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FILED April 23rd 2018
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SANDERS COUNTY CLERK OF DISTRICT COURT
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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

MOTION FOR PROTECTIVE ORDER BY DEFENDANTS WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. AND CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES REGARDING REQUESTS FOR PRODUCTION AND BRIEF IN SUPPORT

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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, MARCO NUNEZ, IVY McGOWAN-CASTLEBERRY, Third-Party Defendants.	

Defendants, Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), and Christian Congregation of Jehovah's Witnesses ("CCJW") (collectively referred to as the "Religious Defendants") submit this brief in support of their Motion for Protective Order brought pursuant to Montana Rule of Civil Procedure 26(c). Religious Defendants respectfully request this Court enter an order that either excuses or limits substantially the Religious Defendants' obligation to respond to six Requests for Production that are overbroad, seek irrelevant information, and are designed to burden, harass and/or embarrass the Religious Defendants.

Pursuant to Montana Rule of Civil Procedure 26(c)(1), Joel M. Taylor, counsel for Religious Defendants has filed a declaration certifying that he conferred in good faith with counsel for the Plaintiffs but was unable to resolve the dispute over the discovery requests.

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I. INTRODUCTION

This case is about incest.[1] The Plaintiffs accuse their step-father/step-grandfather of childhood sexual abuse and seek to hold Religious Defendants, which are religious corporations, responsible because the perpetrator was a simply a member (like a mere parishioner) of a religious congregation. The perpetrator never held a position of authority in any congregation of Jehovah's Witnesses. Unfortunately, the Plaintiffs' mothers disregarded information about known dangers in their family—information the Defendants did not possess—and failed to protect their daughters from Max Reyes.[2]

Judicial intervention is necessary because Plaintiffs' second set of discovery requests exceed the proper scope of discovery.[3] In derogation of the limits imposed by Rule 26, Request for Production Nos. 5, 6, 7, 8, 9 and 12 cover patently irrelevant matters

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[1] Montana Code Annotated § 45-5-507(1) includes step children and "descendant" in the definition of incest.

[2] Ivy McGowan-Castleberry (mother of Alexis Nunez) testified in deposition that she believed a co-worker who in 1998 told Ivy that she had seen Max Reyes place his hands inside Holly McGowan's shirt and fondle her breasts. Found. Aff. Kathleen L. DeSoto ¶ 3, Apr. 20, 2018 (Found. Aff. DeSoto"), Ex. 1: Dep. Ivy McGowan-Castleberry 44:17-45:20, Jan. 10, 2018. Despite that information, Ivy delivered Alexis to Max Reyes' home and left Alexis there for extended periods of time. According to Holly McGowan, her mother, Joni McGowan-Reyes frequently sent Holly to "lay down with Max to cuddle" in a room with a closed door. Found. Aff. DeSoto ¶ 4, Ex. 2: Dep. Holly McGowan 88:7-89:25, Jan. 9, 2018. Alexis Nunez testified in deposition that her grandmother, Joni McGowan-Reyes instructed Alexis to "scratch his back or rub" Max Reyes' shoulders while unsupervised and in a bedroom with the door closed. Found. Aff. DeSoto ¶ 5, Ex. 3: Dep. Alexis Nunez 78:1-13, Jan. 11, 2018.

[3] Before Plaintiffs served the Requests at issue here, Defendants produced or identified as privileged all documents in their possession responsive to Plaintiffs' demands. In total, the defendants produced over 1,000 pages of documents before making this request for judicial intervention. *See* Decl. Joel M. Taylor Support Defs.' Mot. Protective Order ¶ 4, Apr. 18, 2018 ("Decl. Taylor").

that are designed to burden, harass and embarrass the Religious Defendants. Defendants' attorneys attempted to resolve this dispute over discovery but did not reach an amicable resolution. *See* Decl. Taylor ¶ 5. Defendants seek an order protecting them from the burden, expense and annoyance of responding to Request for Production Nos. 5, 6, 7, 8, 9 and 12. The text of those requests are set forth below. Defendants' complete responses, including objections, are attached as Exhibit A to the Declaration of Joel M. Taylor.

