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

Appeal from the United States District Court for the Western District of Texas, Austin Division (Hon. David Alan Ezra, D.J.)

OPENING BRIEF OF MOVANT-APPELLANT TEXAS CATHOLIC CONFERENCE OF BISHOPS

Steven C. Levatino
Andrew F. MacRae
LEVATINO | PACE PLLC
1101 S. Capital of Texas Hwy.
Building K, Suite 125
Austin, Texas 78746
(512) 637-1581
steven@lpfirm.com

Eric C. Rassbach
Daniel H. Blomberg
Diana M. Verm
Joseph C. Davis
Daniel Ortner
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Ste. 700
Washington, DC 20036
(202) 349-0095
erassbach@becketlaw.org

Counsel for Movant-Appellant

RULE 28.2.1 CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

(1) In district court this case is captioned as *Whole Woman's Health, et al. v. Smith*, No. A-16-CV-1300-DAE (W.D. Tex.); in this Court it is captioned as *Whole Woman's Health, et. al. v. Smith*, No. 18-50484 (5th Cir.).

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

Plaintiffs

Whole Woman's Health
Brookside Women's Medical Center PA, d/b/a Brookside Women's Health Center and Austin Women's Health Center
Lendol L. Davis, M.D.
Alamo City Surgery Center d/b/a Alamo Women's Reproductive Services
Nova Health Systems, Inc.
Whole Woman's Health Alliance
Dr. Bhavik Khumar

Counsel:

Autumn Katz, Center for Reproductive Rights
Caroline Sacerdote, Center for Reproductive Rights
David P. Brown, The Lawyering Project
Dipti Singh, The Lawyering Project
J. Alexander Lawrence, Morrison and Foerster, LLP
Jan Soifer, O'Connell & Soifer LLP
Molly Duane, Center for Reproductive Rights
Stephanie Toti, The Lawyering Project

Emily B. Nestler, Center for Reproductive Rights
Francesca G. Cocuzza, Morrison and Foerster, LLP
Juanluis Rodriguez, The Lawyering Project
Patrick J. O'Connell, Law Offices of Patrick J. O'Connell

Non-Party Appellant

Texas Catholic Conference of Bishops

Counsel:
Eric Rassbach, The Becket Fund for Religious Liberty
Daniel Blomberg, The Becket Fund for Religious Liberty
Diana Verm, The Becket Fund for Religious Liberty
Joseph Davis, The Becket Fund for Religious Liberty
Daniel Ortner, The Becket Fund for Religious Liberty
Steven C. Levatino, Levatino Pace LLP
Andrew F. MacRae, Levatino Pace LLP

Defendants

Charles Smith, Executive Commission of the Texas Health and Human Services Commission

Counsel:
Adam Arthur Biggs, Texas Office of the Attorney General
Benjamin S. Walton, Texas Office of the Attorney General
Beth Klusmann, Texas Office of the Attorney General
Darren L. McCarty, Texas Office of the Attorney General
David Austin Robert Nimocks, Texas Office of the Attorney General
Kara Holsinger, Texas Office of the Attorney General

/s/ *Eric C. Rassbach*
Eric C. Rassbach
Attorney of record for Movant-Appellant Texas Catholic Conference of Bishops

Dated: June 26, 2018

STATEMENT REGARDING ORAL ARGUMENT

Movant-Appellant Texas Catholic Conference of Bishops believes oral argument will be helpful because this appeal presents important questions arising under the First Amendment and federal civil rights law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules and Regulations

Legislative Materials

Other Authorities

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331.[1]

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292. On Sunday, June 17, 2018, the district court denied Movant-Appellant Bishops' motion to quash and issued an additional order mandating that the Bishops turn over certain documents to Plaintiffs-Appellees. Later that day, the Bishops filed a notice of appeal.

This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's denial of the Bishops' motion was an immediately appealable collateral order. *See Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 171, 177-78 (5th Cir. 2009).[2]

The Court has jurisdiction under 28 U.S.C. § 1292 because the district court's June 17 order mandating that the Bishops turn over the contested

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[1] The Bishops reserve the question whether the district court had jurisdiction to enforce the subpoena against them. *Cf. Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 F. App'x 926, 929 (11th Cir. 2018) (per curiam) (district court lacked jurisdiction to decide "claims requir[ing] an examination of doctrinal beliefs and internal church procedures").

[2] We note that, with respect to the collateral order doctrine, having the appeal return in short order to this Court on a contempt finding would create, rather than obviate, piecemeal litigation.

emails "might have a 'serious, perhaps irreparable, consequence,' and . . . can be 'effectually challenged' only by immediate appeal." *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Parish*, 756 F.3d 380, 384 (5th Cir. 2014) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)); *see also Abbott v. Perez*, No. 17-586, 2018 WL 3096311, at *10 (U.S. June 25, 2018) (courts look to "practical effect" of order, not label).[3]

PRELIMINARY STATEMENT

This appeal presents the question of how far the State may intrude into the inner sanctum of the Church. What apparently began as an effort by Plaintiffs to intimidate a witness set to testify at a bench trial next month has now morphed into a broader-ranging conflict over whether theological and moral deliberations by a denominational body's religious leaders can ever truly be private.

This sort of attempt to use the third-party discovery process to coercively access the private religious deliberations of the Catholic Church's leadership—what has sometimes been called the *mens ecclesiae*—has been rare. The main example was litigation several decades ago where

[3] The Bishops will address jurisdiction in their response to Plaintiffs-Appellees' motion to dismiss, due June 29.

plaintiffs sought discovery against the United States Conference of Catholic Bishops. *See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). This case will decide in large part whether this kind of discovery dispute stays rare.

As a legal matter, the case is exceedingly easy. In fact, the Court need go no further than applying the "undue burden" standard of Fed. R. Civ. P. 45. The Bishops' internal religious deliberations over the Catholic theological and moral questions surrounding abortion and the proper disposition of aborted human remains are entirely irrelevant to the question of whether Texas's fetal remains law violates Plaintiffs' due process rights. But even without Rule 45, the district court's orders are clear violations of both the Religious Freedom Restoration Act and several provisions of the First Amendment, including most fundamentally the right to church autonomy recognized in *Hosanna-Tabor* and other cases.

By contrast, the public debate surrounding abortion is not so easy, for society or for the courts. But that debate will not get any easier if the

discovery process is weaponized in service to the culture wars. The Bishops therefore urge the Court to demarcate a clear line of separation between Church and State.[4]

STATEMENT OF THE ISSUES

1. Did the district court err by imposing an undue burden on the Bishops as a third-party witness in violation of Fed. R. Civ. P. 26 and 45?

2. Did the district court err by imposing a substantial burden on the Bishops' religious exercise in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*?

3. Did the district court err in finding that coercing production of the Bishops' private internal religious deliberations was sufficiently necessary to overbalance the Bishops' admitted *prima facie* showing that the production would invade their First Amendment rights to the freedoms of assembly, petition, and association?

4. Did the district court err in finding that the First Amendment's Religion Clauses provide no protection from coerced production of the Bishops' private internal religious deliberations?

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[4] Regardless of how the Court rules, the Bishops respectfully request that the Court maintain the existing stay pending any *en banc* or Supreme Court consideration.

5. Did the district court err in finding that the First Amendment's Establishment Clause was not violated by coerced production of the Bishops' private internal religious deliberations?

STATEMENT OF THE CASE

A. The Texas Catholic Conference of Bishops

The Texas Catholic Conference of Bishops is an unincorporated ecclesiastical consultative association that furthers the religious ministry of the Roman Catholic bishops and archbishops in the State of Texas, particularly through advocacy for the social, moral, and institutional concerns of the Catholic Church. RE.62 ¶ 2.

This state-wide association of bishops was created to effectively minister in a geographically large and populous state. Over 8.5 million Catholics live in Texas, with over 1,000 parishes, over 200 missions, and over 2,000 priests. RE.77 ¶ 11. The state also has 8 Catholic colleges and universities and hundreds of religious seminaries and schools serving over 90,000 students. *Id.* In Texas there are 13 dioceses, 2 archdioceses, and 1 ordinariate, all of which are led by bishops. *Id.* ¶ 12. All told, there are 23 bishops in the state. *Id.*

The 23 Bishops constitute the voting members of the board of the Conference. *Id.* The Conference also has eight staff members who are directly accountable to the Bishops and perform important religious functions for the Church, such as assisting in the performance of ministry, facilitating communication between the Bishops, and assisting in fulfilling the mission of the Church as it relates to matters of public policy, Catholic education, and maintaining archival records of the Church. RE.83-84 ¶ 3. The Bishops also directly appoint the Conference's Executive Director, who facilitates communication among the Bishops. *Id*; RE.76 ¶ 9.

The Conference makes possible cooperation and communication among the various dioceses and ministries throughout the State of Texas. RE.76-78. Through the Conference, the Bishops discuss and decide how the Catholic Church in Texas should engage with issues of Catholic moral, theological, and social teaching, including topics of great public concern and controversy such as abortion, healthcare, Medicaid expansion, immigration, and refugee resettlement. *Id.*; ROA.2713-14. The Conference also supervises the state's Catholic schools to ensure fidelity to the Church's teachings and beliefs. RE.76-77 ¶ 10.

