieve the 1997 Documents. The expert explained that finding the documents did not need to be complicated, although one could make it complicated. For example, one could use a search tool already provided by Microsoft, or one could program a new search tool.

5. HEARING

On May 9, 2014, the trial court, specifically Commissioner Gregory, held a hearing on Watchtower's motion to set aside the February 11 order. The trial court said Watchtower asserted clergy-penitent privilege in opposition to the motion to compel as it concerned RFP 66. The court said, "That argument was presented before the Court. Whether it was adequately argued to the satisfaction of defense counsel, it's not to be revisited at this time. It was argued, it must have been rejected. And at this point, I see no reason to further consider the—the correctness of the Court's order ordering further responses to the request for production of Document Number 66."

In regard to the production of the 1997 Documents being too burdensome, the trial court said "those are issues that well could, and more importantly, should have been raised much, much earlier than today." The trial court found the request for a protective order to be untimely. The trial court took the motion to set aside under submission.

6. RULING

On May 13, the trial court denied Watchtower's motion to set aside the order compelling production of the 1997 Documents. The trial court wrote that Watchtower "shall provide a full and complete response without objection or claim of privilege, and shall further produce, all documents responsive to [J.W.]'s request for production, number 66, within 30 days." The trial court denied J.W.'s request for sanctions.

On June 23, the trial court issued an order that was specific to RFP 66. The trial court specifically denied Watchtower's request to set aside the order compelling a further response to RFP 66. The trial court denied J.W.'s request for sanctions, finding that Watchtower acted with substantial justification in bringing the motion to set aside.

7. WRIT PETITION

Watchtower petitioned this court for a writ of mandate. (*Watchtower Bible and Tract Society of New York, Inc. v. Superior Court* (E061557) [order denying petn., Aug. 1, 2014].) Watchtower asserted the 1997 Documents fell within the clergy-penitent privilege; the trial court violated the Establishment Clause and Free Exercise Clause of the United States Constitution; the trial court's order violated the privacy rights of third parties; and the trial court's order was unduly burdensome.

On July 23, 2014, this court issued a stay of the document production. On August 1, this court dissolved

the stay and denied the writ petition. This court's order provided, "First, petitioner's request for a 'protective order' was in fact a disguised motion for reconsideration made with no attempt to comply with Code of Civil Procedure section 1008. Second, petitioner failed to establish that a blanket privilege for penitent-clergy communications applied to every document sought, many of which may well have contained completely nonprivileged information from reporting parties such as victims or parents of victims. Third, in light of the apparent concession that petitioner's repository of documents has been electronically scanned and is 'searchable,' the claims of burden and harassment (which were tardily made) are not persuasive."

8. PETITION FOR REVIEW

Watchtower petitioned the Supreme Court for review of this court's August 1 order denying the writ petition. On September 24, the Supreme Court denied Watchtower's petition.

E. MOTION FOR SANCTIONS

1. MOTION

On November 17, 2014, J.W. filed a motion for terminating sanctions. J.W. argued that she served her request for production of documents on September 25, 2013, and despite court orders, Watchtower had not produced the 1997 Documents over one year after being served. J.W. explained that after the appellate process, on September 29, 2014, she wrote to Watchtower seeking

production of the 1997 Documents, but Watchtower did not respond. On October 22 and November 5, J.W. again sought to meet and confer regarding production of the 1997 Documents, but Watchtower did not respond.

J.W. asserted the 1997 Documents were necessary to proving her negligence-based causes of action, and for an anticipated claim for punitive damages.[3] J.W. contended monetary sanctions could not repair the damage caused by Watchtower's withholding of the 1997 Documents because J.W. needed the 1997 Documents to prove her case. J.W. asserted sanctions establishing liability and punitive damages would be insufficient because the jury awarding damages would not see the harmful documents. J.W. asserted that Watchtower's misuse of the discovery process caused it to forfeit its right to defend itself in the instant case. J.W. requested the trial court strike Watchtower's answer.

2. OPPOSITION

Watchtower opposed J.W.'s motion for sanctions. Watchtower asserted terminating sanctions were an

3. "No claim for punitive or exemplary damages against a religious corporation … shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed." (Code Civ. Proc., § 425.14.) A court may grant leave to file an amended pleading requesting punitive damages only upon an affidavit reflecting the plaintiff has evidence, meeting the clear and convincing standard of proof, to establish punitive damages. (Code Civ. Proc., § 425.14.)

extreme remedy that would deny Watchtower its right of due process. Watchtower contended the 1997 Documents were not relevant to J.W.'s case, and therefore, it would be improper to impose terminating sanctions for the failure to produce the 1997 Documents. Watchtower asserted J.W.'s case would fail on the merits because Simental was only a member of the congregation—he did not hold a higher position—and therefore, Watchtower bore no responsibility for his actions. As a result, Watchtower reasoned that terminating sanctions would place J.W. in a better position than she would have been in had the 1997 Documents been produced.

3. REPLY

J.W. filed a reply to Watchtower's opposition. J.W. asserted that Watchtower's arguments reflected it disagreed with the trial court's order compelling production of the 1997 Documents. J.W. contended that Watchtower's "egregious contempt" for the trial court's authority warranted the imposition of terminating sanctions.

J.W. argued the 1997 Documents were relevant to her case because they could establish duty and breach for her negligence-based causes of action, and they were relevant to her anticipated punitive damages claim. J.W. asserted that because the 1997 Documents were relevant to a large portion of her case, terminating sanctions would not result in a windfall to J.W.

4. HEARING

On January 26, 2015, the trial court, in particular Judge Marquez, held a hearing on J.W.'s motion for sanctions. The trial court said its tentative ruling was to give Watchtower until January 30 to produce the 1997 Documents, and if the 1997 Documents were not produced, then the court would consider striking Watchtower's answer. The trial court explained that it did not want further argument about the relevance of the 1997 Documents because that issue had already been litigated. The court explained that the 1997 Documents needed to be produced by January 30.

