Case No. 18-50484

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., DOING BUSINESS AS BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER; LENDOL L. DAVIS, M.D.; ALAMO CITY SURGERY CENTER, P.L.L.C., DOING BUSINESS AS ALAMO WOMEN'S REPRODUCTIVE SERVICES; WHOLE WOMAN'S HEALTH ALLIANCE; DR. BHAVIK KHUMAR,

Plaintiffs-Appellees

v.

CHARLES SMITH, EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY,

Defendant-Appellee

v.

TEXAS CATHOLIC CONFERENCE,

Movant-Appellant

On Appeal from the United States District Court for the Western District of Texas, Austin Division (Case No. A-16-CV-1300-DAE)

Brief of *Amici Curiae* The Ethics & Religious Liberty Commission of the Southern Baptist Convention and National Association of Evangelicals In Support of Movant-Appellant and Vacatur

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that, pursuant to Fifth Circuit Rule 27.4, in District Court this case is captioned as *Whole Woman's Health, et al. v. Charles Smith, et al.*, No. A-16-CV-1300-DAE (W.D. Tex.); in this Court it is captioned as *Whole Woman's Health, et al. v. Texas Catholic Conference of Bishops*, No. 18-50484 (5th Cir.).

The undersigned counsel of record also certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. In addition, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel states that none of the religious organizations joining this *amicus* brief issues stock or has a parent corporation that issues stock.

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IDENTITY, INTEREST & AUTHORITY TO FILE OF *AMICUS*[1]

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 16 million members. The ERLC is charged by the SBC with addressing public policy—particularly issues of religious liberty. We seek to strengthen and protect religious freedom for the benefit of all. The President of ERLC, Russell Moore, authorized undersigned counsel to file this *amicus* brief on behalf of ERLC and in support of the movant-appellant Texas Catholic Conference of Bishops ("Conference").

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes local churches from forty different denominations and millions of constituents. The NAE believes that the First Amendment properly protects the autonomy

[1] No party's counsel authored the brief in whole or in part, and no one other than the *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with the consent of all parties. Fed. R. App. P. 29 (a).

of religious organizations in matters of internal governance, and that this protection is fundamental to the proper functioning of both church and state. Galen Carey, NAE Vice President for Government Relations, authorized undersigned counsel to file this *amicus* brief on behalf of NAE and in support of the movant-appellant the Conference.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A federal court has ordered that Catholic bishops reveal their confidential deliberations on theological and moral issues—all because the Conference offered testimony in defense of Texas law. While the church leaders in this particular dispute are Catholic bishops, this case should be a cause for serious concern to all faith communities.

Any religious organization would lose fundamental First Amendment rights, especially rights safeguarded by the church autonomy doctrine, unless the District Court's order is reversed. Further, the subpoena contested here imposes a substantial burden under the Religious Freedom Restoration Act—a burden the government cannot remotely justify by pointing to a compelling interest in divulging the ecclesiastical communications of church leaders. Under both the Constitution and federal law, the subpoena cannot stand.

ARGUMENT

I. The District Court's Actions Threaten All Religious Organizations.

The subpoena here is directed at Catholic bishops, but the principle on which the subpoena rests presents a live threat to religious organizations of all stripes. The harm that would be caused by allowing a federal court to compel the disclosure of internal theological and moral deliberations of church leaders and staff could affect other hierarchical churches, such as the Seventh-day Adventist Church and The Church of Jesus-Christ of Latter-day Saints.

Nor is the threat limited to churches with a hierarchical polity. Congregational churches like the member churches of the Southern Baptist Convention would face serious harm. The Southern Baptist Convention is "not hierarchical, with a top-down denominational structure." Southern Baptist Convention, *The Southern Baptist Convention: A Closer Look*, http://www.sbc.net/aboutus/acloserlook.asp. Instead, "[b]y doctrine and polity, the [Southern Baptist Convention] cannot and does not unite local congregations into a single 'church' or denominational body." *Id.* Rather, "[e]ach cooperating Baptist body—local church, association, state convention, and auxiliary—retains its

sovereignty and is fully autonomous." *Id.* And "a church may be part of the Southern Baptist family without participating with a cooperating state convention or local Baptist association." *Id.*

A Baptist minister or group of Baptist ministers cooperating together would stand to lose vital First Amendment rights if forced to disclose confidential deliberations on matters of theological and moral concern, for the same reasons that Catholic bishops are contesting the subpoena in this case. Religious deliberations over doctrine and mission and morality are just as protected by the church autonomy doctrine for congregational churches like the Baptists as for any other religious organization. *See Crowder v. Southern Baptist Convention*, 828 F.2d 718, 726–27 & n.20 (11th Cir. 1987). The threat posed by the subpoena in this case is equally menacing to religious freedom as if it had been levied against a Baptist minister, a state Baptist convention, a Baptist cooperative entity, or any other religious body. Every faith community has a deep interest in preserving the confidentiality of its internal ecclesiastical communications.

