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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ and HOLLY McGOWAN, Plaintiffs, v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Defendants.	Hon. James A. Manley Cause No. DV 16-84 OPPOSITION TO MOTION TO COMPEL DOCUMENTS AND TESTIMONY

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Third-Party Plaintiffs, v. MAXIMO NAVA REYES, Third-Party Defendant.	

Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY"), Christian Congregation of Jehovah's Witnesses ("CCJW") and the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation") (collectively "Religious Defendants") respectfully file their brief in opposition to Plaintiffs' Motion to Compel Documents and Testimony from Defendants and Memorandum in Support Thereof ("Plaintiffs' Motion").

I. INTRODUCTION

In their brief in support of their Motion to Compel, Plaintiffs dismiss the religious beliefs held by members of the Jehovah's Witnesses as somehow being less deserving of constitutional recognition and protection. They argue that because Church Elders communicate confidential statements vertically to upstream religious authorities, those statements must be stripped of the constitutional presumption of confidentiality and are instead public statements. However, Plaintiffs conspicuously refrain from analyzing the controlling Montana law which discusses the sanctity of statements made to clergy,

which protects religious statements regardless of perceptions of a religion's practices or doctrine. The Montana Constitution provides broad protection to clergy-penitent communications, and the statements Plaintiffs seek to compel fall squarely within that ambit. Accordingly, this Court should deny the motion to compel because Defendants have produced all non-privileged documents that relate to Max Nava Reyes and have appropriately redacted documents which contain both non-privileged and privileged statements.

II. DISCUSSION

A. Montana Law Protects Communications Which Occur Within a Religious Context and Which Are Intended to Be Confidential under the Tenets of the Particular Religion Involved.

Plaintiffs' motion to compel ignores the standard adopted by the Montana Supreme Court for evaluating the clergy-penitent (sometimes called the minister-communicant) privilege. Plaintiffs properly cite *State v. MacKinnon,* 1998 MT 78, 288 Mont. 329, 957 P.2d 23[1] and correctly state that communications fall under privilege when a parishioner seeks or receives religious guidance. Pls.' Mot. Compel Documents & Testimony Defs. & Memo. Support Thereof 8-9, Feb. 20, 2018 ("Pls.' Motion"). But Plaintiffs fail to discuss the analysis of *MacKinnon* and completely ignore cases from Utah, which identify the model our Supreme Court adopted after first acknowledging that

[1] MacKinnon was a criminal defendant charged with repeatedly abusing his step-daughter. Following a divorce, MacKinnon encountered his ex-wife and daughter in a parking lot after a church meeting. After apologizing for his conduct, he agreed to continue the conversation inside a restaurant in the presence of church members. A second conversation occurred in a private residence with the same church members present. The court suppressed statements made in private at home, but admitted evidence of statements made in the restaurant.

other states interpret similar statutes differently.

The defendant in *MacKinnon* was charged with felony sexual assault for repeatedly having sexual contact with his 9-year-old step-daughter over a period of four years. *MacKinnon*, ¶ 5. Both MacKinnon and his then ex-wife belonged to the Missoula Christian Church, which allowed members to confess sins to each other, but believed that forgiveness came only from God, based on teachings from the Bible. *MacKinnon*, ¶ 6.

After a church service one evening, MacKinnon apologized for his conduct in the parking lot of the restaurant where the service had been conducted. *MacKinnon*, ¶ 7. The conversation then continued, in the presence of church leaders, within the restaurant itself. Approximately a month later, MacKinnon went to the home of one of the church leaders, and continued the conversation about his conduct. *MacKinnon*, ¶ 7. At trial, the State sought to introduce the statements made by MacKinnon in the parking lot and then subsequently in the home of the church leaders. MacKinnon objected, arguing that the statements were inadmissible because they were statements made to clergy and in the course of discipline within the church, and thus protected under Montana Code Annotated § 26-1-804. *MacKinnon*, ¶¶ 17-18. The District Court admitted the statements made in the restaurant and parking lot, but agreed that the conversation held later, in the home of the church leaders, was inadmissible. *MacKinnon*, ¶ 18.

On appeal, the Montana Supreme Court noted that it had never before interpreted § 26-1-804, and further noted that states had interpreted similar statutes in different ways. *MacKinnon*, ¶¶ 22-23. Washington narrowly interpreted its statute, finding that non-ordained church counselors were not "clergy" under the terms of the statute, and that

confession or course of discipline must be "a sacrament of confession authorized by a particular church discipline" to be worthy of protection. *MacKinnon*, ¶ 22 (citing *State v. Buss*, 887 P.2d 920, 923-924 (Wash. App. Div. 1 1995)).