II. STATEMENT OF FACTS

According to the First Amended Complaint ("FAC"), Holly McGowan "belonged to" *i.e.,* was a general member of, the Thompson Falls Congregation. FAC ¶ 31, Nov. 14, 2016. Alexis Nunez was not a member of the Thompson Falls Congregation but she occasionally "attended services" there. *Id.* at ¶ 37. Plaintiffs allege that Max Reyes ("Reyes") was at times "a baptized Publisher" in the Thompson Falls Congregation. FAC ¶ 40. In the faith of Jehovah's Witnesses, a baptized publisher is a rank-and-file congregation member who holds no "appointed position" in the congregation. *See* Decl. D. Chappel Support Mot. Protective Order at ¶ 23, Apr. 18, 2018 ("Decl. Chappel").

Plaintiffs allege that agency principles establish the Religious Defendants' liability for the harm Reyes caused. FAC ¶ 19. Toward that end, although they did not sue "the Jehovah's Witness Church," and though there is no entity known as such, allegations throughout their pleading refer to the Church. *See e.g.*, FAC ¶¶ 12-13, 36 and 40. Plaintiffs defined that term as "the entire Jehovah's Witnesses religion or denomination as a whole, including but not limited to its entities, organizations, subsidiaries,

congregations, and followers." *See* Decl. Chappel ¶ 4 (quoting McGowan Ans. Interrog. No. 16). Similarly, the Rule 30(b)(6) deposition notices for the Religious Defendants defines "Jehovah's Witnesses" to mean "the entire religious organization known as Jehovah's Witnesses." Found. Aff. DeSoto ¶ 6, Ex. 4: Pls.' Am. Notices. Plaintiffs thus conflate the terms "the Church" and "Jehovah's Witnesses" with the corporations they sued, apparently misunderstanding the role that Watchtower and CCJW have in connection with the religion as a whole.

Simply stated, Watchtower is not synonymous with "the Jehovah's Witness church." Nor does it form a part of the religion. Neither is CCJW. Rather, Watchtower and CCJW are religious corporations that facilitate the work of Jehovah's Witnesses. *See* Decl. Chappel ¶¶ 3-9. Importantly, Reyes and McGowan were members of the Thompson Falls Congregation only. FAC ¶¶ 31-32. They were not members of Watchtower or CCJW. Indeed, the religious corporation Defendants have very few members. Decl. Chappel ¶ 7.

This Court should enter a protective order that denies such broad discovery on patently irrelevant matters beyond the scope of these corporations' activities.

III. LEGAL ARGUMENT

Over twenty-five years ago, the United States Supreme Court warned that with the advent of modern technology, pretrial discovery comes with "a significant potential for abuse . . . not limited to matters of delay and expense; discovery may seriously implicate privacy interests of litigants and third parties." *Seattle Times v. Rhinehart*, 467 U.S. 20,

34-35 (1984), "There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that is not only irrelevant but if publicly released could be damaging to reputation and privacy. *The government clearly has a substantial interest in preventing this sort of abuse of its processes*." *Id.* at 35 (emphasis added) (citations omitted). Consistent with the Supreme Court's holding, Montana Rule of Civil Procedure 26 limits the scope of permissible discovery to "any non-privileged matter that is relevant to any party's claim or defense . . . ***if*** the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." (Emphasis added.)

District courts have wide discretion in controlling discovery. *State of Or. ex rel. Worden v. Drinkwalter*, 216 Mont. 9, 12, 700 P.2d 150, 152 (1985). "While discovery is meant to be a broad tool in facilitating the resolution of lawsuits, it is not without restraint." *State v. Burns*, 253 Mont. 37, 39, 830 P.2d 1318, 1320 (1992). *See also Hegwood v. Mont. Fourth. Judicial Dist. Ct.*, 2003 MT 200, ¶ 16, 317 Mont. 30, 75 P.3d 308 (citation omitted); *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 2005 MT 50, ¶ 54, 326 Mont. 174, 108 P.3d 469.