To provide unified theological guidance and governance, the Bishops rely heavily on the ability to communicate as a group with each other and with the senior leadership of the Conference via email. RE.78 ¶ 13. Given the Conference's size, email is a critical tool that allows for the Bishops to engage in timely deliberations and reach a consensus. *Id.* ¶ 14. These emails frequently include deliberations over theological and moral issues facing the Bishops' ministries, including how the Church should engage in the community and in public policy. *Id.* ¶ 15. The Bishops also less frequently convene meetings in person or on telephone conferences.

B. The Bishops' Burial Ministry and Texas's Fetal Remains Law

The Catechism of the Catholic Church teaches that directly intending to take innocent human life through abortion is gravely immoral and never permitted. RE.79 ¶ 25; Catechism of the Catholic Church §§ 2270-75. Because of that belief, the Bishops have been actively involved in public debate over laws regulating abortion in the Texas. Underlying the Bishops' position is a belief in the need to respect the dignity of all human life. RE.79 ¶ 22. Because of their beliefs, the Bishops advocate for the respectful disposition of fetal remains.

In the fall of 2016, the Bishops became aware of efforts to change Texas law to more humanely dispose of embryonic and fetal tissue remains. Under existing regulations that were enacted in 1989, hospitals, clinics, and other regulated healthcare facilities were able to dispose of fetal remains in a variety of ways, including discharging the remains into the sewer system or dumping the remains into a mixed-use landfill.[5] 25 Tex. Admin. Code § 1.136(a)(4)(B)(i). Officials at the Texas Department of State Health Services (DSHS) began to work on revising the rules. DSHS determined that existing methods were incompatible with the state's "policy objective of ensuring dignity for the unborn." 41 Tex. Reg. 9709 (2016). Accordingly, DSHS adopted amendments limiting the methods available for the disposal of fetal remains to cremation, entombment, burial, placement in a niche, or the scattering of ashes, but not discharging them into the sewer or depositing them in a landfill. *Id.* at 9733-34. Jennifer Allmon, the Conference's Executive Director, provided written and oral testimony on August 2, 2016, in favor of the revised rules, expressing the Bishops' belief that "[t]reating the dead with respect is a

[5] The regulations do not cover the actions of private individuals.

duty of the living and a right of the dead." ROA.437 ¶ 4. The Bishops also submitted a comment in favor of the new regulation. 41 Tex. Reg. 9720.

One of the primary objections to the proposed rule involved the purported cost of interment. After the August 2 hearing, the Bishops began exploring the possibility of helping to facilitate free burial services for fetal remains. ROA.437-38 ¶ 5. In many dioceses across the state, the Bishops have long run a burial ministry in which Catholic cemeteries offer free common burial for miscarried children. Common burial means that the remains of many fetuses are collected and buried together in a single grave. This method is compatible with Church teaching but also significantly reduces the cost of burial. The existing burial ministry cooperates with many hospitals, families, and funeral homes to provide a proper burial for children who die in utero. *Id.* The Bishops began exploring the possibility of expanding these burial ministries to cover the burial of fetal remains throughout the state.

Deciding whether to offer such services was not merely a question of costs or logistics. Indeed, it involved significant internal theological debate and discussion. RE.79 ¶ 24. Catholic ministries must be careful not

to impermissibly partner with abortion services or even offer any material cooperation whatsoever. RE.79 ¶ 26. Catholic ministries must also avoid the danger of scandal by association with abortion providers. *Id.* Determining whether it was appropriate to offer burial services to the victims of abortion therefore involved lengthy private discussions regarding Catholic moral theology on the principle of material cooperation with evil. *Id.* ¶ 24. The Bishops were also required to send directives to Conference staff to ensure that the Church's ministries and positions were consistent with Catholic teaching. *Id.* ¶ 27.

After months of extensive internal deliberations, the Conference announced on December 12, 2016 that it would work with Catholic cemeteries and funeral homes to expand the Bishops' burial ministry and offer the service to children who die by abortion throughout the state at no charge. ROA.438 ¶ 6. The only cost to healthcare facilities would be transportation of the remains. ROA.2730-31. The Bishops estimate that offering such services will cost the Church between $1,500 and $13,800 per diocese annually depending on the frequency and number of burials. ROA.438 ¶ 7. There are more than 100 Catholic cemeteries in the state. *Id.* And the Bishops also hope to be able to collaborate with non-Catholic

cemeteries, funeral homes, and mortuaries to provide a dignified burial for all unborn children who die by miscarriage or abortion. Treating the remains of all human beings, no matter how long they lived or how they died, with dignity, charity, and respect is an extension of the Bishops' respect for the dignity of the living. *Id.* ¶ 8.

C. Plaintiffs' Lawsuit

Plaintiffs-Appellees are several licensed abortion providers. Plaintiffs have challenged numerous provisions of Texas law regulating abortion. *See Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016); *Whole Woman's Health v. Paxton,* No. A-17-CV-690-LY (W.D. Tex. filed July 20, 2017); *Whole Woman's Health Alliance v. Paxton*, No. 18-00500 (W.D. Tex filed June 14, 2018). Plaintiffs have also challenged the fetal remains law.

On December 12, 2016, Plaintiffs brought the lawsuit underlying this appeal against John Hellerstedt, Commissioner of the Texas DHS, in his official capacity.[6] ROA.30. The Bishops are not and have never been a

[6] The state subsequently transferred responsibility for implementing the law to the Texas Health and Human Services Commission, and Commissioner Charles Smith was substituted in the place of Hellerstedt. ROA.1936.

party to the underlying lawsuit, and Plaintiffs' original complaint did not mention the Bishops.

Plaintiffs' complaint asserted five claims: (1) violation of a Due Process liberty interest; (2) unconstitutional vagueness under the Due Process Clause; (3) violation of the Due Process right to privacy; (4) violation of the Equal Protection Clause by treating fetal remains differently than other human remains; and (5) imposition of an unconstitutional burden on interstate commerce. ROA.45-47 ¶¶ 91-100. Plaintiffs asserted no Free Exercise or Establishment Clause claims.

Plaintiffs moved for a temporary restraining order and preliminary injunction. ROA.122. The district court granted the temporary restraining order on December 15, 2016, and set a hearing on the preliminary injunction. ROA.449.

Plaintiffs argued that the fetal remains law would impose undue costs on abortion providers and therefore stymie access to abortions. The Conference is mentioned only a single time in Plaintiffs' 27-page preliminary injunction brief. ROA.139 (citing the Bishops' public comment on the regulation).

Plaintiffs discounted the possibility that private parties would provide free fetal burial services. ROA.142 n.10. Accordingly, Texas requested that Allmon provide testimony that the Bishops had committed to facilitating burial services without cost. ROA.436-39. Allmon's declaration was cited once in Texas's 25-page response brief to show that "at least one non-profit group is prepared to provide for the burial of fetal tissue from all health-care providers across the state without charge." ROA.392.

Allmon testified as a witness for Texas at the preliminary injunction hearing. Allmon reiterated the Bishops' views on the importance of providing a dignified burial for fetal remains. She emphasized that the Conference would absorb all costs of burial associated with its ministry and would not pass any of the costs along to abortion providers. ROA.2719. She also explained that there would be no religious services or rituals associated with a common burial, absent a parental request. *Id.* Allmon further testified that the Bishops would ensure that at least one Catholic cemetery in each of the 15 dioceses would participate in the cost free burial program, ROA.2728, and that the Bishops had the authority to commit cemeteries to participate in the program. ROA.2751.

The district court (then Judge Sparks) granted the preliminary injunction on January 27, 2017, enjoining Texas's regulation. Judge Sparks found that some of the regulation's terms ("other tissue from a pregnancy") were unconstitutionally vague and that the rule imposed an undue burden on abortion access. ROA.1452. Judge Sparks mentioned the Bishops only briefly, questioning whether the Bishops and the affiliated cemeteries had proper permits to handle fetal remains. ROA.1448. He also suggested that burial at a Catholic cemetery might "distress[] patients who have different religious views or do not see fetal tissue as a person." ROA.1449.

Texas appealed the preliminary injunction to this Court. *Whole Woman's Health v. Hellerstedt*, No. 17-50154 (5th Cir. docketed Mar. 1, 2017).

D. Legislative Enactment and Second Preliminary Injunction

Once the regulation was enjoined, the Texas legislature sought to enact a fetal remains law. On April 28, 2017, the Texas House State Affairs Committee held a hearing on whether fetal remains disposal methods were incompatible with the dignity of the human body. ROA.2723-24. Allmon testified in favor of the bill, stating that "respect for the remains

of the human person should be given to those whose lives end before even taking a breath." ROA.437 ¶ 2.

The fetal remains provisions were attached to a larger abortion-related bill known as SB 8, which was signed into law by Governor Greg Abbott on June 6, 2017, and set to take effect on February 1, 2018. Tex. S.B. 8, 85th Leg., R.S., § 19(d) (2017).

Plaintiffs then sought to dismiss Texas's appeal to this Court due to the legislative change. Texas initially opposed the motion to dismiss, but as the date of enactment approached, it moved to dismiss the appeal.