Watchtower asserted that there was not a motion to compel pending and therefore the trial court could not order Watchtower to produce the 1997 Documents by January 30. The trial court explained that it was continuing the sanctions hearing to allow Watchtower time to comply with the February 11, 2014, order. Watchtower asserted that if the trial court was continuing the hearing, then Watchtower would appear on January 30 to argue the issue of sanctions. The trial court responded, "I see. So you don't want to—your intent is not to turn over or produce the files that were ordered on February 11; is that correct?"

Watchtower responded that it would argue the issue of sanctions, in particular, it would explain how the 1997 Documents do not relate to the merits of J.W.'s case. The trial court said, "So you want to argue the issue of the relevancy that has already been litigated … before Judge

Peters[o]n, which was then taken up to the District Court of Appeal, and then to the Supreme Court? You'd like to argue that once more in this court?" Watchtower explained that sanctions should relate to the harm that J.W. would suffer, and the withholding of the 1997 Documents would not cause harm to the merits of J.W.'s case—the 1997 Documents could only be relevant to an anticipated claim of punitive damages.

The trial court said, "Well, the Court's tentative is that it is going to grant the motion and will strike the answer if the—the information that has been ordered to be produced is not produced. [¶] The Court wanted to give you one last opportunity to comply before exercising that type of a sanction." Watchtower argued it would be inappropriate to strike its answer when the 1997 Documents only relate to punitive damages. The trial court asked, "Have you not had that opportunity to argue that before Judge Peters[o]n, before the DCA, and before the Supreme Court?" Watchtower asserted those prior arguments concerned the motion to compel, i.e., whether the 1997 Documents needed to be produced, while the current argument concerned potential harm to J.W. due to Watchtower's failure to produce the 1997 Documents.

The trial court asked, "So you're arguing instead the degree of the sanction? You're agreeing that there is an order[,] that it has not been complied with, but that the sanction is improper?" Watchtower responded, "Correct." The trial court explained, "There was no briefing on the issue of issue[s] sanctions. Watchtower is included as a defendant on all six causes of action. And the issue of the

[1997 Documents] clearly has been found to be relevant to—to the issue of negligence, which would pertain to the first, second, third, and fourth causes of action. [¶] However, on the issue of the intentional torts and having to do with sexual battery and intentional infliction of emotional distress, that's where the Court has its concerns, and that wasn't briefed by either party. And so I don't know that the issue of the [1997 Documents] has to do with [causes of action] five and six."

Watchtower responded, "I would argue that it does not pertain to the liability in [the] first phase of this trial at all." The trial court said, "That's already been litigated, and that has already been ordered to be produced." Watchtower argued the 1997 Documents would not be introduced in the liability phase of trial because "these documents have nothing to do with this victim and that perpetrator." The court said, "That argument has been made throughout the litigation." Watchtower asserted any sanctions should only relate to the punitive damages phase of the litigation.

J.W. said that if the trial court's tentative ruling was to grant terminating sanctions for the negligence causes of action, then J.W. would dismiss her intentional tort causes of action. Watchtower argued that if only the negligence causes of action remained, then the 1997 Documents had no relevance to the case, and there should be no sanctions. J.W. asserted the 1997 Documents were relevant to the negligence causes of actions. The trial court granted J.W.'s motion to dismiss her two intentional tort causes of action. The court took the issue of sanctions under submission.

5. RULING

On February 2, 2015, the trial court issued its ruling on J.W.'s motion for terminating sanctions. The trial court found Watchtower willfully violated the court's February 11, 2014, order by refusing to produce the 1997 Documents, which were relevant to J.W.'s four negligence-based causes of action. The trial court explained that the 1997 Documents were relevant to the issue of duty, in particular J.W.'s allegation that Watchtower failed to reasonably investigate Simental and failed to warn J.W. The trial court explained that Watchtower had exhausted its appellate remedies concerning the February 11 order, but still refused to produce the 1997 Documents.

The trial court wrote, "At the January 26, 2015 hearing … , the Court attempted to give Watchtower another opportunity to produce these documents before ruling on the motion. However, Watchtower rejected this additional opportunity and refused to produce the outstanding documents. Watchtower does not deny that the documents at issue are responsive to the February 11, 2014 court order or that it has been ordered to produce these documents. Based on Watchtower's refusal to produce these documents—despite looming terminating sanctions that would strike Watchtower's Answer—the imposition of lesser sanctions (like monetary sanctions) is insufficient to obtain compliance." The trial court granted J.W.'s motion for terminating sanctions and ordered Watchtower's answer be stricken.

6. Default

J.W. requested entry of Watchtower's default. The trial court clerk entered the default on March 23, 2015.

F. MOTION FOR RELIEF

1. MOTION

On July 7, 2015, Watchtower filed a motion for relief from the order granting terminating sanctions. Watchtower asserted that, in February 2015 it was unable to produce the 1997 Documents because running computer searches for relevant documents caused the computer system to crash. Watchtower contended that its inability to comply with the court's order entitled it to relief under a theory of extrinsic mistake. Watchtower explained that, in March 2015 it developed software that allowed searches to be successfully conducted without the computer crashing.

Watchtower wrote that it "has a satisfactory excuse for not presenting a defense previously; it did not know how to electronically search for and identify the responsive documents." Watchtower contended it had a meritorious defense to J.W.'s lawsuit, in that Watchtower bore no responsibility for Simental, Watchtower had no knowledge of a threat posed by Simental, and the molestation did not occur at a congregation event.

2. OPPOSITION

J.W. opposed Watchtower's motion for relief. J.W. asserted that Watchtower failed to explain what mistake it had made, so as to justify a motion for relief. (Code Civ. Proc., § 473, subd. (b).) J.W. argued that if Watchtower experienced technical difficulties in complying with the trial court's order, then it should have informed the court of those difficulties when the trial court announced its tentative ruling. Further, J.W. argued that Watchtower's motion was untimely because it was not brought in a reasonable amount of time due to the software being developed in March, and the motion being brought in July.