However, Utah had interpreted its statute much more broadly, finding that "the privilege applied to non-penitential communications between lay persons and clergy if the communications were 'made in confidence and for the purpose of seeking or receiving religious guidance, admonishment, or advice and that the cleric was acting in his or her religious role pursuant to the practice of the church.'" *MacKinnon*, ¶ 23 (citing *Scott v. Hammock* ("*Scott II*"), 870 P.2d 947, 956 (Utah 1994)). The *Scott II* case involved child sexual abuse by an adoptive parent (Hammock) who was later charged with crimes and subsequently excommunicated from the Mormon Church. *Scott II*, 870 P.2d at 949. While criminal charges were pending, Hammock had three conversations with his bishop and he was excommunicated from the church. In an earlier civil suit filed in federal court, the church relied on the minister-communicant privilege and moved to quash a subpoena served by the victim (Scott) to obtain documents relating to the excommunication proceedings. A federal judge quashed the subpoena and suppressed evidence of Hammock's statements to his bishop. *See Scott v. Hammock* ("*Scott I*"), 133 F.R.D. 610, 619 (D. Utah 1990). Scott objected to the rulings and the federal court certified a question to the Utah Supreme Court seeking interpretation of Utah law. *Scott II*, 870 P.2d 949.

The Utah Supreme Court accepted the certified question and acknowledged that the "LDS Church states that according to its doctrine and practice, confession is part of a

repentance process that may be initiated either by a member or by a bishop or stake president. . . . full confession often occurs over a substantial period of time during counseling and guidance sessions; sometimes it does not take place until after the member has been excommunicated." *Scott II*, 870 P.2d at 956 (internal quotations and citation omitted). The state court agreed with the federal bench that discussions Hammock had with his bishop were privileged and inadmissible.[2] "Whether Hammock acknowledged wrongdoing or sought forgiveness is not determinative because the bishop communicated with Hammock in the bishop's clerical role with regard to spiritual or religious matters." *Scott II*, 870 P.2d at 956.

The *Scott II* court noted that "the term 'confession' need not be construed to apply only to penitential communications and that a broad construction of that term is necessary to take into account the essential role clergy play in dealing with the wrongdoing of parishioners." *Scott II*, 870 P.2d at 953-954. The court was further concerned that all religions be afforded constitutional safeguards, regardless of the individual beliefs:

> Reading the privilege statute narrowly would create the risk that the law would be discriminatorily applied against the religious practices of churches on the basis of theological differences as to how reconciliation with God is to be achieved. It would not be appropriate for a court to be asked to accord greater verity or importance to one's denomination's sacraments, practices, or disciplines over those of another.

Scott II, 870 P.2d at 954.

The Montana Supreme Court agreed with the *Scott II* approach, noting that under both the federal and Montana constitutions, "all persons are guaranteed the free exercise

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[2] The court did not reach the question of the church's discipline file because the issue was neither briefed nor argued. *Scott II*, 870 P.2d at 956.

of their religious beliefs and all religions are guaranteed governmental neutrality." *MacKinnon*, ¶ 24. The Court noted that it wanted to "minimize the risk that § 26-1-804, MCA, might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine" and thus adopted the broader interpretation of the clergy-penitent privilege as held by the Utah court in *Scott II*. *MacKinnon*, ¶ 24. Under that standard, the court held that the district court properly admitted the restaurant conversations, because there was no evidence to suggest that the conversation was held for the purpose of spiritual counseling, admonishment or advice. *MacKinnon*, ¶ 25.

Rather than relying on the law as set out in *MacKinnon*, Plaintiffs only cite cases from other jurisdictions without explaining that those cases and the laws governing those cases are distinguishable.[3] An actual application of controlling Montana law establishes

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[3] *In re Roman Catholic Archbishop of Portland*, 335 B.R. 815, 829 (Bankr. D. Or. 2005) the court held that the minister-communicant privilege "should be applied only to communications that are made to a clergy person acting in the capacity of a spiritual advisor." Thus, communications to persons "acting as employers or administrators or in other, non-spiritual capacities, are not privileged." *Id.* at 830. All communications herein were spiritual in nature.

Charissa W., et al., v. Watchtower Bible and Tract Society of New York, et al., No. 26-22191, Cal. Super. Ct., Sept. 29, 2005, applied a California rule of evidence that is not at issue in this case. (Order attached as Exhibit O to Plaintiffs' Motion.)

State v. Laurel Delaware Congregation of Jehovah's Witnesses, No. N14C-05-122 MMJ, 2016 Del. Super. LEXIS 49 (Super. Ct. Jan. 26, 2016), is an unreported civil enforcement action involving interpretation of the state reporting statute. The court found the statute would be unconstitutional on its face if it is narrowly interpreted, but that it passes constitutional muster when read in conjunction with a broad interpretation of the evidentiary privilege for penitential communications. Note, however, that the Delaware court applied that statute contrary to Utah's model.