Courts may issue protective orders related to discovery "for good cause," including "to protect a party or person from . . . undue burden or expense." Mont. R. Civ. P. 26(c)(1). Courts are empowered, for example, to forbid discovery or to limit the scope of discovery to certain matters. *See* Mont. R. Civ. P. 26(c). Discovery requests are improper if they are "unduly broad" and seek information about documents that are irrelevant to the issues in the case. *Park Cnty. Concerned Citizens v. DePuy*, 2008 MT

246, ¶ 31, 344 Mont. 504, 190 P.3d 293. This Court should enter a protective order that establishes the relevant time period for discovery; protects third-party privacy rights; and forbids inquiry into intra-faith communications between congregation elders and elders assisting Watchtower and CCJW in New York. That Order is appropriate because the Requests (1) are not reasonably calculated to lead to the discovery of admissible information, (2) violate constitutionally protected rights, and (3) are so patently overbroad that any potential relevance is not proportional to the burden and expense involved in marshaling the information, and redacting privileged information. On the contrary, the requests are designed to harass and embarrass the Defendants.

A. The Court Should Block Plaintiffs' Overbroad Discovery Requests Because They Are Not Relevant to the Issues And Are Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Relevance is defined at Montana Rule of Evidence 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." And a "fact that is of consequence" must be a "*fact in issue*" (*Brion v. Brown*, 135 Mont. 356, 363, 340 P.2d 539, 543 (1959) (emphasis in original) (citation omitted)) or, stated differently, a "fact in controversy" (*Rhodes v. Weingand*, 145 Mont. 542, 546, 402 P.2d 588, 590 (1965)). Facts in controversy are limited to the issues framed by the pleadings. *See State ex rel. Westlake v. Dist. Ct. of First Jud. Dist. in and for Lewis and Clark County*, 119 Mont. 222, 238 (1946) ("It is likewise a well-recognized rule of law that the issues in a cause are made and raised alone by the pleadings.") (citation omitted). Indeed, "proof

without pleading is just as unavailing as pleading without proof." *Ibid.*

Based upon the issues framed by the FAC in this case,[4] the focus of discovery should be on what allegedly occurred between *these* Plaintiffs (Alexis Nunez and Holly McGowan), *this* alleged perpetrator (Maximo Nava Reyes), and *these* Defendants (Watchtower, CCJW and Thompson Falls Congregation) at or about the time of the alleged abuse. The Defendants' knowledge of *these* parties is relevant; knowledge about other entities and other third parties – especially those who are not similarly situated – is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence as required by Rule 26.

Instead of limiting discovery to any relationship that existed between these parties, Plaintiffs base their tort claims upon duties that allegedly result from religious affiliation and religious practices.[5] The Court should narrow the scope of discovery to the relationships, if any, these corporate Defendants have with Plaintiffs and the secular

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[4] The claims against Watchtower and CCJW sound in tort: negligence (FAC ¶¶ 46-49); negligence per se (*id.* at ¶¶ 51-54); and breach of fiduciary duty (*id.* at ¶¶ 58-61). Theories supporting those claims include allegations of a special relationship (*id.* at ¶¶ 58-59); vicarious liability for employees/agents (*id.* at ¶¶ 56-57) and malice (*id.* at ¶¶ 62-65). The Defendants do not address the merits of any of those claims herein.

[5] *See e.g.*, FAC ¶ 10 (referring to Watchtower as "the parent organization" and the "Governing Body" establishing policies for Jehovah's Witnesses throughout the world); ¶ 12 (describing elders as "the highest rank within the church"); ¶ 13 (using terms "publisher," "ministerial servants" "church members"); ¶¶ 14-18 (describing a process for studying the bible and eventually leading to becoming "an agent" for "the Jehovah's Witness Church."). But Plaintiffs do not allege (nor can they) that Max Reyes was employed by or was a member of either Watchtower or CCJW (he was not). They do not allege (nor can they) that Max Reyes was commissioned by the defendants to take custody and control of the Plaintiffs (he was not). Nor do they allege (nor can they) that Max Reyes' self-serving acts of child molestation were committed at the direction of or for the benefit of the Defendants (they were not).

purposes they serve. *See Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 298-299, 852 P.2d 640, 648 (1993) (declining examination of "Temple Recommend" and church "callings" to determine corporate liability); *Miller v. Catholic Diocese of Great Falls, Billings,* 224 Mont. 113, 118, 728 P.2d 794, 797 (1986) (refusing to examine a religious school's discipline policy and evaluate a teacher's interpretation and application of policy in violation of the First Amendment).