3. RESPONSE

Watchtower responded to J.W.'s opposition. Watchtower asserted its inability to produce the 1997 Documents was an extrinsic mistake that caused it to be unable to comply with the court's order. Watchtower asserted that it would have produced the 1997 Documents if it had been able to do so, and it was producing the 1997 Documents in another case. Watchtower explained that it did not inform the court, in January 2015 of its technical difficulties because it did not know that, in March 2015 it would successfully develop a program to search the 1997 Documents. Watchtower explained that because it did not know the technical issues would be resolved, it chose to confine its January arguments to the issue of the 1997 Documents being irrelevant.

4. HEARING

On July 29 and August 5, the trial court, again Judge Marquez, held hearings on Watchtower's motion. The trial court's tentative ruling was to deny Watchtower's motion due to Watchtower lacking standing, due to being in default. The trial court held a second hearing to permit the parties to discuss a recently published Supreme Court case.

Watchtower explained that while the software was developed in March, portions of the 1997 Documents were produced for the first time in May, in a San Diego County case. The trial court asked why the computer difficulties were not mentioned in January. Watchtower explained that it would not have been able to comply with the court's order by January 30, so it did not argue the computer issue.

J.W. argued that Watchtower was in default and therefore lacked standing to move for relief from the terminating sanctions. J.W. explained that Watchtower needed to seek relief from the default in order to have standing. Watchtower explained that it did not have grounds to seek relief from the default.

The trial court explained that Watchtower's motion was, in substance, a motion for reconsideration of the motion for terminating sanctions based upon new evidence. The trial court explained that such a motion is required to be brought within 10 days. Watchtower explained that it was seeking equitable relief based upon extrinsic

mistake. The trial court asked if Watchtower was making a strategic decision to reopen the instant case due to the 1997 Documents having been disclosed in the San Diego County case. Watchtower explained it returned to court because its software was functioning properly.

The trial court concluded Watchtower lacked standing to seek relief because it was in default. Further, the court concluded Watchtower's motion was an untimely motion for reconsideration of the sanctions motion, and that Watchtower did not argue new facts because the computer problems were known to Watchtower in January 2015. To the extent the motion was a motion for relief, the trial court found Watchtower failed to prove mistake, surprise, or excusable neglect because Watchtower knew of the computer problems in May 2014 and thus could have raised them in January 2015. The trial court concluded there was not a satisfactory explanation for Watchtower's failure to raise the computer issue in January 2015.

In regard to equitable relief, the trial court found Watchtower failed to prove extrinsic fraud or mistake related to its failure to raise the computer issue in January 2015. The trial court found Watchtower's refusal to comply with the court's "February 11, 2014 order was tactical and strategic in nature," and constituted "willful defiance of the Court['s] orders." The court explained that Watchtower's motion for relief was brought only after Watchtower produced the 1997 Documents in a San Diego County case. The trial court denied Watchtower's motion.

Appendix C

G. DAMAGES

The trial court held a default prove-up hearing on the issue of damages. The trial court considered exhibits that were submitted. The trial court awarded J.W. $3 million for pain and suffering; $1 million for future medical expenses; and $16,152.39 for costs. The trial court entered judgment in favor of J.W. in the amount of $4,016,152.39.

DISCUSSION

A. PROXIMATE CAUSE

Watchtower contends J.W. failed to allege proximate cause in her FAC.

"On an appeal from a default judgment an objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered." (*Gore v. Witt* (1957) 149 Cal.App.2d 681, 686 [308 P.2d 770].) We apply the de novo standard of review when considering whether a complaint alleges sufficient facts to state a cause of action, such facts being assumed true for this purpose. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230 [191 Cal. Rptr. 3d 536, 354 P.3d 334].)

Our Supreme Court has "recognized that proximate cause has two aspects. '"One is cause in fact. An act is a cause in fact if it is a necessary antecedent of an event."' [Citation.] This is sometimes referred to as 'but-for' causation.

Appendix C

"The second aspect of proximate cause 'focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other than simple causality." [Citation.] "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.'" [Citation.]' As Witkin puts it, '[t]he doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, the defendant will nevertheless be absolved because of the manner in which the injury occurred… . Rules of legal cause … operate to relieve the defendant whose conduct is a cause in fact of the injury, where it would be considered unjust to hold him or her legally responsible.' [Citation.]

"'Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint… . Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact.'" (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352–353 [188 Cal. Rptr. 3d 309, 349 P.3d 1013], italics & fn. omitted.)

We begin with the first factor—cause in fact. In the FAC, J.W. alleged the Jehovah's Witness Church is hierarchical in nature: authority begins with Watchtower

and flows down to the congregations. J.W. alleged that Simental was an elder in a congregation prior to joining the Mountain View congregation, and then upon joining the Mountain View congregation he was made an elder of that congregation. J.W. alleged, "Without the access to [J.W.] created by [Simental's] position with [Watchtower] as a Baptized Publisher, Ministerial Servant and Elder, [Simental] could not have sexually molested [J.W.]"

In the FAC, J.W. has alleged that it was Simental's position of authority within the church that created the opportunity for him to molest her. A reasonable inference from this allegation is that J.W. met Simental due to his position within the church, and her parents felt J.W. was safe in Simental's care because he held a position of authority in the church. Thus, Simental's position as an elder in the church was a necessary antecedent of the molestation. (See *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal.5th 216, 225 [233 Cal. Rptr. 3d 487, 418 P.3d 400] (*Liberty*) [employer's "acts must be considered the starting point of the series of events leading to Doe's molestation"].) J.W. sufficiently alleged that Watchtower was responsible for Simental being in a position of authority within the church by alleging that Watchtower is the ultimate authority in the Jehovah's Witness Church.