Back in the district court, Plaintiffs moved to enjoin the new law. ROA.1546. The case was transferred to Judge Ezra. ROA.1634. Plaintiffs amended their complaint in December 2017, ROA.1655, and moved for another preliminary injunction, ROA.1685. The amended complaint still did not mention the Bishops and likewise contained no Establishment Clause or Free Exercise Clause claim. Similarly, the second preliminary injunction motion did not mention the Bishops and only briefly mentioned the plan to "turn[] over fetal tissue to religious institutions for religious disposition[.]" ROA.1706.

The district court granted the second preliminary injunction in part on January 29, 2018. ROA.1921. Specifically, it enjoined all provisions concerning the disposal of fetal remains and any associated implementing rules. ROA.1920-21. Judge Ezra's opinion did not mention the Bishops. Judge Ezra referred all nondispositive discovery matters to Magistrate Judge Andrew Austin. ROA.1921.

E. The Subpoena and Motion to Quash

On February 7, 2018, Judge Ezra set a bench trial for July 16, 2018. ROA.1932. On March 19, 2018, the parties jointly stipulated that neither party would "seek to introduce evidence concerning the monetary cost of compliance with the challenged laws, including the cost of collection, storage, transportation, and disposal of embryonic and fetal tissue remains." RE.56. Plaintiffs further stipulated that "they will not argue that the monetary cost of compliance with the challenged laws contributes to their alleged constitutional infirmity" and "waive[d] any argument in this lawsuit that the monetary cost of compliance with the challenged laws contributes to their alleged unconstitutionality." *Id.*

On March 21, 2018, Plaintiffs served the Bishops with a third-party subpoena requesting a wide array of communications. The subpoena read in part as follows:

> 1. All Documents concerning EFTR [embryonic and fetal tissue remains], miscarriage, or abortion.
>
> 2. All Documents concerning communications between [the Texas Catholic Conference of Bishops] and current or former employees of DSHS, HHSC, the Office of the Governor of Texas, the Office of the Attorney General of Texas, or any member of the Texas Legislature, since January 1, 2016.
>
> 3. All documents concerning the Act, the Amendments, or this lawsuit.

RE.57.

On its face, the subpoena required the Bishops to produce all communications concerning abortion since the formation of the Bishops' Conference in 1965. It also sought every communication that the Bishops' Conference had with Texas officials, regardless of their subject matter or relevance to Plaintiffs' case. And it compelled production of all internal documents, no matter their confidentiality or religious content. The subpoena also sought to impose a continuing discovery obligation on the Bishops. *Id.*

The Plaintiffs served similarly broad subpoenas on cemeteries that had signed up on the state's registry of providers who would facilitate the disposal of fetal remains, many of which are Catholic organizations affiliated with the Conference. ROA.1977; ROA.2382 ¶ 18.

The Bishops filed a first motion to quash and for a protective order on April 2, 2018. ROA.1944. In addition to asserting relevance objections, the Bishops argued that the subpoena violated the First Amendment by infringing on their rights of free exercise, freedom of speech, assembly, and petition. ROA.1950. In addition, the Bishops argued that the subpoena violated the Religious Freedom Restoration Act and was unduly burdensome under Fed. R. Civ. P. 45. *Id.*; ROA.1951. That motion was denied without prejudice on April 3. ROA.2019.

On April 3, the Bishops conferred with Plaintiffs regarding the scope of the subpoena. Plaintiffs insisted that the Conference produce all internal communications that used the following terms: SB8, "SB 8", Fetal, Fetus, Embryonic, Embryo, Abortion, Aborted, Miscarriage, Unborn, or "burial ministry." ROA.2067. The Bishops objected to this search because it went beyond the scope of Plaintiffs' lawsuit, would produce voluminous

documents, and would require time-consuming, expensive document review. The Bishops also objected because the request would yield confidential internal deliberations among the Bishops themselves, which they said that they would not produce voluntarily.

The Bishops suggested search terms that would narrow the scope of the subpoena to documents that solely related to the challenged law and the Bishops' burial ministry. Plaintiffs refused. Instead, Plaintiffs offered only to limit the time period of the subpoena to documents produced since January 1, 2016, and to limit the search to documents and conversations involving Allmon. ROA.2067. Plaintiffs also repeatedly demanded production of Allmon's internal communications with the Bishops.

In the absence of an agreement, and without waiving its objections to the Plaintiffs' search terms, the Bishops conducted a search. The search produced over 6,000 pages of records. Because of the confidentiality and sensitivity of the documents, Allmon reviewed all of them personally, in consultation with the Bishops' attorneys. ROA.2128. After reviewing the documents using Plaintiffs' terms, the Bishops ultimately produced 4,321 pages of documents. ROA.2288. As of June 10, 2018, the Conference esti-

mates that it had to spend over 100 staff hours responding to the subpoena and accrued over $20,000 in attorney's fees and costs. RE.65-66 ¶ 10.

The Bishops produced all responsive documents involving communications with individuals external to the Conference. RE.64-65 ¶ 8.[7] This included all communications with state officials, external communications to Catholic conferences in other states, communications with Catholic cemeteries in Texas participating in the Bishops' burial ministry, and internal communications to lower-level Conference staff. RE.64 ¶ 8; *see also* Allmon Depo.

In addition to the more than 4,000 pages of documents the Conference produced prior to the June 13 hearing, Plaintiffs also deposed Allmon for more than three hours immediately after the hearing. At the deposition, Plaintiffs were able to ask questions about many of the fact issues they

[7] Upon further review of the withheld documents, a handful were identified that were mistakenly withheld and will be turned over shortly. Any errors in the privilege log were the result of the unusually accelerated schedule and can be remedied in due time. In the normal course of discovery, the parties would come to consensus on the documents on an individual basis. But Plaintiffs argue that the Bishops have *no* right to privacy on *any* of their internal documents. That cannot be.

claim require access to the contested internal emails. Allmon Depo. 20:19-21:16, 48:9-49:5, 92:4-97:4.[8]

Despite the Bishops' efforts, Plaintiffs insisted on more, demanding production of about 300 internal communications between the Bishops and Conference staff. These documents include confidential theological and moral deliberations of the Bishops. RE.85 ¶ 12. Some are so sensitive that even most staff are not authorized to view them. *Id.* Because the Bishops would not voluntarily produce the communications containing these deliberations, Plaintiffs sought an informal hearing with the magistrate judge.

F. The Rulings Below

The informal hearing was held at 4:00 p.m. on Friday, June 8. At the end of the hearing, the magistrate unexpectedly ordered the Bishops to file a motion to quash by 9 a.m. on Monday, June 11, and then set a hearing for June 13. ROA.2064. The Bishops complied with the accelerated timeframe. ROA.2065. In their renewed motion to quash, the Bishops

[8] Movant-Appellant has moved to supplement the record with the transcript of the Allmon deposition.

once again raised objections under the First Amendment, RFRA, and the federal rules. ROA.2073.

On the morning of June 13, 2018, the magistrate held a hearing on the motion. During the hearing, the magistrate narrowed the focus of argument to the First Amendment free exercise and freedom of association issues. ROA.2964 at 4:19-21.

Plaintiffs argued that they were entitled to the internal documents because the Bishops had represented that at least 15 Catholic cemeteries would sign up for the registry, and fewer than that had up to that point done so. The internal documents were purportedly necessary to determine whether the Bishops had lost interest in their burial ministry or deprioritized it. ROA.2984-85 at 24:15-25:23. Plaintiffs also claimed that they had an interest in knowing whether the Bishops' burial ministry "is going to be conducted in a way that's respectful of the dignity and the diverse religious traditions of abortion patients." ROA.2985 at 25:15-18. In response, the Bishops argued that Plaintiffs' injunctions against the law had dissuaded cemeteries from signing up. ROA.2990 at 30:8-16. Texas also emphasized that the registry was not a complete list of all of the "hundreds of cemeteries and funeral service providers throughout the

state who are available," and that the stipulation excluding arguments regarding cost rendered the issue irrelevant. RE.93:9-25.

Plaintiffs claimed that they were "only seeking the communications because [Allmon] volunteered to testify in this case about the burial ministry that the bishops have proposed to offer[.]" ROA.2984 at 24:1-6. Plaintiffs then offered an exchange: if the Conference "wants to keep its internal communications confidential, it can simply withdraw Ms. Allmon's testimony." ROA.2985-86 at 25:24-26:10. Further, Plaintiffs asked the court to "bar Ms. Allmon from testifying at trial" unless the contested private deliberative documents were produced. ROA.2986 at 26:11-17. But Texas clarified that Allmon would be "subpoenaed like every other witness" testifying for the State. ROA.2993 at 33:13-15. And the Bishops argued that Plaintiffs' "ultimate goal in this attack is to get her to withdraw" and that the document requests were being used as a tactic to that end. ROA.2987 at 27:19-23.

The magistrate acknowledged that "there's not going to be a production" of the internal records absent an appeal to Judge Ezra. RE.94:18-23. He suggested that a stay would be appropriate to allow the Conference to seek review. *Id.* But he emphasized that the decision was not in

his hands, and that Judge Ezra was "very committed—probably as committed as the bishops are to their position in general on these issues . . . to his July 19 trial date in the case." RE.96:2-7. After the hearing concluded, the parties immediately began Allmon's deposition. RE.94:14-17.