Further, as discussed in greater detail in the next section, much of the information Plaintiffs now seek expands the scope of discovery to include *all* reports/claims of child abuse in *every* congregation and *all* entities affiliated with Jehovah's Witnesses including "past and present parent corporations, subsidiaries, divisions, predecessor companies, proprietorships, joint venture, employees, agents, officers, directors, affiliates, brokers, servants, representatives, and all persons acting directly or indirectly under their control" at *any* time regardless of what position (if any at all) the perpetrator held, regardless of where the act occurred, regardless of whether the act constituted a crime in the jurisdiction where it occurred, regardless of whether the allegation was substantiated, regardless of whether the accused perpetrator was charged with a crime, and regardless of whether or not there was a criminal conviction.

Plaintiffs thus cast an absurdly broad discovery net seeking to catch information about anyone who practiced the faith of Jehovah's Witnesses. The requests are overbroad, seek patently irrelevant information and are not proportional to the needs of this case, the amount in controversy, the parties' resources, the importance of the issues

in the action, and the importance of the discovery to resolving the issues. Therefore, this Court should protect the Religious Defendants from the burden, expense, and harassing nature of Request for Production Nos. 5, 6, 7, 8, 9 and 12:

> **<u>REQUEST FOR PRODUCTION NO. 5</u>**: Documents related to claims paid from the KHAA[6] or GAA[7] for claims related to sexual misconduct by an adult Jehovah's Witness perpetrated against a minor Jehovah's Witness.

> **<u>REQUEST FOR PRODUCTION NO. 6</u>**: All complaints or petitions that have been filed against You, Your officers or directors in any state or federal court from the last twenty years, which allege sexual misconduct by an adult Jehovah's Witness perpetrated against a minor Jehovah's Witness.

> **<u>REQUEST FOR PRODUCTION NO. 7</u>**: Complete transcripts of depositions of the persons most knowledgeable or corporate representatives designated by Watchtower Defendants in lawsuits to which Watchtower Defendants were a party that related to sexual misconduct by an adult Jehovah's Witness perpetrated against a minor Jehovah's Witness. To the extent Defendants consider documents responsive to this request as confidential, they may be produced under the protective order in this case. If Defendants object based on confidentiality agreements and/or protective orders please produced [sic] those agreements or orders.

> **<u>REQUEST FOR PRODUCTION NO. 8</u>**: All discovery responses including Responses to Interrogatories and Responses to Requests for Admissions answered by Watchtower Defendants in lawsuits to which Watchtower Defendants were a party which related to sexual misconduct by an adult Jehovah's Witness perpetrated against a minor Jehovah's Witness. To the extent Defendants consider documents responsive to this request as confidential, they may be produced under the protective order in this case. If Defendants object based on confidentiality agreements and/or protective orders, please produced [sic] those agreements or orders.

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[6] KHAA was a Christian program that operated until 2014 in the spirit of the Scriptural principle found at 2 Corinthians 8:14. Congregations donated funds to cover losses, provide assistance with repairing damaged property, and providing humanitarian aid.

[7] GAA replaced KHAA and operated in the spirit of the Scriptural principal found at 2 Corinthians 8:14. Congregations donated funds to cover losses that result from what the Bible calls "unexpected events." (Ecclesiastes 9:11.)

> **<u>REQUEST FOR PRODUCTION NO. 9</u>**: All affidavits, declarations, stipulations, submitted by Watchtower Defendants in lawsuits to which Watchtower Defendants were a party which related to sexual misconduct by an adult Jehovah's Witness perpetrated against a minor Jehovah's Witness. To the extent Defendants consider documents responsive to this request as confidential, they may be produced under the protective order in this case. If Defendants object based on confidentiality agreements and/or protective orders, please produce those agreements or orders.
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> **<u>REQUEST FOR PRODUCTION NO. 12</u>**: All letters, emails, facsimiles, or other documentary, tangible or electronically stored information of any kind Watchtower Bible and Tract Society of New York, Inc. received in response to the Body of Elder Letters dated March 14, 1997.