We now turn to legal causation. In California, an employer may be liable to a third party for negligently hiring or retaining an unfit employee. (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836 [10 Cal. Rptr. 2d 748].) Negligent hiring/retention is a theory

of direct liability—not vicarious liability. In a negligent hiring/retention cause of action, the neglect alleged is not that of the employee. The neglect pleaded is that of the employer itself. (*Fernelius v. Pierce* (1943) 22 Cal.2d 226, 233 [138 P.2d 12].)

An employer may be negligent because it has reason to know the employee, because of his qualities, ""is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the [employee] causes harm, the [employer] may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor. … [¶] … An [employee] … may be incompetent because of his reckless or vicious disposition, and if [an employer], without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. … [¶] One who employs another to act for him is not liable … merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. … [¶] Liability results … not because of the relation of the parties *but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. …*"" (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1213–1214 [69 Cal. Rptr. 2d 370].)

Appendix C

We examine whether J.W. sufficiently alleged that Watchtower had reason to know of the threat of pedophilia posed by Simental. J.W. alleged, "Watchtower … knew or reasonably should have known of [Simental's] dangerous and exploitive propensities and/or that [Simental] was an unfit agent. Despite such knowledge, [Watchtower] negligently failed to supervise [Simental] in the position of trust and authority as a Jehovah's Witness … Elder, religious instructor, counselor, surrogate parent … , where he was able to commit the wrong acts against [J.W.]"

J.W. alleged that Watchtower knew of the threat of pedophilia posed by Simental, yet Watchtower permitted Simental to hold a position of authority that placed him in the company of children. Because J.W. has alleged that Watchtower had knowledge of the threat posed by Simental, she has sufficiently pled facts from which Watchtower could be held legally responsible for the molestation. (See *Mark K. v. Roman Catholic Archbishop* (1998) 67 Cal.App.4th 603, 611–612 [79 Cal. Rptr. 2d 73] [the liability of a church may be found where the church had reason to be suspicious of a priest's propensity for pedophilia].) In sum, J.W. has sufficiently pled proximate cause.

Watchtower contends proximate cause was not sufficiently pled because J.W. did not allege that the slumber party was a church sponsored activity. Under a theory of negligent hiring, an employer is held responsible for its hiring decision. This is a theory of direct liability. (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [189 Cal. Rptr. 3d 570].) It differs from respondeat

superior, which is a theory of vicarious liability. Under a theory of respondeat superior, the employee must have been acting within the scope of his employment at the time of the wrongdoing, and then the employer is held liable for the employee's bad act.[4] (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 393–394 [97 Cal. Rptr. 2d 12].)

Thus, under a negligent hiring/retention theory, the issue is not whether the employee was acting within the scope of his employment, but whether the employer acted properly in hiring or retaining the employee. As a result, a failure to plead that the party was a church sponsored event does not mean causation could not be found by a trier of fact. In a negligent hiring/retention analysis, the focus is on Watchtower's actions in hiring/retaining Simental, i.e., the risk of molestation that Watchtower allegedly knowingly created. Accordingly, we are not persuaded that proximate cause was improperly pled due to a failure to allege that the party was a church sponsored event. (See e.g., *Liberty, supra*, 5 Cal.5th at p. 225 ["a finder of fact could conclude that the causal connection between [the employer's] alleged negligence and the injury inflicted by [the employee] was close enough to justify the imposition of liability on [the employer]. … [The employer's] acts must be considered the starting point of the series of events leading to Doe's molestation"].)

---

4. "[W]e are not aware of any California decision that has held a religious institution liable under the theory of respondeat superior for the acts of institution personnel in molesting parishioners." (*Evan F. v. Hughson United Methodist Church, supra*, 8 Cal.App.4th at p. 840, fn. 2.)

Appendix C

Watchtower asserts this court would be contradicting the Restatement of Agency by holding that J.W. adequately pled proximate cause. The Restatement provides, "A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." (Rest.3d Agency, § 7.05.) A comment in the Restatement explains, "[W]hen the actor's tort occurs in the course of an extramural activity unrelated to the actor's employment, the tort may lack a sufficient causal relationship to the actor's employment." (Rest.3d Agency, § 7.05, com. c, p. 180.)

The Restatement reflects causation *may* not be present when the harm occurs outside the work environment. It does not reflect that causation *cannot* be found when the harm occurs outside the work environment. Because causation may be found when the harm occurs outside the work environment, we are not persuaded that our conclusion—that J.W. adequately pled proximate cause—contradicts the Restatement.

Watchtower asserts that our conclusion in this case—that proximate cause was adequately pled in the FAC—will open the litigation floodgates. As set forth *ante*, proximate cause issues are typically questions of fact. (*State Dept. of State Hospitals v. Superior Court, supra*, 61 Cal.4th at pp. 352–353.) Our conclusion is limited to the facts pled in J.W.'s FAC. Whether proximate cause is adequately pled in future cases will need to be decided on a case-by-case basis. (See *Liberty, supra*, 5 Cal.5th at p.

223 ["California cases expressly recogniz[e] that negligent hiring, retention, or supervision may be a substantial factor in a sexual molestation perpetrated by an employee, depending on the facts presented"].) Accordingly, we are not persuaded that our conclusion will open the litigation floodgates.

Watchtower contends proximate cause was not sufficiently pled because Watchtower relinquished control over congregational affairs to the CCJW (Christian Congregation of Jehovah's Witnesses, Inc.). In J.W.'s FAC, she alleged, "While supervised, directed and controlled by Defendants Mountain View, French Valley, Watchtower and CCJW, Gilbert Siment[a]l committed the acts of childhood sexual abuse alleged herein." Thus, J.W.'s allegations reflect that Watchtower was responsible for supervising Simental at the time of the molestation.

