

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

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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

	<i>Page</i>
STATEMENT PURSUANT TO RULE 29.6	i
TABLE OF CONTENTS.	ii
TABLE OF CITED AUTHORITIES	iii
I. There are no procedural impediments barring review	1
A. The issues were preserved for review.	1
1. The important federal constitutional issues are properly preserved.	2
2. California’s court of last resort considered important federal questions that Watchtower presented	5
3. Watchtower complied with Rule 14.	6
B. This case warrants review under Rule 10 . . .	6
II. Watchtower is the ideal litigant to champion federal constitutional rights	8
III. There is no factual void that prevents review	10
CONCLUSION	11

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>American Ry. Express Co. v. Levee</i> , 263 U.S. 19 (1923).....	7
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940).....	9
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	6
<i>Church of Lukumi Babalu Aye, Inc. v. Hialeah</i> , 508 U.S. 520 (1993).....	2
<i>D. H. Overmyer Co. v. Frick Co.</i> , 405 U.S. 174 (1972).....	4
<i>Dillard v. City of Springdale, Arkansas</i> , 930 F.3d 935 (8th Cir. 2019).....	10
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i> , 494 U.S. 872 (1990).....	2
<i>Fowler v. Rhode Island</i> , 345 U.S. 67 (1953).....	9
<i>Goodyear Dunlop Tires Operations, S.A. v. Brown</i> , 564 U.S. 915 (2011).....	7

Cited Authorities

	<i>Page</i>
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	8
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	6
<i>Michigan-Wisconsin Pipe Line Co. v. Calvert</i> , 347 U.S. 157 (1954)	7
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105 (1943)	9
<i>New York ex rel. Bryant v. Zimmerman</i> , 278 U.S. 63 (1928)	6
<i>Schneider v. State of New Jersey</i> , 308 U.S. 147 (1939)	8
<i>Serbian Eastern Orthodox Diocese v.</i> <i>Milivojevich</i> , 426 U.S. 696 (1976)	2
<i>Street v. New York</i> , 394 U.S. 576 (1969)	6
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981)	9
<i>Watchtower Bible and Tract Society of New</i> <i>York, Inc. v. Village of Stratton, Ohio</i> , 536 U.S. 150 (2002)	9

Cited Authorities

	<i>Page</i>
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	8
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	9
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992)	7

STATUTES AND OTHER AUTHORITIES

U.S. Const., amend. I	<i>passim</i>
U.S. Const., amend. XIV	9
28 U.S.C. § 1257	7
Sup. Ct. R. 10	6, 8
Sup. Ct. R. 14.1(g)	1
Sup. Ct. R. 14.5	6

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,

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