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

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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.

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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,

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