Watchtower contends proximate cause was not sufficiently pled because J.W.'s allegation that Simental was appointed and confirmed as an elder was alleged on information and belief. Watchtower contends the allegation is not well pled because J.W. failed to allege facts supporting the basis for her belief that Simental served as an elder.

When analyzing the sufficiency of a complaint, we treat all properly pled facts as true. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal. Rptr. 2d 709, 45 P.3d 1171].) A "[p]laintiff may allege on information and belief any matters that are not within [her] personal knowledge, if [s]he has information leading [her] to believe

that the allegations are true." (*Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792 [228 P.2d 6].)

J.W. alleged that she has belonged to Jehovah's Witness congregations from birth until after she was molested. J.W. and Simental belonged to the Mountain View congregation "and regularly attended Jehovah's Witness meetings sponsored by that congregation. [¶] … [J.W.] and her parents attended the same meetings at the same Kingdom Hall as [Simental] twice per week." It can reasonably be inferred from J.W.'s allegations that her belief that Simental was an elder was based upon her participation in the same congregation as Simental. Accordingly, we are not persuaded that J.W. failed to properly plead proximate cause against Watchtower.

B. DUE PROCESS

Watchtower contends the trial court violated Watchtower's right of due process by striking Watchtower's answer due to a failure to comply with the February 11, 2014, order because the February 11, 2014, order was not in writing.[5]

5. In general, a defendant's default admits the truth of the allegations in the plaintiff's complaint. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823 [59 Cal. Rptr. 3d 1].) As a result, if "the defaulting party takes no steps in the trial court to set aside the default judgment, appeal from the default judgment presents for review only the questions of jurisdiction and the sufficiency of the pleadings." (*Corona v. Lundigan* (1984) 158 Cal.App.3d 764, 766–767 [204 Cal. Rptr. 846]; see *Butenschoen v. Flaker* (2017) 16 Cal.App.5th Supp. 10, 13 [224 Cal. Rptr. 3d 679].) However, an order granting terminating sanctions is not appealable,

We apply the de novo standard of review. (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107 [73 Cal. Rptr. 2d 523].) Due process requires adequate notice be provided prior to the imposition of sanctions. (*Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 976 [272 Cal.Rptr. 126].) Watchtower is asserting the lack of a written order compelling further discovery (on Feb. 11, 2014) led to confusion about the required discovery and thus, Watchtower lacked notice of what was required and therefore the terminating sanctions were improper.

The trial court's February 11, 2014, minute order reads, "Motion is granted and denied in part[.] Ruling as stated on the record." At the hearing on the motion for terminating sanctions, Watchtower did not express confusion regarding the February 11, 2014, order compelling further discovery. At the sanctions hearing, the trial court asked, "You're agreeing that there is an order[,] that it has not been complied with, but that the sanction is improper?" Watchtower responded, "Correct." It appears from Watchtower's response that it understood the February 11, 2014, minute order because Watchtower agreed there was an order and agreed it had

---

so the losing party must ordinarily await entry of a judgment of dismissal to seek review. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 264 [26 Cal. Rptr. 3d 831]; Code Civ. Proc., § 904.1, subd. (b).)

Watchtower is appealing from a default judgment. However, it did not have an opportunity to appeal from the order granting terminating sanctions and striking its answer. Because the issue raised is procedural, and this is Watchtower's first opportunity to raise the issue for appellate review, we will address the issue.

not complied with the order—Watchtower did not argue it was confused or that the February 11 minute order should be interpreted in a different manner. Moreover, in March 2014 Watchtower filed a motion to set aside the trial court's order compelling production in response to RFP 66, which indicates Watchtower understood the court ordered Watchtower to produce the 1997 Documents. Accordingly, because Watchtower understood that it was ordered to produce the 1997 Documents, we conclude its right of due process was not violated.

Watchtower contends its right of due process was violated because, on February 11, 2014, Judge Peterson did not rule on Watchtower's objections to RFP 66. Watchtower's objections were presented in J.W.'s separate statement. The separate statement provided that Watchtower objected to RFP 66 based upon (1) the minister-communicant privilege; (2) invasion of privacy; (3) the request not leading to admissible evidence; and (4) the request being overbroad. Further, Watchtower asserted that it did not have any documents predating July 15, 2006, concerning Simental, which were sent in response to the March 14, 1997, letter.

When Judge Peterson began the February 11 hearing, he said in regard to all of Watchtower's objections to all of the requests for production, "[Watchtower] object[s] on the following grounds: Number one, penitent/clergy privilege, attorney/client privilege, attorney work product, privacy, and in several instances, the time period which would cover the documents sought to be received."

The court continued, "Turning to the issue of privacy, [Watchtower] cite[s] no authority that there is a privacy right in this case. However, even if there is one, disclosure of information relating to sexual predators of children outweighs any privacy. That comes from the clergy cases. [¶] Objection to the time period. The defendants want to stop discovery at the time of the slumber party, however [J.W.'s] response overcomes this argument. [¶] … [¶] As to the penitent/clergy privilege, first of all, [J.W.] argues collateral estoppel. The Court does not accept that argument … . [¶] … [Watchtower] herein argue[s] that … just because the information is shared by a congregation of elders should not take them out of the privilege. However, the *Roman Catholic Archbishop of Los Angeles* case clearly states and holds that when the communication is shared, the privilege is waived. … The court has also reviewed the attorney/client and attorney work product issues."

The trial court grouped all of the similar objections together for the various requests for production, but the trial court did address the different objections. The trial court's comments reflect it read the objections, the responses, and the law relevant to the objections. Accordingly, we are not persuaded that the trial court failed to rule on Watchtower's objections.

Watchtower contends Judge Peterson's ruling on February 11, 2014, only pertained to Request for Production No. 2—he did not rule upon RFP 66. At the end of the February 11 hearing, J.W.'s attorney said, "There were a number of requests that were separate and apart from the identified documents that we were discussing… . For instance, [J.W.] sought the production of various iterations of the Jehovah's Witness Handbook to be produced as well as several letters." Counsel continued, "So there's been no ruling with respect to those. And the ones that are significant would be the elder handbooks." The trial court responded, "Well, excuse me, [counsel]. [¶] My ruling as to the objections and stating that all remaining items—the request for all remaining items is granted, would that not include all those documents, the books?"