II. The District Court's Actions Violate the First Amendment's Church Autonomy Rights.

A. *The First Amendment Prevents Courts From Prying into the Internal Affairs of Churches*

The church autonomy doctrine flows from both the Free Exercise and Establishment Clauses of the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) (holding that the ministerial exception, a specific application of the church autonomy doctrine, is "grounded in the Religious Clauses of the First Amendment"); *see also* Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 IOWA L. REV. 1, 42–58, 75–77 (1998). Courts may not interfere with the internal ecclesiastical deliberations of religious organizations. Forcing a religious organization to divulge internal ecclesiastical deliberations via subpoena interferes with its internal governance by chilling or altering such deliberations. Plaintiffs' subpoena, which seeks to compel the disclosure of such deliberations, unmistakably violates the First Amendment.

The First Amendment's Religion Clauses provide "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. St.*

Nicholas Cathedral, 344 U.S. 94, 116 (1952)); *see also Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) (declaring that the First Amendment's two Religion Clauses protect "the right of religious organizations to control their internal affairs"—"the freedom to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655, 658 (10th Cir. 2002) ("The church autonomy doctrine is rooted in the protection of the First Amendment rights of the church" and provides "that churches have autonomy in making decisions regarding their own internal affairs, . . . prohibit[ing] civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity").

Thus, "civil courts exercise no jurisdiction" over "a matter which concerns theological controversy." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713–14 (1976). In internal communications between each other and their staff, the Texas bishops were discussing matters of faith and doctrine concerning a theological controversy. Those discussions lie beyond the jurisdiction of civil courts. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,

483 U.S. 327, 341–42 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, ***define their own doctrines, resolve their own disputes***, and run their own institutions.'") (emphasis added) (internal quotation marks omitted).

To avoid the "substantial danger that the State will become entangled in essentially religious controversies," *Serbian East Orthodox*, 426 U.S. at 709, and the "hazards . . . ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern," *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969), the First Amendment leaves "civil courts no role to play in reviewing ecclesiastical decisions," *Serbian East Orthodox*, 426 U.S. at 713, including the deliberations that produce such decisions.

Inquiries by civil courts into purely ecclesiastical deliberations and decision-making "is exactly the inquiry that the First Amendment prohibits" and "recogni[zing] . . . an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry." *Id.* The wall separating ecclesiastical deliberation from

judicial inquiry prevents "the error of [civil court] intrusion into a religious thicket," and preserves the understanding that "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.'" *Id.* at 719, 721–22 (quoting *Kedroff*, 344 U.S. at 116);*see also id.* at 718 (finding that a state supreme court's "detailed review" of a bishop's "removal and defrockment" was "impermissible under the First and Fourteenth Amendments").

B. *Forcing the Disclosure of Internal Deliberations Interferes with Church Autonomy*

Further, it is not just where "secular authorities would be involved in evaluating or interpreting religious doctrine" that the First Amendment's right of church autonomy "bar[s] the involvement of civil courts," but also where a court's investigation itself "would necessarily intrude into church governance in a manner that would be inherently coercive," even if the inquiry was into matters that "were purely nondoctrinal." *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). In this case, the matters for which plaintiffs have sought a subpoena are anything but "purely nondoctrinal": they go to the heart of Catholic doctrine and tradition on

the theological questions arising from the practice of abortion.

The Supreme Court has expressed special concern that the judicial processes of prying into internal church affairs could be just as harmful and unconstitutional as judicial findings about internal church affairs. "It is not only the conclusions that may be reached by [the government] which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to the findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs.").

Concerned with intrusion into constitutionally protected space, courts have frequently warned of the dangers to church autonomy rights from government investigations of any type of church, investigations which create a chilling effect to internal deliberations and actions. *See, e.g., Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (warning against "subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church" because "[t]here is a danger that churches, wary of [agency]

or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments.").