Later that day, the magistrate denied the Bishops' motion. RE.38. Before the magistrate entered that order on the docket, the district court *sua sponte* entered an order shortening the time for an appeal from the normal 14 days to less than 24 hours, requiring the Conference to file by noon the next day. ROA.2277; *see also* 28 U.S.C. § 636(b); W.D. Tex. Local Rules, Appendix C, Rule 4(a).

The Bishops moved for an extension of time to file an appeal with the district court, ROA.2287-92, which the district court promptly denied, ROA.2294. The Bishops then appealed the magistrate's order to the district judge by noon on June 14. ROA.2295-2315. The district court denied the appeal at 12:01 p.m. on Sunday, June 17. ROA.2347-2363. In addition to denying the appeal, the district court ordered the Bishops to turn over a specific set of documents within 24 hours of entry of its order. ROA.2362-63.

On June 17, the Bishops appealed. ROA.2364-66. They filed a motion for a stay in the district court on June 18, ROA.2367-69, and an emergency motion for a stay in this Court. The district court granted the Bishops a 72-hour stay to appeal to this Court, ROA.2386. This Court then granted a stay pending appeal, and expedited the appeal.

On June 25, as it had promised at the June 13 hearing, Texas subpoenaed Allmon to testify at the trial.

SUMMARY OF THE ARGUMENT

This appeal concerns approximately 300 documents, almost all emails, that Plaintiffs seek to compel the Bishops to produce pursuant to a third-party subpoena. The documents contain private religious deliberations on theological and moral issues among the Bishops and their ministerial staff.

Plaintiffs have no right to—or need for—the documents.

First, their demand for the documents goes far beyond what they are empowered to ask for under the third-party subpoena provisions of Fed. R. Civ. P. 45. Their request creates an undue burden on the Bishops, as balanced against Plaintiffs' nugatory interest in obtaining the documents. Plaintiffs may wish to intimidate a witness for the State, but that

is hardly grounds to force the Bishops to turn over private, privileged religious deliberations, particularly when Plaintiffs already have thousands of pages of documents and have deposed the Executive Director of the Conference.

Second, requiring production of the Bishops' private religious deliberations would violate the Religious Freedom Restoration Act, because it would create a substantial burden on the Bishops' religious exercise of deliberating together in private regarding theological and moral issues surrounding abortion and the disposition of fetal remains. Full and frank discussions require privacy. Moreover, no one has identified any compelling governmental interest to be furthered by forcing the Bishops to turn over the contested emails, nor is such an order the least restrictive means available. The district court's holding that the Bishops waived their RFRA claim is simply mistaken.

Third, requiring production of the Bishops' private religious deliberations would violate the First Amendment by burdening the Bishops' rights of assembly, religious association, and petition, invading the Church's autonomy in violation of the Religion Clauses, and creating excessive entanglement between Church and State.

STANDARD OF REVIEW

A lower court's decision on a motion to quash a subpoena is reviewed for "abuse of discretion." *Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994). A "court abuses its discretion when its decision is based on an erroneous view of the law," and prejudices "the substantial rights of the appellant." *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 261 (5th Cir. 2011).

A lower court's decision to issue injunctive relief is also reviewed for abuse of discretion. *ODonnell v. Harris Cty.*, No. 17-20333, 2018 WL 2465481, at *3 (5th Cir. June 1, 2018). "[A]n injunction that 'is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue'" qualifies. *Id.* (quoting *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016)).

Moreover, this Court "has an obligation to 'make an independent examination of the whole record' in order to make sure that the judgment does not constitute a forbidden intrusion" on First Amendment rights. *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 491-92 (5th Cir. 2013) (citation omitted).

ARGUMENT

I. Requiring production of the Bishops' private religious deliberations violates Rule 45(d).

At the June 13 hearing, Plaintiffs admitted their ultimate objective in seeking production of the Bishops' private religious deliberations: witness intimidation. They don't want Allmon to obey the State of Texas's subpoena to testify at trial, and so are using irrelevant and intrusive discovery demands to coerce the Bishops. ROA.2985 ("If TCCB wants to keep its internal communications confidential, it can simply withdraw Ms. Allmon's testimony").

Whether one calls it a "strategic subpoena against public participation" or not, Plaintiffs' subpoena is a use of discovery tactics forbidden under Rule 45 that this Court should not countenance. If Plaintiffs think Allmon is an improper witness, they may move to strike her testimony. But they cannot abuse the subpoena power to engage in a proxy battle with Texas, and particularly not by punishing and intimidating the Bishops for allowing their official to testify regarding their public positions on a matter of some importance to their religious mission. *See*, *e.g.*, *Chapman & Cole v. Itel Container Int'l B.V.*, 116 F.R.D. 550, 557 (S.D. Tex. 1987) (imposing sanctions because party "abused the discovery process

by attempting to intimidate at least one nonparty witness"); *David v. Signal Int'l, LLC*, 257 F.R.D. 114, 122 (E.D. La. 2009) (protective order needed because production of documents cause litigant to "withdraw from the suit rather than produce such documents").

Aside from Plaintiffs' impermissible attempt at intimidation, there are three reasons why the district court's orders were an abuse of discretion. First, the district court failed to lift the significant undue burden placed on the Bishops' rights and interests, which was far from counterbalanced by Plaintiffs' interest in obtaining the remaining internal emails. Second, the court's order would compel the production of privileged or otherwise protected documents, the disclosure of which would irreparably harm the Bishops and violate First Amendment safeguards. Third, the district court failed to provide basic process in considering the Bishops' claims.

A. Requiring production of the Bishops' private religious deliberations imposes an undue burden that outweighs any probative value.

The district court committed reversible error by failing to properly balance the severe undue burden placed on the Bishops against the Plaintiffs' ephemeral interest in the Bishops' private religious deliberations.

Under Rule 45, a court "must" quash or modify a subpoena where it

would subject a person to an "undue burden." Fed. R. Civ. P. 45(d)(3)(A). The "scope of discovery through a Rule 45 subpoena is governed by Rule 26(b)," and thus Rule 45's undue burden analysis incorporates Rule 26's requirements against "irrelevance or overbreadth as reasons for quashing a subpoena." *Zamora v. GC Servs. LP*, No. 15-CV-00048, 2017 WL 1861843, at *3 (W.D. Tex. 2017). In determining undue burden, courts consider factors such as "the burden imposed"; the "breadth," "time period," and "particularity" of the subpoena; the "relevance of the information requested"; and the "need" for the information by the requesting party. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817-18 (5th Cir. 2004). Not all of the factors are necessary. For instance, facial overbreadth alone "presents an undue burden." *Id.*

Here, *all* of the *Wiwa* factors weigh heavily in the Bishops' favor, not least because undue burden analysis "requires" courts to be especially "sensitive to the costs imposed on third parties" who have been subpoenaed. *See Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) ("concern for the unwanted burden thrust upon non-parties" is entitled to "special weight in evaluating the balance of competing needs" under Rule 45 (citations omitted)); *accord Wiwa*, 392 F.3d at 818.

First, the subpoena is facially overbroad. It seeks documents that are irrelevant to the case (such as all communications the Bishops have ever had with certain Texas officials on any subjects), its facial scope spans the entire 50-year life of the Conference, and it would require hundreds of work hours and over a million dollars to comply with. RE.57, 63 ¶ 6.

The subpoena violated Rule 45 from the day it was issued. Under Rule 45(d)(1), counsel for Plaintiffs were "responsible for" the subpoena, and thus "must" have taken reasonable steps "to avoid imposing undue burden or expense on a person subject to the subpoena." *See also Theofel v. Farey Jones*, 341 F.3d 978, 984 (9th Cir. 2003) ("The subpoena power is a substantial delegation of authority to private parties," who "have a grave responsibility to ensure it is not abused."). Moreover, the district court "*must* enforce a party or attorney's duty to avoid imposing undue burden . . . and *must* impose an appropriate sanction[]" where they fail to comply. *Bentley v. LCM Corp.*, No. 08-1017, 2010 WL 3705234, at *3 (W.D. La. 2010) (emphasis in original).

Plaintiffs' facially overbroad subpoena should not have been issued nor allowed to be used as leverage over the Bishops to force 100 hours of staff time and $20,000 in attorney's fees to run burdensome searches.

RE.65-66 ¶ 10. The district court's failure to quash the subpoena due to facial overbreadth was thus reversible error, as was its failure to transfer the costs of compliance to Plaintiffs. *Legal Voice v. Stormans, Inc.*, 738 F.3d 1178, 1184-85 (9th Cir. 2013) ("cost shifting [is] mandatory in all instances in which a non-party incurs significant expense from compliance with a subpoena"; $20,000 constitutes significant expense); *Cohen v. City of New York*, 255 F.R.D. 110, 123 (S.D.N.Y. 2008) (requiring cost-shifting).

Moreover, the Plaintiffs have taken *no action* to withdraw all or part of the March 21 subpoena or to reissue a narrower subpoena. Instead, their June 12 opposition to the motion to quash was the first time they stated any willingness to do so at some unspecified point in the future. That means that the *operative* subpoena is still the vastly overbroad one that they first served on the Bishops on March 21, 2018. That Plaintiffs still have not formally withdrawn or narrowed the subpoena even after the dispute has reached this Court speaks volumes.