Counsel said, "So the ruling said that all the materials that were not specified as being privileged are to be produced." The trial court replied, "Certainly, and I apologize if I wasn't clear." The trial court's comments reflect that it considered the objections to all of the items and that its ruling was meant to apply to all of J.W.'s requests for production—it was not limited to request for production No. 2. Accordingly, we conclude the trial court did not violate Watchtower's right of due process.

C. TERMINATING SANCTIONS

Watchtower contends the trial court erred by imposing terminating sanctions because it was too severe of a sanction.

Appendix C

"California discovery law authorizes a range of penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions. [Citations.] A court has broad discretion in selecting the appropriate penalty, and we must uphold the court's determination absent an abuse of discretion. [Citation.] We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling.

"Despite this broad discretion, the courts have long recognized that the terminating sanction is a drastic penalty and should be used sparingly. [Citation.] A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights. [Citation.] The trial court should select a sanction that is ""tailor[ed] … to the harm caused by the withheld discovery."" [Citation.] "'[S]anctions 'should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.'"" …

"The discovery statutes thus 'evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination.' [Citation.] Although in extreme cases a court has the authority to order a terminating sanction as a first measure [citation], a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be

ineffective." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 [201 Cal. Rptr. 3d 156].)

Watchtower contends the trial court should have imposed an issue sanction concerning the element of duty. In particular, Watchtower asserts the trial court should have sanctioned Watchtower by forbidding Watchtower from arguing it did not owe a duty to J.W. Watchtower did not raise this duty-focused argument in the trial court.

At the hearing on J.W.'s request for terminating sanctions, Watchtower argued that the withholding of the 1997 Documents would not cause harm to the merits of J.W.'s case in the liability phase of trial; Watchtower asserted the 1997 Documents could only be relevant to an anticipated claim of punitive damages. Watchtower asserted any sanctions should only relate to the punitive damages phase of the litigation. Meanwhile, J.W. asserted the 1997 Documents could be relevant to duty, breach, and an anticipated claim of punitive damages. J.W. requested terminating sanctions.

We cannot conclude the trial court abused its discretion by failing to enter an order that was never suggested. (See *Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, 750–751 [115 Cal. Rptr. 3d 611] [argument is forfeited due to failure to raise it in the trial court].) Neither Watchtower nor J.W. argued for an issue sanction on the element of duty. Therefore, the trial court did not abuse its discretion by not ordering a duty-focused issue sanction.

Appendix C

Watchtower contends that when J.W. dismissed her intentional tort causes of action, the trial court should have used that opportunity to consider imposing lesser sanctions. When J.W. offered to dismiss her intentional tort causes of action for the sake of obtaining terminating sanctions on her negligence-based causes of action, Watchtower argued that if only the negligence causes of action were to remain, then the 1997 Documents had no relevance to the case, and there should be no sanctions. Because Watchtower did not seek lesser sanctions when the intentional torts were dismissed, we cannot fault the trial court for failing to order such lesser sanctions. (See *Colony Ins. Co. v. Crusader Ins. Co.*, *supra*, 188 Cal. App.4th at pp. 750–751 [argument is forfeited due to failure to raise it in the trial court].)

Watchtower contends the trial court erred in its finding that lesser sanctions would be ineffective. In its written ruling, the trial court wrote, "Based on Watchtower's refusal to produce these documents—despite looming terminating sanctions that would strike Watchtower's Answer—the imposition of lesser sanctions (like monetary sanctions) is insufficient to obtain compliance." The trial court said its tentative opinion was to grant terminating sanctions, but it gave Watchtower four days to start producing the 1997 Documents. Watchtower did not produce the 1997 Documents. Given that the prospect of terminating sanctions did not motivate Watchtower to comply with the court's discovery order, it is logical to conclude that lesser sanctions would have been ineffective in motivating Watchtower to comply. Accordingly, we conclude the trial court's reasoning is sound.

Watchtower contends the trial court's reasoning is erroneous because "a responding party facing terminating sanctions would *always* forfeit consideration of a lesser sanction by the mere fact that it has not complied." This case does not present the situation that Watchtower seems to describe in which a party does not comply and terminating sanctions are immediately ordered. The key here is the court's warning that terminating sanctions would likely be granted, and the multiday opportunity for Watchtower to comply once notified of that possibility. The trial court gave Watchtower notice that it would likely grant terminating sanctions after a four-day period if Watchtower did not start producing the 1997 Documents, and Watchtower, despite that warning, did not comply with the court's nearly year-old discovery order. Thus, with that particular procedural history, it was reasonable to conclude that lesser sanctions would be ineffective in motivating Watchtower to comply with the court's discovery order. (See *Mileikowsky v. Tenet Healthsystem, supra*, 128 Cal.App.4th at pp. 279–280 ["where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction"].)

D. MOTION FOR RECONSIDERATION

Watchtower contends the trial court erred by denying Watchtower's motion to set aside the order granting terminating sanctions.

Appendix C

Code of Civil Procedure section 1008 governs motions for reconsideration of prior orders. It provides that "any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." (Code Civ. Proc., § 1008, subd. (a).) "The name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to decide the same matter previously ruled on is a motion for reconsideration under Code of Civil Procedure section 1008." (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577 [129 Cal. Rptr. 3d 380].)

The trial court granted terminating sanctions on February 2, 2015. Watchtower moved for relief on July 7. In the motion, Watchtower argued that the order granting terminating sanctions should be reconsidered because Watchtower gained the technical ability to comply with the trial court's discovery order. Watchtower's motion, in substance, was a motion for reconsideration based upon new circumstances. The new circumstances consisted of Watchtower's newly acquired ability to search the 1997 Documents. Therefore, the motion had to be brought within 10 days of February 2. Watchtower's motion was not brought within 10 days of February 2, and therefore was untimely. As a result, the trial court did not err by denying Watchtower's motion.