See Decl. Taylor, Ex. A. The Plaintiffs rejected Religious Defendants' offer to limit the scope of these requests and produce information related to other claims and cases that involved similar allegations of incest and/or claims against members of the Thompson Falls, Montana, Congregation of Jehovah's Witnesses during a reasonable period of time. *See* Decl. Taylor ¶¶ 7-9. The burden and expense involved in identifying responsive documents, combing through them for privilege, privacy rights, and protective orders, analyzing them in the context of the applicable 50 state privilege laws then redacting sensitive third-party information *before* educating a witness to testify on behalf of the corporations is not proportional to the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the discovery to resolving the issues. *Ibid. See also* Mont. R. Civ. P. 26(b)(2)(C).

B. This Court Should Excuse Watchtower and CCJW from Responding to Request for Production No. 12 for the Additional Reason That Responsive Documents Contain Information About Multiple Third-Parties Who Have Privacy Rights.

The Montana Constitution, ratified in 1972, explicitly grants a right to privacy,

intending "to protect citizens from illegal private action and from legislation and from governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private. *Armstrong v. State*, 1999 MT 261, ¶ 35, 296 Mont. 361, 989 P.2d 364 (1999). As a result, article II, section 10 of the Montana Constitution provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Because it is a right explicit in the Declaration Rights of Montana's Constitution, it is a *fundamental right* subjected to strict scrutiny. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 121 (1997).

A court order is a form of governmental intrusion. *See Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (extending the Church Autonomy Doctrine to cover judicial actions as well as legislative actions). Defendants contend that there is no compelling state interest that would justify such an extensive intrusion into privacy rights required to disclose "all documents" of any kind sent/received "in response to the Body of Elders Letter dated March 14, 1997" ("the Letter"). A court order that compels the release of responsive documents infringes on the fundamental right to privacy and cannot survive strict scrutiny.

As discussed earlier, Defendants already produced the documents that mention Reyes and these Plaintiffs. None of the documents responsive to Request for Production No. 12 ("BOE Letter Responses") mentions Reyes for the simple reason that Reyes never received an ecclesiastical appointment in any congregation. Decl. Taylor ¶ 9; Decl.

Chappel ¶ 65. As discussed in greater detail below, the Letter at issue in Request for Production No. 12 pertained to an ecclesiastical review process to ensure that all congregations in the United States were in full compliance with scriptural doctrines. *Id.* ¶ 63. Under a promise of strict intra-faith confidentiality, congregation elders wrote to elders in the Service Department at the branch offices of Jehovah's Witnesses and provided information about third persons wholly unrelated to this case. *Id.* ¶ 63. Therefore, disclosure of the BOE Letter Responses would impact not only the free exercise of religion (*id.* ¶ 70), but also privacy rights of multiple third parties, each of whom has a privacy interest that this Court must protect.

1. Information that could identify victims of child abuse is particularly sensitive and must be protected.

There is no question that child abuse victims have privacy rights. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 22, 333 Mont. 331, 142 P.3d 864. "[I]nformation is deemed private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 703 (Cal. 1994). Society and courts readily accept that the identity of a victim of child sexual abuse is private because most victims of sexual abuse "feel shame, embarrassment and guilt." *Scull v. Superior Court*, 254 Cal. Rptr. 24, 29 n.2 (Ct. App. 1988) (quoting California State Assem. Office of Research, Sexual Abuse: A Lifelong Legacy (1986) p. 10).

The further dissemination of information relating to childhood sexual abuse risks

continued harm to those victims. If a victim is deprived of choices, e.g., whether, how, to whom, and when to make the disclosures, nonconsensual disclosure can cause re-victimization, aggravate a victim's condition, and interfere with counseling and recovery efforts.

This Court should not risk harm to victims (or other third parties) by compelling disclosure of sensitive information in this case. This includes disclosure to attorneys, experts, and court personnel. To avoid such harm, the Court should issue a Protective Order that excuses Defendants from responding to Request for Production No. 12. In the alternative, the Court should limit the scope of inquiry to any information disclosed by elders in Thompson Falls and permit full redaction of *all* third-party information, including family members, that could lead to the identification of a victim.