And it is not just the court's intrusion that is the constitutional problem, but also compelling the publication of a church's internal information. *See Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) (holding unconstitutional an investigation by an agency into costs and disbursements of a Catholic school because of "potential in the chilling of the decision making process [of the church institution] occasioned by the threat that those decisions will become [public and] . . . could provide private groups or the press with the tools for accomplishing much the same ends" as "government control"). As the Supreme Court warned in another context that is equally applicable here, "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

C. Church Autonomy Rights Apply Regardless of Denominational Structure

Finally, the First Amendment's protection of church autonomy does not depend on a church's organizational structure. *See Crowder*, 828 F.2d

at 726–27 & n.20 (11th Cir. 1987) (applying the First Amendment's church autonomy doctrine and rejecting "[a]ppellants' argument that [because] the [Southern Baptist Convention] has a congregational, rather than a hierarchical, form of church governance," the doctrine does not apply). Granted, many of the Supreme Court's decisions in this area have involved hierarchical churches. But that is merely a matter of fact, not doctrine. *See id.* at 727 n.20 ("The distinction drawn in *Watson v. Jones* between the types of congregational and hierarchical church polities was relevant only to determining the ecclesiastical body to which the civil court must defer in determining rights to use of property.") (citation omitted); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 35 n.2 (D.D.C. 1990) ("[T]he Court can discern no justification for refusing to apply the First Amendment analysis and reasoning of Supreme Court and lower federal court case law involving hierarchical churches to this case" where the defendant "is a congregational church").

Granting a religious organization the protections of the church autonomy doctrine only if it is hierarchical would likewise violate the Establishment Clause by recognizing greater or lesser constitutional protection depending on the form of church government selected by a

particular denomination. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

The applicability of the church autonomy doctrine to all faith communities—hierarchical and congregational—matters in this case for one simple reason. The court order directing Catholic bishops to disclose their confidential communications on matters of church doctrine and policy poses a threat to the religious freedom of all clergy and to all faiths, including Baptist ministers. On this principle of church autonomy, we stand together.

III. The District Court's Actions Amount to a Substantial Burden on Free Exercise and Violate RFRA

The Religious Freedom Restoration Act ("RFRA") provides that the "[g]overnment shall not substantially burden a person's exercise of religion" except where the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental relief." 42 U.S.C. § 2000bb-1. And RFRA broadly defines "government" so as to include the federal courts. *See id.*

The substantial burden analysis under RFRA does not ask

"whether the religious belief asserted in a RFRA case is reasonable," but "whether the [government] imposes a substantial burden on the ability of objecting parties to [act] in accordance with their religious beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014). In other words, the substantial burden analysis has nothing to do with the centrality of one's religious belief, but rather with government action forcing a religious believer to comply with the law (and violate one's religious beliefs) or be punished.

The subpoena permitted by the District Court imposes a substantial burden on the Catholic bishops who are before this court. They can comply with the subpoena only by publishing the internal discussions they had with each other and staff about the theological and moral dimensions of abortion and related practices. Publication of these sensitive deliberations would invite intense scrutiny and criticism by the media and others unfriendly to the faith, and it would chill future internal discussions by the bishops and their staffs. Or the bishops can flout the subpoena and face the possibility of contempt of court, with its accompanying civil and criminal penalties.[2] Either way, the freedom of

[2] The potential costs of a contempt citation do not even count the thousands of dollars

these religious leaders to discuss their religious beliefs and positions confidentially is substantially burdened. *See Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981) ("Where the state . . . put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013) (a substantial burden exists where the government "truly pressures [a religious] adherent to significantly modify his religious behavior") (internal quotation marks omitted).

Thus, the government must prove a compelling interest in substantially burdening the bishops and prove that it has acted in the least restrictive way possible. But neither the plaintiffs nor the District Court can meet that standard. The bishops are not even parties to the original suit. They have committed no crime or tort. Plaintiffs claim to need the bishops' internal deliberations merely to cross-examine a witness. If that interest counts as compelling, then the boundaries of "compelling" are limitless. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (requiring, under RFRA, that

in legal fees the bishops have incurred so far in asserting their First Amendment rights. Dkt. 150-1 at 5, ¶ 10.

compelling government interests be "interests of the highest order"). Without a compelling interest to justify the substantial burden on the bishops' exercise of religion, the subpoena violates RFRA. *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826, 835 (3d Cir. 1999) ("[E]nforc[ing] a . . . subpoena over a RFRA objection," can only be done if "necessary to serve a compelling state interest.").

CONCLUSION

The threat posed by the subpoena here is not one limited to the Catholic bishops in this appeal: all religious organizations will eventually have to bow in similar circumstances if the subpoena is upheld by this Court, regardless of their organizational structure or religious belief. And the First Amendment cannot sustain this subpoena because it strikes at the very core of church autonomy—the right of a religious body to internally deliberate on matters of faith and doctrine free from the prying eyes of the government. Nor can this subpoena survive RFRA because it substantially burdens the Catholic bishops' free exercise rights for no good reason, much less a compelling one. For all these reasons, the District Court's order should be vacated.

DATED this 25th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and 29 (b) because it contains 2,903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

This brief complies with the requirements of Fed. R. App. P. 32 (a)(6) and Fifth Circuit Rule 32 because it has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2010 in 14-Point Century style in the body of the brief and 12-point Century style in the footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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