Watchtower contends the trial court erred by concluding Watchtower lacked standing to bring the

motion for reconsideration, due to Watchtower being in default. This court reviews the trial court's ruling, not its reasoning. (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1561 [49 Cal. Rptr. 3d 259].) As set forth *ante*, the trial court could properly deny Watchtower's motion due to it being untimely. Therefore, the trial court did not err.

Watchtower contends the trial court should have construed its motion as a motion for equitable relief from default. At the hearing on Watchtower's motion, the trial court asked, "[A]m I correct, that there has never been a motion to set aside the default?" Watchtower responded, "There has not been, your Honor. Because we didn't—we didn't have the grounds." Watchtower did not inform the trial court that it wanted its motion to be construed as a motion for relief from default. As a result, we cannot fault the trial court for not treating the motion for reconsideration of the terminating sanctions as a motion for relief from the default. (See *Colony Ins. Co. v. Crusader Ins. Co.*, *supra*, 188 Cal.App.4th at pp. 750–751 [argument is forfeited due to failure to raise it in the trial court].)

Watchtower contends its motion was based in equity and should have been granted due to Watchtower's excusable neglect. "'Excusable neglect' is generally defined as an error ""a reasonably prudent person under the same or similar circumstances might have made."""" (*Ambrose v. Michelin North America, Inc.* (2005) 134 Cal. App.4th 1350, 1354 [37 Cal. Rptr. 3d 1], italics omitted.)

In Watchtower's motion, it explains that terminating sanctions were granted on February 2, 2015, and, at the end of March 2015 Watchtower developed the ability to search the 1997 Documents. Watchtower continued, "Accordingly, being now able to produce the documents ordered by this Court, Watchtower is offering to do so on a rolling basis as it is doing in [a San Diego County case]." Watchtower has not explained a mistake or error that occurred prior to February 2. Rather, Watchtower has set forth a change in circumstance. The new circumstance is that Watchtower gained the ability to search the 1997 Documents. A change in circumstance does not equate with a mistake or error. Accordingly, to the extent Watchtower's motion could be construed as seeking equitable relief, the trial court did not abuse its discretion in denying the motion because excusable neglect was not shown. In sum, the trial court did not err.

E. REQUESTS FOR JUDICIAL NOTICE

J.W. requests we take judicial notice of various documents. Watchtower opposes the request. First, J.W. requests we take judicial notice of an appellant's opening brief received by the California Court of Appeal, Fourth District, Division One in *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246 [225 Cal.Rptr.3d 81]. The brief is marked as received by the appellate court; it is not marked as filed. J.W.'s counsel declares the brief is a true and correct copy of the brief filed by the court. The brief filed by the court would bear a file stamp, unlike the brief provided in this request that is marked as received by the court. Accordingly, it does

not appear to be a conformed copy. (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 914–915 [110 Cal. Rptr. 3d 850] [requesting party bears the burden of providing a conformed copy or explaining why a conformed copy is unavailable].) Because the brief is not marked as filed by the court, we deny J.W.'s request that we take judicial notice of the brief. (*Ibid.*; Evid. Code, § 452, subd. (d).)

Second, J.W. requests we take judicial notice of a discovery referee's recommendation in *Padron v. Doe 1* (Super. Ct. San Diego, 2018, No. 37-2013-00067529-CU-PO-CTL). The document does not bear a stamp reflecting it was filed by the court. J.W.'s counsel declares the brief is a true and correct copy of the brief filed by the court. The document filed by the court would bear a file stamp, which this document does not. Therefore, it does not appear to be a conformed copy. (*Wolf v. CDS Devco, supra*, 185 Cal.App.4th at pp. 914–915 [requesting party bears the burden of providing a conformed copy or explaining why a conformed copy is unavailable].) Accordingly, we deny J.W.'s request that we take judicial notice of the referee's recommendations. (*Ibid.*; Evid. Code, § 452, subd. (d).)

Third, J.W. requests we take judicial notice of two minute orders from *Padron v. Doe 1*, *supra*, No. 37-2013-00067529-CU-PO-CTL, and two minute orders from *Lopez v. Doe 1 Linda Vista Church* (Super. Ct. San Diego, 2018, No. 37-2012-00099849-CU-PO-CTL). We grant the request. (Evid. Code, §§ 452, subd. (d), 453.)

Watchtower contends the minute orders are irrelevant and therefore the request should be denied. We have not

relied on the minute orders in our opinion, and we do not find the minute orders to be helpful in this case because, as Watchtower notes, the minute orders were not before the trial court in the instant case. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493 [138 Cal. Rptr. 828] [denying judicial notice of documents not presented to the trial court].) However, J.W. relies upon the minute orders in making her argument to this court. For example, J.W. argues, "Watchtower is a repeat offender who has consistently flouted court orders to produce documents regarding its knowledge of child molestation … in multiple pending cases besides this case." Because the minute orders are relevant to J.W.'s argument, we conclude they have some relevance.

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

MILLER
J.

We concur:

MCKINSTER
Acting P.J.

FIELDS
J.

APPENDIX D — TRIAL COURT JUDGMENT IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE, FILED JULY 15, 2016

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF RIVERSIDE

MCC1300850

JW, INDIVIDUALLY, BY AND
THROUGH HER GUARDIAN,

Plaintiff,

v.

MOUNTAIN VIEW
CONGREGATION, *et al.*,

Defendant.