Second, even after Plaintiffs stated in their June 12 opposition and at the June 13 hearing that they could narrow the subpoena somewhat, it still imposed an undue burden. The subpoena impermissibly:

- Cost 100 work hours and $20,000 in attorney's fees. RE.65-66 ¶ 10; *see, e.g.*, *Beinin v. Ctr. for Study of Popular Culture*, No. C 06-2298, 2007 WL 832962, at *5 (N.D. Cal. 2007) (rejecting 40 hours and $11,000 in attorney's fees).

- Forced the Conference to delay and miss ministry opportunities. RE.60 ¶ 7; RE.80 ¶ 30; RE.84-86 ¶¶ 9-18.

- Forced the Conference to review and disclose thousands of pages of its external communications, and sought forced disclosure of thousands of pages of *internal* communications, to a public policy opponent. RE.64 ¶ 8; RE.85 ¶¶ 11-12; *Chevron Corp. v. Donziger*, No. 13-MC-80038, 2013 WL 1402727, at *2-3 (N.D. Cal. 2013) (expressive association's forced disclosure "to an opponent" created severe burden).

- Forced the Conference to turn over communications that it had received from other Catholic ministries, which severely chilled its relationships with them. RE.86 ¶ 17; *Chevron*, 2013 WL 1402727, at *2-3.

- Created a chill on the Conference's internal activities and coordination in a variety of ways, such as:
    - Impeding information flow between Bishops, severely burdening their ability to make decisions together, RE.78 ¶¶ 14-19, RE.80-81 ¶¶ 29-37, RE.87 ¶ 20;
    - Requiring cancelation of internal ministry reports, RE.85-86 ¶ 15, and training materials, RE.86 ¶ 16;
    - Discouraging bishops and staff from engaging in other public policy activities, RE.80-81¶¶ 33-35;
    - Chilling participation of Catholic cemeteries in the Texas fetal remains registry, RE.86 ¶ 18; and
    - Undermining the Conference's ability to have frank dialogue to enhance deliberations, RE.78 ¶¶ 15-17, RE.80 ¶ 32, RE.81 ¶ 37, RE.87 ¶¶ 20-21.

All of those harms to the Bishops are cognizable, and severe, burdens

under Rule 45. *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1144 n.12 (9th Cir. 2009) (protecting "private internal . . . communications concerning the formulation of campaign strategy and messages"); *Chevron*, 2013 WL 1402727, at *2-3 (rejecting subpoena which would "severely chill debate and the exchange of information" within an expressive organization, leaving staff unable to "voice opinions, share strategies, brainstorm, or talk openly"); *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51-52 (D.D.C. 2005) (rejecting subpoena of amici in part because "imposing such a burden on amici would undoubtedly discourage entities from making amicus filings at all").

Third, the Bishops' internal communications are not relevant to Plaintiffs' claims. To the extent that the Bishops' participation in the registry is even relevant, the relevance is limited to the Bishops' current public actions and not their previous, private, prayerful deliberations about those actions. And Plaintiffs will have a full and fair opportunity to consider the Bishops' current public actions via cross-examination of Allmon as a witness at trial, as they did at the preliminary injunction hearing.

Moreover, Plaintiffs did not make a sufficient showing that the Bishops' internal deliberations could be relevant. *Cohen*, 255 F.R.D. at 117

(courts "should be particularly sensitive to weighing the probative value" of information demanded from a "nonparty"). The Bishops were originally asked about their involvement in the free/reduced-cost cemetery registry when cost was still a live issue in this case. But Plaintiffs have since stipulated that they are not challenging cost. RE.56. Thus, the relevant inquiry is how many cemeteries are available statewide, not just Catholic cemeteries. And according to Texas, there are hundreds of religious and secular cemeteries available, many times more than the 15 (or perhaps 10?) cemeteries that Plaintiffs are squabbling about now. RE.93:6-8.

Fourth, and relatedly, there is no *need* for production of the internal documents. Plaintiffs have obtained over 4,000 pages of the Bishops' documents, which represent *all* responsive public statements and *most* responsive private statements made by the Conference to *anyone* in the last two years about the fetal remains program. *See Colonial BancGroup, Inc. v. PricewaterhouseCoopers LLP*, 110 F. Supp. 3d 37, 42 (D.D.C. 2015) (quashing subpoena where "the documents Defendants seek in addition to those already offered . . . are likely to be 'unreasonably cumulative or duplicative'"). Further, Plaintiffs have already deposed Allmon and ob-

tained her testimony on each of the matters they said they wished to examine. *Phillips & Cohen, LLP v. Thorpe*, 300 F.R.D. 16, 18 (D.D.C. 2013) (undue burden if information "obtainable from some other source"). For instance, Plaintiffs' theory below was that the internal communications are necessary to allow them to determine whether the Bishops remained committed to the free/low-cost burial ministry. ROA.2984-85 at 24:15-25:23. That question was squarely asked and answered at Allmon's deposition. Allmon Dep. 15:13-16:8. Likewise, Plaintiffs complain that they do not know why more cemeteries have not lined up to participate in the program that they have had enjoined. But Plaintiffs already have their answer to that, too: namely, that Plaintiffs' string of injunctions have made signing up for the registry less urgent. ROA.2990 at 30:8-16; *see also* Allmon Dep. 45:14-46:19. Plaintiffs' subpoenas against the cemeteries that *did* sign up also discouraged other cemeteries from doing the same. RE.86 ¶ 18. Plaintiffs have already received far more from the Bishops than they need.

That all goes to another reason why the district court abused its discretion: instead of requiring Plaintiffs to conclusively *show* both relevance and need for the documents, the district court allowed them simply

to *assert* as much. Never mind that Plaintiffs did not submit the 4,000-plus pages of documents for the court's review, nor that the deposition transcript was unavailable when the district court issued its ruling. The district court committed reversible error by failing at a basic function: not holding the Plaintiffs to their burden of proof.

Fifth, the district court abused its discretion because, even assuming the demanded confidential deliberations were conceivably relevant, Plaintiffs did not show a need for them that overbalanced the harm to the Bishops. *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 925 (8th Cir. 1999) ("discovery is not permitted" in such circumstances). Indeed, where subpoenaed documents contain "highly sensitive and confidential information," a court should not compel disclosure without a showing of "*substantial* need" for them. *In re Stewart Title Co.*, No. H-09-247, 2009 WL 1708079, at *2 (S.D. Tex. June 17, 2009) (emphasis supplied). This is particularly true for a "non-party who would be entrusting the confidentiality of its documents to parties who do not represent its interests" and are its "direct competitor." *Id.* The documents at issue here are both sensitive and confidential, some so much so that only senior Conference staff can even view them.

RE.85¶ 12; *see also Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004) ("fierce emotions" over abortion were "combustible" and cautioned against the release of sensitive documents). Plaintiffs did not come close to showing a substantial need to obtain the Bishops' confidential deliberations and thus review what even some Conference staff cannot.

Sixth, courts must consider the "cumulative impact" of requiring compliance with a particular subpoena. *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007). Requiring production here would create a perverse incentive for parties to seek discovery into the Bishops' internal governance, as well as the internal affairs of other religious groups, resulting in increasing entanglement and other church-state conflicts "that follow in the train of . . . legal processes." *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970); RE.80-81 ¶¶ 33-35.

Seventh, and finally, Rule 45 ought not be construed so as to "give rise to serious constitutional questions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979). If there is any interpretation "'fairly possible by which the question may be avoided'" then the Court must take it. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

B. The subpoena would require disclosure of privileged or protected internal church communications.

A subpoena also must be quashed if it "requires disclosure of privileged ***or other protected*** matter." Fed. R. Civ. P. 45(d) (emphasis added). This includes subpoenas that would chill First Amendment rights, since "the First Amendment prevents use of the power to investigate enforced by the contempt power." *DeGregory v. Att'y Gen. of State of N.H.*, 383 U.S. 825, 829 (1966). As we explain below, compelled disclosure of private religious deliberations severely harms a constellation of First Amendment rights, including rights to freedom of assembly and church autonomy, as well against government entanglement in religion. *See* Section III *infra*. "[E]videntiary privilege is a necessary prophylactic" to protect sensitive First Amendment interests. *United States v. Craig*, 528 F.2d 773, 778 (7th Cir. 1976); *In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 188 (Tex. 2007) (evidentiary privilege for First Amendment interests "advance[s] a greater societal good").

These exemptions have been applied broadly to protect the weighty interests at stake. *See, e.g.*, *Scott v. Hammock*, 133 F.R.D. 610, 619 (D. Utah 1990) (First Amendment interests counseled interpreting priest-

penitent privilege to quash subpoena for internal religious communications); *Ellis v. United States*, 922 F. Supp. 539, 543 (D. Utah 1996) (same). That is especially true when, as here, forced disclosure "could interfere seriously with . . . religious duties and objectives." *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 77 (1st Cir. 1979).

Indeed, because of the importance of the First Amendment interests at stake, the scope of this privilege must be *broader* than the analogous deliberative process privilege enjoyed by the government. "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9, (2001) (internal citation omitted). Since freedom of religion is more important than "enhanc[ing] the quality of agency decisions," the ecclesiastical deliberative process privilege must perforce be broader.