2. Information about a congregation and/or its members could identify victims and should be protected.

Information about congregations, congregation members, and even the names of perpetrators would make it easy to identify and locate the victims involved. There are currently 1,232,293 congregation members in the United States (https://www.jw.org/en/jehovahs-witnesses/worldwide/US/ (last accessed March 19, 2018)) and 13,578 congregations in the United States. *Id.* Based on those statistics, congregations in the United States average only 90 members (1,232,293 ÷ 13,578 = 90). Thus, the disclosure of a person affiliated with a congregation name or location makes it easy to identify and locate the victims involved. Victims' right to privacy could easily be thwarted if this disclosure were allowed.

There is absolutely no compelling need in this case that could overcome a sexually abused victim's right to privacy. *See Davies v. Superior Court*, 682 P.2d 349, 358 (Cal. 1984) (explaining that "when a litigant's request for discovery touches another person's privacy interest, a litigant is not as free to obtain information as he might otherwise be"); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 22 (Ct. App. 2000) (describing the process to overcome a person's constitutional right to privacy through "a careful balancing" of the fundamental right to privacy against "the compelling public need" for discovery – not the need of a particular litigant).

The right to privacy extends beyond victims and their families, and is a fundamental right in Montana. *See Gryczan*, 942 P.2d at 122.

In *U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1234 (10th Cir. 1999), the Court explained that the concept of privacy is multi-faceted and extends to having significant moral freedom to exercise full individual autonomy, to define who he or she is by controlling access to information about him or herself, and the right to solitude, secrecy and anonymity. The right to privacy includes the right to associational anonymity. *See Watchtower v. Vill. of Stratton*, 536 U.S. 150, 153 (2002) ("There are a significant number of persons who support causes anonymously. . . . the requirement that [one of Jehovah's Witnesses] be identified . . . necessarily results in the surrender of the anonymity this Court has protected"].); *Williams v. United States*, 399 F.2d 670, 671-672 (10th Cir. 1968) (no error where the government withheld the identity of persons who furnished information because of "the importance of the obligation of

citizens to come forward with information . . . and that the preservation of their anonymity encourages them to so perform their duties"). Thus, to the extent the Court compels disclosure of *any* information responsive to Request No. 12, information about *all* third parties mentioned in the documents should be redacted.

"The public interest in preserving confidential information outweighs in importance the interest of a private litigant." *Pearce v. Club Med. Sales*, 172 F.R.D. 407, 410 (N.D. Cal. 1997). Releasing information to litigants, their attorneys, experts, and court personnel invades that right to privacy. Moreover, a protective order that permits the release of information to attorneys, experts, and court personnel cannot mitigate an intrusion into a person's life. No amount of precautions can guarantee that information, once revealed under a protective order, will not be misused or "leaked" to others not entitled to it. *Pearce*, 172 F.R.D. at 411.

Courts frequently recognize the need to protect private information because individuals have a substantial interest in the privacy of their home, including the right to avoid unwanted communications. *Cnty. of L.A. v. L.A. Cnty. Emp. Relations Com.*, 301 P.3d 1102, 1116 (Cal. 2013) (citing *Planned Parenthood Golden Gate v. Superior Court*, 99 Cal. Rptr. 2d 627, 638 (Ct. App. 2000); *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). Any information that could lead a party to identify people and contact them at home should be protected. That includes the names of family members, other congregation members, and the names of congregations that addressed a claim of child abuse.

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3. Religious organizations have privacy rights beyond evidentiary privilege that must be protected.

Montana recognizes a religious organization's privacy interest in its records. *See Burns*, 830 P.2d at 1320 (affirming district court's order denying discovery of personnel records related to employee charged with criminal sexual misconduct). Although the documents at issue here are not "personnel" records,[8] the branch office of Jehovah's Witnesses has a privacy interest in its documents, including those that are responsive to Request for Production No. 12. Those documents are intra-faith communications between appointed elders in local congregations (men who assist local congregations on a part-time basis) and elders at the branch office who are members of a Religious Order and work full time to assist local elders. Decl. Chappel ¶ 40. The documents were created to facilitate an internal ecclesiastical review process. *Id.* ¶ 63. This Court should not undermine privacy rights and impact religious decisions by requiring disclosure of these private communications. *See* V. Schwartz and C. Appel, THE CHURCH AUTONOMY DOCTRINE: WHERE TORT LAW SHOULD STEP ASIDE, 80 U. Cin. L. Rev. (2012) at 54 ("Churches can hardly be said to possess their constitutionally guaranteed autonomy—a sphere of activity with 'independence from secular control or manipulation'—if litigants can rummage through their most confidential and sacred matters in ordinary litigation.").