McFarland v. West Congregation of Jehovah's Witnesses, Lorain, OH, Inc., 2016-Ohio-5462, ¶ 27, 60 N.E.3d 39, 50 (Ct. App.), reversed a trial court's order compelling the production of communications between a congregation elder and an elder in New

that the conversations with Max Reyes and the elders of the Thompson Falls Congregation are confidential under the tenets of the faith, beliefs and practices of Jehovah's Witnesses and entitled to protection.

Congregation elders had conversations with Reyes in the context of meetings held in accordance with the religious practices of Jehovah's Witnesses. Those conversations are confidential under the religious beliefs and practices of Jehovah's Witnesses and should not be disclosed to these Plaintiffs. It makes no difference whether Reyes approached the elders for counsel, or if the elders initiated the process. Within the faith of Jehovah's Witnesses, an ecclesiastical judicial process involves efforts to assist a sinner to restore his good relationship with God. A sinner's eternal life prospects are hinged under confession of serious sin and forgiveness based on the shed blood of Jesus Christ. It is a process based purely on spiritual counseling and relates exclusively to religious matters. *See* Found. Aff. Tessa A. Keller ¶ 3, Mar. 8, 2018, Ex. A: Dep. Donald John Herberger 90-95, Sept. 13, 2017. Under the religious beliefs and practices of the Thompson Fall Congregation of Jehovah's Witnesses, communications with congregation members in an ecclesiastical judicial setting are considered confidential.

Plaintiffs conflate the question of whether the privileged nature of communications with other members of the congregation (e.g., Holly McGowan or her

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York assisting Watchtower. Because the Court reversed that part of the trial court order, it did not evaluate those documents under the First Amendment. Because the issue was not preserved in the lower court for analysis on appeal, the court declined to evaluate other non-privileged documents under the First Amendment or the State Constitution. *McFarland*, 60 N.E.3d at 57.

brother Peter McGowan) are coextensive with the privileged nature of communications with Max Reyes. Pls.' Motion 9. Yet they acknowledge that once Plaintiff McGowan consented to the release of her communications, the Defendant Congregation released her letter. Plaintiff McGowan's consent, however, does not address the issue of communications between Reyes and Congregation elders. Those remain privileged under the term "confession" as adopted by the Montana Supreme Court in *MacKinnon*.

Under Montana law, disclosure of information that came from communications in the context of an ecclesiastical investigation and subsequent ecclesiastical processes that relate to the congregation's decision on person's membership in the congregation is confidential and protected. Plaintiffs' disagreement with the faith, beliefs and practices of Jehovah's Witnesses does not strip the constitutional protections, and thus, the Plaintiffs' motion should be denied.

B. The United States and Montana Constitutions Preclude a Finding That Conversations Between Congregation Elders and Service Department Elders Waive the Minister-Communicant Privilege.

The *MacKinnon* court took into consideration the right to the free exercise of religion under the federal First Amendment and under article II, section 5 of the Montana Constitution, and for that very reason adopted Utah's model for addressing communications between a church and its parishioners. *MacKinnon*, ¶ 24. Without examining that model, Plaintiffs next argue incorrectly that communications between elders in the Thompson Falls Congregation elders and elders assisting Watchtower Bible and Tract Society of New York, Inc. and/or Christian Congregation of Jehovah's Witnesses are not privileged. Pls.' Motion 12.

The Utah model protects *intra-faith* communications. *Scott I*, 133 F.R.D. at 619 ("intra-faith communications from one ecclesiastical officer to another for the purpose of carrying out church discipline are also protected."). The Utah Supreme Court clarified this rule of law by stating that certain communications such as those made "in a social context" are not privileged because they are not made in the course of the cleric's professional responsibilities or in a religious context. *Scott II*, 870 P.2d at 955. There is no comparable issue here because all communications between congregation elders in Montana and elders in New York were contained within a religious context. And all relevant intra-faith communications were from one ecclesiastical officer to another for the purpose of carrying out church discipline.[4] As such, they are privileged.

Notably, in its analysis, the Utah Supreme Court stated that "Constitutional considerations buttress our conclusion," i.e., that "penitential communications" are not limited to "confessions." The court explained that a narrow construction of the privilege, which is the same narrow construction these Plaintiffs promote, "would raise serious doubts under Article 1, section 4 of the Utah Declaration of Rights, which provides for freedom of conscience and religion" because it "would exclude from protection a significant amount of religious confidences that many religions in Utah would deem an important part of the discipline of their faith." *Scott II*, 870 P.2d at 954 (quoting *Scott I*, 133 F.R.D. at 618).