C. The district court failed to afford the Bishops adequate process.

Finally, the district court should be reversed because it failed to provide even minimum process in considering the Bishops' motion to quash. Where a district court's procedural approach "deni[es] the [opposing party] an opportunity to be heard," this Court "may reverse the district court on these grounds alone." *Texas Keystone, Inc. v. Prime Nat. Res., Inc.*, 694 F.3d 548, 555 (5th Cir. 2012) (quotation omitted).

Here, the magistrate and the district court denied the Bishops an opportunity to receive adequate consideration of their motion. *Compare* ROA.2064 (setting abbreviated schedule for motion to quash) *with* W.D. Tex. Local Rule CV-7(e) & (f) (normal schedule); *compare also* ROA.2277 (setting 24-hour deadline for appeal to district court) *with* W.D. Tex. Local Rules, Appendix C, Rule 4(a) (normal 14-day schedule). Moreover, at noon on a Sunday, while many of the Bishops were still in church celebrating Mass, the district court ordered the Bishops to produce the contested documents in their entirety within 24 hours. RE.54-55.

The lower court's rushed disposition prejudiced the Bishops, both because it did not offer them adequate opportunity to brief the issues, but also because it led the district court to make plain errors. Most obviously,

the district court wrongly concluded that the Bishops' RFRA defense had been waived even though it was fully briefed. *See* Section II.B *infra* (explaining court's waiver error).

Given the core constitutional and civil rights at stake, it is surprising that the only reason the court gave for its extreme haste was a mid-July *bench* trial date. RE.96. Of course courts must be allowed to control their dockets. But a bench trial setting cannot become an *idée fixe* at the expense of basic constitutional protections.

II. Requiring production of the Bishops' private religious deliberations would violate RFRA.

A. Requiring production of the Bishops' private religious deliberations would constitute government imposition of a substantial burden on the Bishops' religious exercise.

The district court's actions here easily qualify as a "substantial burden" on the Bishops' "exercise of religion." 42 U.S.C. § 2000bb-1.

The first step in making out the religious claimant's case under RFRA is to "outline" the religious exercise at issue. *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 259 (5th Cir. 2010) (applying rubric of the broadly parallel Texas RFRA). Here, the Bishops' private group deliberations over fundamental questions of theology, morals, and

ethics is a quintessential religious exercise. As in many religious traditions, internal deliberations among Catholic leaders guided by prayer have been foundational to the most important theological developments in the Catholic Church, from the Council of Chalcedon to the Second Vatican Council. RE.82 ¶ 39. This religious exercise requires the freedom to deliberate privately, with God and one another, and to determine when and how the fruit of internal religious deliberations ought to be communicated to the Church at large and to the public. RE.88 ¶¶ 23-25. By contrast, forcing religion to become a "reality show" with the cameras always on would be a recipe for inauthentic religion. The still small voice of conscience cannot be formed under klieg lights.

Second, the Court must identify the substantial burden being imposed on the religious exercise. A substantial burden exists when the government "truly pressures the adherent to significantly modify his religious behavior," *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), or imposes a significant cost to avoid violating belief. *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013). Here, having to turn over the Bishops' private deliberations about how to deal with the issue of abortion in public life is both a retroactive burden on the prior discussion and a chill on

future communication. RE.80-81 ¶¶ 29-38; RE.88 ¶ 25.

Prospectively, the Conference faces contempt of court if it does not comply with the subpoena. Forcing the Conference to choose between obeying a court order and protecting its internal religious deliberations is a substantial burden. *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."). Retrospectively, the Bishops have already incurred over $20,000 in legal costs to avoid having to turn over internal documents, not to mention Conference employees' time. RE.65 ¶ 10.

For these reasons, the Third Circuit has recognized that a subpoena can be a substantial burden under RFRA. *In re Grand Jury Empaneling*, 171 F.3d 826, 835 (3d Cir. 1999) (in criminal case, to "enforce a . . . subpoena over a RFRA objection," it must be "necessary to serve a compelling state interest"). Other courts have likewise found that discovery can violate RFRA. *Perez v. Paragon Contractors Corp.*, No. 13-CV-281, 2014 WL 4628572, at *3-4 (D. Utah Sept. 11, 2014) (sustaining subpoenaed witness's RFRA objection to questions about internal church affairs); *see also Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531 (9th Cir. 1997), *overruled*

on other grounds, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (prison's secret taping of criminal confession violated priest's RFRA rights).

Finally, both enforcement of the subpoena and the district court's separate production order are acts of the *government*. *See* 42 U.S.C. § 2000bb-2 (defining "government" as a "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States"); *In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996) (RFRA applies to "implementation of federal bankruptcy law" by "federal courts," which "are a branch of the United States"). Government is thus imposing a substantial burden on the Bishops' religious exercise.

B. Requiring production of the Bishops' private religious deliberations is not the least restrictive means of furthering a compelling governmental interest.

To justify the subpoena or the district court's separate production order, Plaintiffs would have to show that they further a compelling governmental interest, and are the least restrictive means of pursuing that interest. *Tagore*, 735 F.3d at 330. Only "interests of the highest order" are considered compelling. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). And "RFRA requires the government to explain" the compelling interest "*to the person* whose sincere exercise of

religion is being seriously impaired," not just in the abstract. *Id.* (emphasis added). Thus far, neither Plaintiffs nor the district court have even attempted to identify any compelling governmental interest.

Plaintiffs also founder on the "exceptionally demanding" least-restrictive-means prong, under which government "must" use any available less restrictive means. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). Here, the Bishops have submitted over 4,000 pages of responsive documents, and Allmon has testified about the "factual" questions Plaintiffs and the district court have identified as relevant. RE.85 ¶ 11, RE.94; *Mockaitis*, 104 F.3d at 1530. Plaintiffs have not identified what marginal need they have to gain access to the internal deliberations of the Bishops. *See also supra* Part I.A.

The sole rationale identified by Plaintiffs and the district court for ignoring RFRA was a supposed waiver. ROA.2338 n.9; RE.44-45. But in its rush to rule, the district court got this wrong. The Bishops expressly raised RFRA as a defense in both their initial and renewed motion to quash. *See* RE.60 ¶ 7; RE.65 ¶ 9; *see also* RE.69 ¶ 5 (Bishops' objections to subpoena, raising RFRA). More importantly, it was the district court's own orders that created the substantial burden, so the magistrate could

not have passed on the RFRA claim. In any case, there is a presumption against waiver of RFRA rights. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). Ignoring a fully-briefed RFRA argument was an abuse of discretion.

III. Requiring production of the Bishops' private religious deliberations would violate the First Amendment.

Requiring production of the Bishops' private religious deliberations would violate the First Amendment in three ways: by limiting the Conference's freedoms of assembly, association, and petition; intruding into internal church affairs; and entangling church and state.

A. Requiring production of the Bishops' private religious deliberations would violate the Bishops' rights of assembly and association.

1. The Bishops made a prima facie showing that production of the Bishops' private religious deliberations would chill their assembly and association rights.

"It is beyond debate that" the First Amendment protects not just the right of individuals to advocate their points of view in public but also the "freedom to engage in association" with others "for the advancement of beliefs and ideas." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449,

460 (1958). This right—textually grounded in the First Amendment's Assembly Clause but often referred to as the "freedom of association"—protects the right of "persons sharing common views [to] band[] together to achieve a common end." *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294-95 (1981); *see also* Michael W. McConnell, *Freedom By Association*, First Things (Aug. 2012), https://bit.ly/2Ii6FQ5 ("Freedom of assembly or association is necessary to protect the seedbed of free speech: the group that plans and guides the speech."). The freedom of association thus prohibits "direct" governmental action "restrict[ing] the right of [persons] to associate freely." *Patterson*, 357 U.S. at 461. It also protects against "governmental action which, although not directly suppressing association, nevertheless" has "the effect of curtailing the freedom to associate." *Id.* at 460-61.

This right can be triggered by enforcement of discovery requests requiring a protected group "to disclose certain associational information when disclosure may impede future collective expression." *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 479 (10th Cir. 2011); *see also, e.g.*, *Perry*, 591 F.3d at 1160 ("Disclosures of political affiliations and activities that have a deterrent effect on the exercise of

First Amendment rights are . . . subject to . . . exacting scrutiny") (internal quotation marks omitted); *AFL-CIO. v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) ("[W]here . . . the [government] compels public disclosure of an association's confidential internal materials, it intrudes on the privacy of association and belief guaranteed by the First Amendment[.]") (internal quotation marks omitted). Indeed, *Patterson*, "[t]he seminal" freedom-of-association case, *Motor Fuel*, 641 F.3d at 479-480, involved just this scenario.

In *Patterson*, Alabama sought discovery of the NAACP's membership lists, but the Supreme Court held that enforcing this discovery request would violate the freedom of association. 357 U.S. at 451, 460-66. That would "affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate," because the NAACP had shown that "revelation of the identity of its rank-and-file members" could "induc[e] members to withdraw . . . and dissuade others from joining." *Id.* at 462-63. Given this chilling effect, the compelled disclosure had to satisfy "the closest scrutiny." *Id.* at 460-61.