December 21, 2015, Dated
July 15, 2016, Filed

JUDGMENT

1. ☒ **BY DEFAULT**

a. Defendant was properly served with a copy of the summons and complaint.

b. Defendant failed to answer the complaint or appear and defend the action within the time allowed by law.

c. Defendant's default was entered by the clerk upon plaintiff's application.

d. ☐ **Clerk's Judgment** (Code Civ. Proc., § 585(a)). Defendant was sued only on a contract or judgment of a court of this state for the recovery of money.

e. ☒ **Court Judgment** (Code Civ. Proc., § 585(b)). The court considered
(1) ☐ plaintiff's testimony and other evidence.
(2) ☒ plaintiff's written declaration (Code Civ. Proc., § 585(d)).

***

5. **Parties.** Judgment is

a. ☒ for plaintiff *(name each)*:
JW, Individually, by and through her Guardian *Ad Litem,* T.W.
and against defendant *(names)*:
Watchtower Bible and Tract Society of New York, Inc.

***

6. **Amount.**

a. ☒ Defendant named in item 5a above must pay plaintiff on the complaint:

Appendix D

(1) ☒ Damages	$4,000,000.00
(2) ☐ Prejudgment interest at the annual rate of %	$
(3) ☐ Attorney fees	$
(4) ☒ Costs	$16,152.39
(5) ☐ Other (specify):	$
(6) **TOTAL**	$4,016,152.39

***

Date: July 15, 2016

/s/_____
JUDICIAL OFFICER
RAQUEL A. MARQUEZ

APPENDIX E — JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE, DATED FEBRUARY 2, 2015

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF RIVERSIDE SUPERIOR COURT
OF CALIFORNIA

Minute Order/Judgment

CASE NO. 1300850 DATE: 02/02/15 DEPT: S303

CASE NAME: JW VS MOUNTAIN VIEW CONGREGATION OF JEHOVAH'S

CASE CATEGORY: Negligence

HEARING: Hearing Re: Ruling on matter submitted 01/26/2015.

Honorable Judge Raquel A Marquez, Presiding

Clerk: A. Behrmann

Court Reporter: None

No appearance by either party.

Court subsequently rules on matter taken under submission on 01/26/15.

Motion for terminating sanctions against Watchtower is granted.

Answer to 1st Amended Complaint of W by WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK INC ordered stricken

Appendix E

After taking under submission Plaintiff JW's Motion for Sanctions as to Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), the court grants JW's request for terminating sanctions as to Watchtower. Watchtower has willfully violated the Court's February 11, 2014 order, by refusing to produce documents that are relevant to Plaintiff's first four causes of action for negligence (the only causes of action asserted against Watchtower). (C.C.P. 2031.310(i); Biles v. Exxon Mobil Corp (2004) 124 Cal.App.4th 1315, 1327.) While disputed by Watchtower, the reports at issue (which relate to known molesters within the organization) pertain to the issue of duty regarding Plaintiff's claim that Watchtower failed to reasonably investigate Plaintiff.' perpetrator and failed to warn, train and educate (FAC 55, 59, 63 and 66) (Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal.App.4th 377, 397-404.)

Watchtower has exercised its right to file a Petition for Writ of Mandate regarding the February 11, 2014 order, which was denied by the District Court of Appeals on August 1, 2014. It has also filed a Petition for Review with the California Supreme Court, which was denied on September 24, 2014. Watchtower has exhausted its remedies regarding the February 11, 2014 order, but still refuses to produce.

At the January 26, 2015 hearing for Plaintiff's Motion for Sanctions, the Court attempted to give Watchtower another opportunity to produce these documents before ruling on the motion. However, Watchtower rejected this additional opportunity and refused to produce the

outstanding documents. Watchtower does not deny that the documents at issue are responsive to the February 11, 2014 court order or that it has been ordered to produce these documents. Based on Watchtower's refusal to produce these documents - despite looming terminating sanctions that would strike Watchtower's Answer - the imposition of lesser sanctions (like monetary sanctions) is insufficient to obtain compliance.

Notice of ruling to be prepared, served and submitted by prevailing party.

Notice to be given by Clerk

Print Minute Order

APPENDIX F — LETTER FROM THE CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES

CHRISTIAN CONGREGATION
OF JEHOVAH'S WITNESSES

2821 Route 22, Patterson, NY 12563-2237
Phone: (845) 306-1100

SDR:SSF December 30, 2003
(Effective: February 1, 2004)

MOUNTAIN VIEW CONGREGATION OF
JEHOVAH'S WITNESSES, MURRIETA, CA 904201
C/O JOHN VAUGHN
26886 VALENSOLE CT
MURRIETA CA 92562-4527

Dear Brothers:

This is to advise that the recommendation for appointment(s) of the following brother(s) has been approved under the direction of the Governing Body and holy spirit. This is being conveyed as shown by the official stamp and date of approval.

ELDER(S)	**MINISTERIAL SERVANT(S)**
George Bennett	Ryan Bennett
Rick Bodnar	Tom Hargrove
Phil Castro	Larry Larsen
Michael Cowan	Richard Vanderham

Appendix F

Gilbert Simental
Andrew Sinay
Thomas Taylor
John Vaughn
Daniel Winder

Serving with you under the appointed Head of the congregation, Jesus Christ,

Christian Congregation of Jehovah's Witnesses

P.S. To body of elders: Please have two elders speak to any brother recommended for appointment whose name appears above. Ask if there is any reason why his name should not be announced. If so, ***do not announce it***, but return this form and explain why he cannot serve. Each one appointed should be sure that he is well acquainted with what the Bible says about his responsibilites in the congregation. In all that he does, he should look to God's Word for guidance and should cooperate closely with the faithful and discreet slave class, through whom the Lord is providing direction for his congregation.

Whenever an elder or a ministerial servant is deleted, please make the following announcement, whatever the reason for the deletion: "_____ is no longer serving as an elder (ministerial servant)." If an elder is deleted for reasons other than moving to another congregation with a favorable recommendation, he should

turn over his Kingdom Ministry School textbook to the Congregation Service Committee.

DELETION(S)