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[8] Thus, the rationale of *St. John's Lutheran Church v. State Comp. Ins. Fund*, 252 Mont. 516, 524, 830 P.2d 1271, 1276 (1992) does not apply. There, the court concluded there was no internal impact or infringement on the relationship between the church and its pastor in considering the pastor as "an employee" for workers' compensation purposes. Designating a pastor as an employee did not involve the State in an internal matter of the church.

4. Documents responsive to Request for Production No. 12 are protected by the minister-communicant privilege.

The evidentiary privilege for "clergy-penitent" communications that occurred in Montana belongs to the communicant. Mont. Code Ann. § 26-1-804. The Religious Defendants cannot waive that privilege for the communicant and any argument to the contrary is hollow. Regardless, although the statutory scheme does not define "clergy," case law explains that statements directed to clergy persons acting in their "professional character" and "in the course of discipline enjoined by the Church" are protected. *State v. MacKinnon*, 1998 MT 78, ¶ 19, 288 Mont. 329, 957 P.2d 23 (1989).[9] Elders in the faith of Jehovah's Witnesses fit the definition of clerics because they are spiritual advisors, authorized to hear confessions and officiate at weddings and funerals. Decl. Chappel ¶ 26. This is true of elders in local congregations as well as elders in the Service Department. *Id.* ¶¶ 17, 26 and 38.

Protected communications between a member of the congregation and congregation elders are not limited to expressions of sinful conduct. On the contrary, Montana takes a broader view of penitential communications. As explained in *MacKinnon, supra,* the Supreme Court of Montana acknowledged that a narrow interpretation of the minister-communicant privilege would discriminate against religious

[9] 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.

practices and violate the free exercise clauses of the federal and Montana constitutions. *MacKinnon*, ¶ 19. Thus, to "minimize the risk that § 26-1-804, MCA, might be discriminatorily applied," the court reasoned that the approach set out by the Utah Supreme Court in *Scott v. Hammock*, 870 P.2d 947 (Utah 1994) is best. *MacKinnon*, ¶ 19.

Scott involved child sexual abuse by an adoptive parent (Hammock) who was later charged with crimes and subsequently excommunicated from the Mormon Church. *Scott*, 870 P.2d at 947. While criminal charges were pending, Hammock had three conversations with his bishop and there was an internal proceeding that ultimately resulted in Hammock's excommunication from the church. *Ibid.* In a later civil suit filed in federal court, the Mormon Church relied on the minister-communicant privilege when it moved to quash a subpoena served by the victim (Scott) to obtain documents relating to the excommunication proceedings. A federal judge entered two orders that (1) quashed the subpoena and (2) suppressed evidence of Hammock's statements to his bishop. *See Scott v. Hammock*, 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 on penitential communications. *Ibid.*

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*, 870 P.2d at 956. The state court agreed with the federal bench that discussions Hammock had with his bishop were privileged and inadmissible.[10] "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." *Ibid.* All such communications are covered by evidentiary privilege. That is the model the Montana Supreme Court adopted. *MacKinnon, supra,* ¶ 21 (citing *Scott*, 870 P.2d at 947).

Notably, the *Scott* court explained how "Constitutional considerations buttress" the conclusion that intra-faith communications are privileged and why a narrow construction of the privilege "would raise serious questions under Article I, 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*, 870 P.2d at 954. When certifying its question to the state court, the federal court similarly stated that "it is apparent the constitutional claims of defendant and the LDS Church are substantial" and the court concluded that "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*, 133 F.R.D. at 619. An identical issue exists in this case where some of the information disclosed in the

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

context of confidential communications with congregation elders is repeated to Service Department elders in the March 1997 Letter Responses. Congregation elders cannot waive penitential privilege by communicating that information within a church hierarchy during an internal review process. Decl. Chappel ¶ 63. That information is not admissible evidence.

Discovery must be reasonably calculated to lead to the discovery of *admissible* evidence. The information sought by Request for Production No. 12 is not reasonably calculated to lead to the discovery of admissible evidence. This Court should enter a protective order that excuses the Religious Defendants form responding to that request.