Discouraging group membership is not the only way a compelled disclosure can unconstitutionally chill association rights. *E.g.*, *Perry*, 591 F.3d at 1163 ("identifying two ways in which compelled disclosure . . . can deter protected activities," and clarifying that this is not "an exhaustive list"). Instead, the freedom of association protects against compelled disclosures that the association shows would in any way "make it more difficult for members of [the] association to foster their beliefs." *Motor Fuel*, 641 F.3d at 489-90. Importantly here, this includes disclosures that would "stifle full and frank discussions within and among" the association and its members. *Id.* at 490; *see also Perry*, 591 F.3d at 1163 (requisite chilling effect exists when disclosure would "mut[e] the internal exchange of ideas"); *AFL-CIO*, 333 F.3d at 177 (same, when disclosure would "frustrate . . . groups' decisions as to how to organize themselves [and] conduct their affairs, . . . as well as their selection of a message and the best means to promote that message" (internal quotation marks omitted)).

Perry illustrates the point. There, same-sex couples challenged California's traditional-marriage law, then sought to have the proponents of

the ballot initiative that resulted in the law turn over their "internal campaign communications relating to campaign strategy and advertising." 591 F.3d at 1152. The Ninth Circuit held that compelling these disclosures would violate the "First Amendment privilege" recognized in *Patterson*. *Id.* at 1159-65. "Implicit in the right to associate with others to advance one's shared political beliefs" "is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Id.* at 1162. The proponents had thus made a "prima facie showing" that compelled disclosures would chill this component of their association rights, because they had presented declarations stating that they would be "less willing to engage in" internal communications about "political and moral" issues if they knew that those private deliberations would ultimately be subject to disclosure. *Id.* at 1163. The "evidentiary burden" therefore "shift[ed] to the plaintiffs to demonstrate a sufficient need for the discovery to counterbalance th[e First Amendment] infringement." *Id.* at 1164.

Here, too, the association right threatened is the Bishops' ability to "exchange ideas and formulate [their] message[] in private." *Id.* at 1162. And here, too, the Bishops have "made a prima facie showing of arguable First Amendment infringement by demonstrating consequences which

objectively suggest an impact on, or chilling of, associational rights." *Id.* at 1163 (internal quotation marks omitted). The district court correctly concluded as much. RE.51.

The declarations submitted by the Bishops, RE.75-88, explain in detail the importance of private internal email deliberations for the Bishops in "reach[ing] consensus . . . and decid[ing] the theological positions and ministry-related actions of the" Catholic Church in Texas, including on "matters of public policy." RE.76-78; *see also* RE.87. They also explain in detail the ways in which "the prospect of being compelled to divulge . . . internal deliberations" regarding the Church's ministry would undermine "the openness, frankness, and effectiveness of" the Bishops' "decision-making" about the Church's affairs, forcing them to "curtail[] written communications" when attempting to determine how to "express [their] faith" on sensitive public-policy issues. RE.78, 80-82; *see also* RE.86-88 (describing threat to "the efficiency of the deliberations" and Bishops' "vibrant group give-and-take"). That is exactly the kind of chilling effect on internal group deliberation that the First Amendment forbids.

2. Required production of the Bishops' private religious deliberations would also chill their petition rights.

The right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights," *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 517 (2002), and although it may share "common ground" with other First Amendment guarantees, it is not "equivalen[t]" to them. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011); *see also, generally,* Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986) ("confin[ing] the First Amendment petition guarantee" to the scope of other First Amendment rights violates "the Framers' intent"). Plaintiffs subpoenaed the Bishops because they testified in favor of a bill. Dragging the Bishops into court in retaliation, and requiring them to reveal their internal deliberations would plainly discourage petitioning, eliminating the "breathing space essential to" the petition right's "fruitful exercise." *BE & K*, 536 U.S. at 531 (internal quotation marks omitted).

Moreover, the Bishops' case is strengthened because they are a particular type of First Amendment-protected association: a religious organization. Because the First Amendment gives "special solicitude" to religion, the Supreme Court has recognized that religious organizations have

even greater rights to associational autonomy than "a labor union . . . or a social club." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012). Religious organizations' heightened "independence" "from secular control or manipulation" should also inform this Court's analysis of the Bishops' petition and freedom-of-association arguments. *Id.* at 186; *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1136 (10th Cir. 2013) (en banc) ("the Religion Clauses add to the mix when considering freedom of association.").

3. Plaintiffs failed to prove that the infringement was the least restrictive means of advancing a compelling interest.

Once the objecting party demonstrates that compelled disclosure would chill associational rights, the burden shifts to the party seeking disclosure to show that it serves a "compelling" interest and is "the least restrictive means of obtaining the [desired] information." *Perry*, 591 F.3d at 1161 (internal quotation marks omitted). This is a balancing test designed to ensure that, "[w]hen First Amendment interests are at stake, [parties seeking disclosure] use a scalpel, not an ax." *Ealy v. Littlejohn*, 569 F.2d 219, 228 (5th Cir. 1978) (internal quotation marks omitted). The

district court concluded that disclosure was required despite the infringement on First Amendment rights because the Bishops' interest in avoiding disclosure was "relatively weak," while "Plaintiffs present[ed] a strong interest in obtaining the internal emails." RE.52. That is exactly backwards.

First, the district court said that "[t]here is no indication [the Bishops'] members will withdraw their membership" or change their public position on abortion if forced to make the disclosures. *Id.* But the chilling effect here is not that the Bishops will stop being bishops or disregard Catholic teaching on abortion; it is that they will be impeded in having frank, private discussions about the theology and morals of abortion and their mission in the context of particular policy issues like the fetal remains law. RE.78, 80-82, 86-88. That, again, is a chilling effect cognizable under the First Amendment. *Perry*, 591 F.3d at 1163 (First Amendment protects against disclosure that "would have the practical effects" of "inhibiting internal campaign communications that are essential to effective association and expression"); *see also Motor Fuel*, 641 F.3d at 489-90 (First Amendment protects against not just disclosures that would "deter membership" but also those that would "hinder [group members'] ability

to communicate among themselves regarding legislative policy"). And undisputed testimony shows that this chilling effect is not only "likely," *Patterson*, 357 U.S. at 462-63, but has already occurred. RE.80 ¶ 32 ("[b]ecause of the subpoena, we have curtailed our written communications regarding [the fetal remains] ministr[y.]"), RE.86 ¶ 17 (since the subpoena, "there has been a dramatic reduction in the sharing of ministry resources and strategy"); *see also supra* Section I.A.

The district court is even less convincing with respect to Plaintiffs' interests. To trump the Bishops' First Amendment rights, Plaintiffs would have to show that the information sought is "highly relevant—a more demanding standard of relevance than that under" Rule 26. *Perry*, 591 F.3d at 1161. Further, Plaintiffs would have to show that the subpoena is "absolutely necessary" for them to obtain the information. *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980). This test is not met if Plaintiffs could "obtain . . . the information . . . from other sources, without intruding on protected activities," *Perry*, 591 F.3d at 1164-65.

Here, as explained above, the Bishops' *internal* religious deliberations are not relevant at all, much less "highly relevant." To the extent Plaintiffs need information about the Bishops' *external* actions, including with

respect to participation in the cemetery registry, they can seek that information from Texas, in the external documents already produced, or in Allmon's testimony. *See id.* at 1164 (plaintiffs could seek "all communications actually disseminated to voters," rather than obtaining the internal deliberations "over strategy and messaging" that led to those communications).

And even if it were remotely plausible that the disclosures sought here were the least restrictive means for Plaintiffs to get the registry information, the district court relied only on Plaintiffs' representations, *see* RE.52 (citing ROA.2336-37). Disclosing "materials of a delicate nature . . . representing the very heart of the [subpoenaed] organism which the first amendment was intended to nurture and protect" on Plaintiffs' say-so was an abuse of discretion. *AFL-CIO*, 333 F.3d at 179.

B. Requiring production of the Bishops' private religious deliberations would intrude on internal church affairs in violation of the Religion Clauses.

The First Amendment's Religion Clauses protect "the right of religious organizations to control their internal affairs." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012). The Bishops' right to

private internal deliberations is unnecessarily threatened by the subpoena.

The church autonomy right stems from both the Establishment and Free Exercise Clauses, which together "radiate a spirit of freedom for religious organizations, an independence from secular manipulation or control" that places "matters of church government and administration beyond the purview of civil authorities." *McClure*, 460 F.2d at 559-60 (citation omitted). Church autonomy protects not just the selection of religious leaders, but also the ability to be "free from state interference" in "matters of church government as well as those of faith and doctrine." *Cannata*, 700 F.3d at 172 (internal quotation omitted); *Hosanna-Tabor*, 565 U.S. 171 (protections of membership, property, and other internal church governance).

One crucial application of this doctrine is to safeguard internal church deliberations and decision-making. Indeed, "[t]he church autonomy doctrine is *rooted* in protection of the First Amendment rights of the church to discuss church doctrine and policy." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002) (emphasis supplied).

Courts emphatically forbid any "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190.

This Court has recognized that this principle guards against two types of concerns, either of which "alone is enough to bar the involvement of the civil courts." *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). The first concern arises where the investigation itself "would necessarily intrude into church governance in a manner that would be inherently coercive," even if the alleged subject of inquiry "were purely nondoctrinal." *Id.* Here, using the judicial subpoena power to compel "investigation and review of such matters of church administration and government . . . could only produce by its coercive effect the very opposite of the separation of church and State contemplated by the First Amendment." *McClure*, 460 F.2d at 560.