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[4] Plaintiffs also take issue with separate communications that elders have with Watchtower's Legal Department. Pls.' Motion 7. Those communications are not covered by the minister-communicant privilege. They are covered by the attorney-client privilege. Mont. Code Ann. § 26-1-803.

The same is true here where the Declaration of Rights outlined in article II of the Montana Constitution is a set of *fundamental* rights. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). Governmental action infringing on a fundamental right must be reviewed under a strict scrutiny analysis. *Id.* Thus, Montana affords citizens broader protection against governmental intrusion than does the Federal Constitution. Section 5 of that Bill of Rights protects the free exercise of religion. For the Thompson Falls Congregation of Jehovah's Witnesses, maintaining confidentiality of intra-faith records is an essential requirement for open communication necessary to aid sinners to repentance.

As confirmed by the *MacKinnon* court in its reason for adopting the Utah model for analyzing privileged communications, there are important considerations of a Constitutional dimension that require the court to avoid religious discrimination "because of differing judicial perceptions of a given church's practices or religious doctrine." *MacKinnon*, ¶ 24. The federal court in Utah stated that "it is apparent the constitutional claims of defendant and the LDS church are substantial." *Scott I*, 133 F.R.D. at 619. Thus, that court explained that "[t]he privilege should respect the privacy of communications in the intra-faith communication unless there is a compelling state interest to the contrary." The Utah court fully understood that the communications at issue were "passed vertically from one religious authority up to another within the church hierarchy . . . as a part of the church sanction process and in carrying out church discipline." *Scott I*, 133 F.R.D. at 619. That intra-faith communication did not waive privilege. "[T]he repeating of the defendant's statements and its communication to

superior religious authorities must be deemed cloaked with confidentiality and privilege from forced disclosure." *Scott I*, 133 F.R.D. at 619 (citing *inter alia, In re Verplank*, 329 F. Supp. 433 (D.C.C.D. Cal. 1971)).

The same constitutional issues exist in this case where information disclosed in the context of disciplinary proceedings was communicated within organizational hierarchy. Defendants' constitutional arguments are valid. Borrowing the description from both state and federal courts in *Scott*, those constitutional issues are "serious" and "substantial." *Scott II*, 870 P.2d at 954; *Scott I*, 133 F.R.D. at 619. This Court should deny Plaintiffs' motion in order to protect privileged communications.

C. Respecting the Defendants' Religious Objections Harmonizes with Montana's Heightened View of Privacy Rights.

Without any legal analysis, Plaintiffs defer discussion of privacy rights to "a separate procedure." Pls.' Motion 15. It should be noted nonetheless that applicable religious policies and procedures requiring confidentiality harmonize with Montana's heightened view of privacy rights. *State of Mont. v. Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992) ("Montana adheres to one of the most stringent protection of its citizens' right to privacy in the country."); *accord Gryczan*, 942 P.2d at 121 (citing *State v. Siegal*, 281 Mont. 250, 262, 934 P.2d 176, 183 (1997); *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997); and *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61, 75 (1995)) (each confirming that the Supreme Court of Montana has long held that the state constitution affords Montana citizens broader protection of their right to privacy than does the federal constitution).

Burns is particularly instructive. There, an employee of the Catholic Church was charged with deviate sexual conduct. *Burns*, 830 P.2d at 1319. The defendant pleaded not guilty and provided the prosecutor with a list of fifteen character witnesses. *Burns*, 830 P.2d at 1319. The prosecutor issued an investigation subpoena to obtain personnel records from the Catholic Diocese in Helena in search for reports of similar instances of misconduct, disciplinary action, transfer records, and witnesses who could rebut testimony from the character witnesses. *Burns*, 830 P.2d at 1319. The court heard arguments and ruled that the information was not discoverable "on the grounds that the Diocese has compelling rights of privacy to its personnel files and all of the documents contained therein." *Burns*, 830 P.2d at 1321. The Supreme Court of Montana affirmed the ruling, explaining that "[p]rohibiting discovery of materials that are not probative is one of the functions of trial judges which is within their discretionary powers." *Burns*, 830 P.2d at 1322. The trial judge properly exercised his discretion and denied access to the defendant's personnel records.

The documents at issue here are not "personnel" records. They are best described as intra-faith communications protected by the minister-communicant privilege. However, to the extent the records are categorized differently, the Defendants still possess an undeniable right to privacy in all of the documents contained in its files. This Court should not invade that privacy interest by compelled disclosure.

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III. CONCLUSION

For the foregoing reasons, the Religious Defendants respectfully request the Court deny Plaintiffs' Motion to Compel in its entirety.

DATED this 6th day of March, 2018.

Attorneys for Religious Defendants/Third-Party Plaintiffs:

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By _____
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2018, a copy of the foregoing document was served on the following persons by the following means:

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