C. Compelled Disclosure of Unredacted Documents Would Violate the Right to the Free Exercise of Religion and Would Excessively Entangle the Government in Religious Practices.

The United States Supreme Court has long recognized the importance of allowing religious organizations to evaluate the fitness of church members and to resolve intra-faith disciplinary issues – free from government intrusion. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976) (recognizing that "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern"). Indeed, "[T]he very process of civil court inquiry into clergy-church relationship can be sufficient entanglement" to be forbidden by the First Amendment. *Alcazar v. Corp. of the Catholic Archbishop*, 598 F.3d 668, 672-673 (9th Cir. 2010) ("Entanglement has substantive and procedural components. . . . As for the procedural dimension, the very process of civil court inquiry into the clergy-church relationship can

be sufficient entanglement."), *vacated in part on other grounds*, 627 F.3d 1288 (9th Cir. 2010).[11]

Montana has similarly acknowledged the importance of avoiding judicial entanglement with the practice of religion and the difficulty in doing so: "[c]andor compels acknowledgment ... that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *St. John's Lutheran Church v. State Comp. Ins. Fund*, 252 Mont. 516, 524, 830 P.2d 1271, 1276 (1992) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). Indeed, Montana fully recognizes the need to adopt "a hands-off policy" when it comes to determining whether actions are rooted in religious belief. *See Davis*, 852 P.2d at 648.[12] "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. *Miller*, 728 P.2d at 796 (citation omitted) (concluding that a tort

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[11] *See also Hosanna-Tabor Evangelical Church and Sch. v. EEOC*, 565 U.S. 171, 173 (2012) ("[T]he First Amendment . . . gives special solicitude to the rights of religious organizations."); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (explaining that the "very process of inquiry" by means of civil discovery into ecclesiastical matters also "may impinge on rights guaranteed by the Religion Clauses"). *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Watson v. Jones*, 80 U.S. 679, 728-729 (1871) ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.").

[12] *Gilko v. Permann*, 2006 MT 30, ¶ 17, 331 Mont. 112, 130 P.3d 155 (2006), *overruled Davis* to the extent that there is a question about the existence of a "special relationship" or a fiduciary duty. That is a question of law, not a question of fact. *Id.* at ¶ 17. The remainder of *Davis* remains good law.

action for the discharge of an employee was barred by the free exercise clause of the United States and Montana Constitutions).

Governmental action that strips away a religious organization's promise of confidentiality in intra-faith records by compelling the production of such records would chill communications between congregation elders and Service Department elders who need to speak freely if they are to serve the spiritual needs of congregation members as well as evaluate the character and fitness of those recommended to serve as elders or ministerial servants. *See* Decl. Chappel ¶ 39; *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1530 (9th Cir. 1997) ("[T]he knowledge, belief, or suspicion that freely-confessed sins would become public would operate as a serious deterrent to participation in the sacrament and an odious detriment accompanying participation."); *Newport Church of Nazarene v. Hensley*, 56 P.3d 386 (Or. 2002) ("[F]reedom of worship is closely related to the selection of officials to lead that worship."); *Soc'y of Jesus of New England v. Commonwealth*, 808 N.E.2d 272, 280 (Mass. 2004) (concluding that a subpoena requiring the Jesuits to disclose internal reviews of priests would "conflict with, and burden, the methods chosen to foster and preserve their relationship with a religious order"). For this reason, this Court should excuse the Defendants from responding to Request for Production No. 12. An order compelling production would impermissibly entangle this Court into the steps taken to ensure compliance with Scriptural mandates.

IV. CONCLUSION

For the foregoing reasons, the Religious Defendants respectfully request that this

Court enter a Protective Order that excuses them from responding to Plaintiffs' Request for Production Nos. 5, 6, 7, 8, 9 and 12.

DATED this 20th day of April, 2018.

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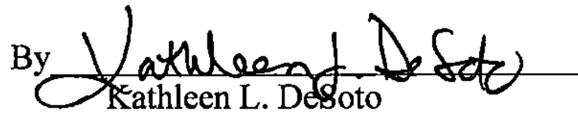

By Kathleen L. DeSoto

CERTIFICATE OF SERVICE

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