Churches facing such probes would inevitably make internal church decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d

1164, 1171 (4th Cir. 1985) (Wilkinson, J.). That would reflect an unconstitutional "chilling of the decision making process" for churches. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1264 (10th Cir. 2008) (McConnell, J.); *accord C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007) (same).

That is precisely what happened here: the "Bishops and staff" are "reticent to communicate or share documents electronically" due to the chill caused by Plaintiffs' subpoena. RE.65 ¶ 9. Internal church decision-making has suffered. RE.80 ¶¶ 29-33; RE.85-86 ¶¶ 14-19. So will future decisions, as the Bishops are concerned that engaging in the public square on other matters (such as immigration policy) may again open their internal deliberations to subpoenas. RE.80 ¶¶ 32-35; RE.88 ¶¶ 20-25.

The second concern is that "secular authorities would be involved in evaluating or interpreting religious doctrine." *Combs*, 173 F.3d at 350. The district court held that the Bishops' internal communications are not sufficiently religious or sensitive to merit protection. RE.37 n.2; RE.48. But that is itself a forbidden evaluation of religious doctrine. One person's discussions about "providing healthcare services," RE.47, are to others matters of import that *inherently* have a "religious focus." RE.79-80

¶¶ 26-29; *accord* RE.64-65 ¶ 8; *contra* RE.37 n.2. Indeed, by what criteria or authority can a judge gainsay what the Bishops believe would "embarrass the church"? RE.37 n.2; *see Weaver*, 534 F.3d at 1265 (government "has neither competence nor legitimacy" in such matters); *Tagore*, 735 F.3d at 328 (examining religious beliefs requires "a light touch" and "judicial shyness"); RE.64-65 ¶ 8 (disclosure could cause "confusion and dispute within the Catholic Church").

Courts have thus repeatedly refused to allow governmental inquiries into internal church affairs. For example, the First Circuit rejected the government's "compelled disclosure" of a church school's records, finding that the church's "ability to make decisions" regarding its "mission of religious education" would suffer "chilling" and be "substantially infring[ed]." *Surinach*, 604 F.2d at 78. In so holding, the First Circuit rejected the reasoning that compelled disclosure was allowed "because the information solicited did not probe into doctrinal matters." *Id.* at 76. *See* RE.37-38 & n.2 (subpoena goes to "a fact issue, not one of religion;" documents "have no religious focus"). *See also Baldwin v. C.I.R.*, 648 F.2d 483, 487 (8th Cir. 1981) ("disclosure of certain information will infringe upon a church's First Amendment freedoms").

Similarly, the D.C. Circuit rejected an NLRB inquiry procedure that allowed it to require religious schools to answer questions about their "curricular and policy choices and policies," *Weaver*, 534 at 1264, and 're-spond to doubts'" about their religious devotion. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002).[9]

The district court relied on *Ambassador College v. Geotzke* to reject these arguments. 675 F.2d 662, 664 (5th Cir. Unit B 1982). There, in a dispute over fraud regarding a deed, the Fifth Circuit required the religious college to produce financial information over First Amendment objections. *Id.* at 663. The Court held that the case presented "no danger of government seeking to monitor or regulate a religious group," and that "questionable actions, bordering on fraud," exposed the college to such

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[9] *See also Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 787 F. Supp. 689, 699 (W.D. Tex. 1992), *rev'd on other grounds* 986 F.2d 962 (5th Cir. 1993) (rejecting attempt by Texas to demand church's internal records, finding that Texas lacked "constitutional authority to probe into the internal operations of a church"); *Bangor Baptist Church v. State of Me., Dep't of Educ. & Cultural Servs.*, 549 F. Supp. 1208, 1222-23 (D. Me. 1982) (rejecting state demand of "informational requirements pertaining to [church] school finances, tuition policies, and educational philosophy"); *In re Deliverance Christian Church*, No. 11-62306, 2011 WL 6019359, at *5 (N.D. Ohio Dec. 1, 2011) (recognizing First Amendment privilege protecting church's internal information from discovery); *Christ Covenant Church v. Town of Sw. Ranches*, No. 07-60516-CIV, 2008 WL 2686860, at *6 (S.D. Fla. June 29, 2008) (same).

discovery. *Id.* at 664-65.

Geotzke is distinguishable. First, there is no argument in this case that the Bishops are insincere in their beliefs or that, as a third-party witness, they are somehow engaged in fraudulent behavior. Second, this case, unlike *Geotzke*, would open the door to continued government monitoring and regulation. The Bishops would be subject to subpoenas in any situation—not only where fraud is alleged—but any time they seek to conduct their ministry in the public square. Third, the Fifth Circuit found that some of the requests in *Geotzke* did in fact implicate constitutional concerns, but that those requests were irrelevant, cautioning that "[t]rial courts should always be careful to screen out irrelevant, broad based discovery when the answers might implicate constitutional rights of a party." *Id.* at 665.

In sum, allowing the district court to require the Bishops to produce their internal religious deliberations would irreparably violate the Bishops' "first amendment immunity" from unconstitutional "burdens of litigation" that intrude on its internal affairs. *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011).

C. Requiring production of the Bishops' private religious deliberations would entangle church and state in violation of the Establishment Clause.

Forcing the Bishops to turn over their private religious deliberations to abortion clinics would violate the Establishment Clause's rule against entanglement between church and state twice over. It both exercises civil authority over the Bishops' internal religious deliberations and subjects the Bishops' internal religious deliberations to evaluation by the court.

The Supreme Court has long recognized that "state inspection" of religious organizations "is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971). "It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). Indeed, in authorizing production of the Bishops' private religious deliberations, the district court has already started to "inspect" internal religious documents of the church, "trolling through" them for the Bishops' internal deliberations on public issues. *See* RE.37 n.2 (determining whether documents would "embarrass" the church or "subject it to threats or reprisals").

Indeed, part of the reason for avoiding entanglement is to prevent

churches' "personnel and records" from "becom[ing] subject to subpoena . . . the full panoply of legal process designed to probe the mind of the church." *Rayburn*, 772 F.2d at 1171. This kind of entanglement can happen even in the absence of direct conflict between church and state. "[E]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." *Id.* (citation omitted). Thus, the magistrate's assessment of the documents reviewed in camera is of no moment for entanglement purposes; it jeopardizes the Bishops' autonomy all the same. The "very process of inquiry" into the Bishops' deliberations "impinge[s] on rights guaranteed by the Religion Clauses." *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (quoting *Catholic Bishop*, 440 U.S. at 502); *accord Bryce*, 289 F.3d at 658.

Requiring production also threatens "government involvement in . . . ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 189; *accord Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 426 (2d Cir. 2018) (forbidding "excessive entanglement with 'ecclesiastical decisions'"). That is especially likely where the church is a non-party suffering "the unwanted burden

thrust upon" it by a subpoena, whose privacy interests are thus entitled to "special weight." *Watts*, 482 F.3d at 509.

Requiring production of the Bishops' private religious deliberations would require the court to impermissibly "evaluate . . . competing opinions on religious subjects," *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (1996), and "weigh in on issues of Catholic doctrine and practice," *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). Indeed, that has already happened. *See* RE.37 n.2; RE.48 (characterizing religious communications between the Bishops as "routine discussions"); *see also New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."). The Bishops have already provided thousands of pages of relevant external documents; subjecting their private religious deliberations to review by a court overrides their decision about the nature and sensitivity of their internal communications.

* * *

Disputes over documents can have profound consequences. "Thomas More went to the scaffold rather than sign a little paper for the King." *E.*

Tex. Baptist Univ. v. Burwell, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of rehearing en banc), *panel opinion vacated and remanded*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). The Court should "avoid these ends by avoiding these beginnings." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

CONCLUSION

The district court's refusal to quash the subpoena and separate order requiring production of the Bishops' private religious deliberations should be reversed and remanded with instructions to quash.

Respectfully submitted,

/s/ Eric Rassbach
Eric C. Rassbach
Daniel H. Blomberg
Diana M. Verm
Daniel Ortner
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW,
Ste. 700
Washington, DC 20036
(202) 955-0095
erassbach@becketlaw.org

Steven C. Levatino
State Bar No. 12245250
steven@lpfirm.com
Andrew F. MacRae
State Bar No. 00784510
andrew@lpfirm.com
Levatino | Pace PLLC
1101 S. Capital of Texas Hwy.
Building K, Suite 125
Austin, Texas 78746
(512) 637-1581
(512) 637-1583 (Fax)

Counsel for Movant-Appellant Texas Catholic Conference of Bishops

CERTIFICATE OF SERVICE

I certify that on June 26, 2018, an electronic copy of this brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Bitdefender Endpoint Security and is free of viruses.

/s/ *Eric C. Rassbach*
Eric C. Rassbach

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2, it contains 12,973 words as determined by the word-count function of Microsoft Word 2013.

This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook 14 pt.) using Microsoft Word 2013.

/s/ Eric C. Rassbach
Eric C. Rassbach

Attorney for Appellant

Dated: June 26, 2018

ADDENDUM

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

42 U.S.C. § 2000bb. Congressional findings and declaration of purpose

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it 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 interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. 2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

Federal Rule of Civil Procedure 26(b)

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Federal Rule of Civil Procedure 45(d)

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

* * *

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required*. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.