

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 18-50484

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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 SUR-  
GERY 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

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Appeal from the United States District Court  
for the Western District of Texas

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(Filed Jul. 15, 2018)

Before JONES, COSTA, and HO, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This is an emergency appeal from an extraordinary discovery order by the district court to a religious body. The court compelled document production of the group's internal communications despite its status as a non-litigant and its voluntary furnishing of substantial discovery materials. Because the trial date looms, and with the benefit of full briefing from both parties, we elect to consolidate the Appellant's motion to stay, along with the Appellees' motion to dismiss this appeal, with a determination of the merits of the discovery order. We REVERSE the court's order denying the Appellant's motion to quash and compelling further document discovery.

### **BACKGROUND**

The Texas Conference of Catholic Bishops ("TCCB") is an unincorporated ecclesiastical association that furthers the religious ministry of the Roman Catholic Bishops and Archbishops in the State of Texas. Catholic Bishops communicate through TCCB to determine how the Catholic Church should address various moral, theological, and social issues, including abortion policy. The Catechism of the Catholic Church teaches that the dignity of all human life demands respect and that abortion is gravely sinful. *See* Catechism of the Catholic Church §§ 2270-75.

In August 2016, Jennifer Allmon, TCCB’s Executive Director, voluntarily testified in administrative proceedings in favor of amending state regulations regarding the disposal of embryonic and fetal tissue. Proposed by the Texas Department of State Health Services (“DSHS”), the new regulations would prohibit disposing of fetal remains in a landfill or sewer, as had been earlier allowed. *See* 41 Tex. Reg. 9709-41 (2016). Ms. Allmon’s written and oral testimony communicated the Bishops’ conviction that fetal remains should be disposed of with respect.

Because a primary objection to the new regulations was the increased cost of interment, the Bishops considered facilitating free burials for fetal remains.<sup>1</sup> On December 12, 2016, TCCB announced that it would work with Catholic cemeteries and funeral homes throughout Texas to offer free common burial<sup>2</sup> services to fetal remains produced as a result of abortions.

In late 2016, the plaintiffs—several Texas health care providers licensed to perform abortions in the state—challenged the fetal remains regulations pursuant to 42 U.S.C. § 1983. The plaintiffs alleged, *inter alia*, that the costs imposed by the regulations would violate Due Process by burdening the rights of women seeking an abortion. The plaintiffs sought a temporary restraining order and preliminary injunction. The

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<sup>1</sup> Many dioceses in Texas already ran such burial ministries.

<sup>2</sup> Common burial is when the remains of multiple fetuses are collected and buried together in a single grave, which reduces the cost of burial.

district court granted the temporary restraining order on December 15, 2016 and scheduled a hearing on the preliminary injunction.

The plaintiffs argued, in part, that the fetal remains amendments would “make[] the availability of abortion services contingent on the ability and willingness of third-party vendors to bury or scatter the ashes of embryonic or fetal tissue at a non-prohibitive cost. . . . These options are prohibitively expensive.” In response, the State of Texas cited Ms. Allmon’s testimony as evidence that a “non-profit group is prepared to provide for the burial of fetal tissue from all health-care providers across the state without charge.”

Ms. Allmon testified at the preliminary injunction hearing, reiterating the Bishops’ moral views and their commitment to absorb the costs associated with the burial ministry without providing religious rituals associated with the burial unless a parent so requested. She also testified that the Bishops had authority to commit Catholic cemeteries to participate in this program. On January 27, 2017, the district judge granted the preliminary injunction, finding that some terms in the regulations were unconstitutionally vague and that the rules impermissibly burdened abortion access. The State appealed.

While the appeal was pending, the Texas legislature moved to enact a law specifying legitimate methods for disposing of fetal remains. Ms. Allmon again testified on behalf of TCCB in favor of these provisions. As part of a larger abortion-related bill—SB8—these

provisions were then signed into law in June 2017, set to take effect on February 1, 2018. *See* Tex. S.B. 8, 85th Leg., R.S., § 19(d) (2017).

The plaintiffs immediately moved to enjoin the new law. On January 29, 2018, the district court preliminarily enjoined the provisions of SB8 dealing with fetal remains disposal. The district court set a bench trial date for July 16, 2018 and referred discovery matters to a magistrate judge. On March 19, 2018, the parties stipulated that neither party would produce evidence concerning the cost of compliance with the challenged laws,” with the plaintiffs affirming that they “waive[d] any argument . . . that the monetary cost of compliance with the challenged laws contributes to their alleged unconstitutionality.” This stipulation allows the plaintiffs to avoid disclosure of any of their financial information. Ms. Allmon is currently identified as a trial witness on behalf of the state and will testify in her capacity as Executive Director of TCCB.<sup>3</sup>

On March 21, 2018, the eve of Holy Week for Christians, a period of intense religious devotional activity, the plaintiffs served TCCB with a third-party subpoena. The subpoena requested, in part, (1) “All Documents concerning EFTR [embryonic and fetal tissue remains], miscarriage, or abortion,” (2) “All Documents concerning communications between [TCCB] and current

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<sup>3</sup> Ms. Allmon and TCCB participated as a third-party witness voluntarily. However, on June 25, Texas subpoenaed Ms. Allmon to testify at the trial.

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,” and (3) “All documents concerning the Act, the Amendments, or this lawsuit.” The subpoena had no retrospective time limitation; made no exception for confidential internal or religious communications; and the return date of the subpoena was 9:00 a.m. on the Tuesday following Easter Sunday.

The Bishops filed their first motion to quash the subpoena and for a protective order on that Monday, April 2, 2018. They contended that the subpoena sought irrelevant evidence, that it violated the free exercise, freedom of speech, freedom of assembly, and freedom of petition guarantees of the First Amendment, that it violated the Religious Freedom Restoration Act (“RFRA”), and that it was unduly burdensome under Fed. Rule Civ. Pro. 45(d). The Bishops’ motion was initially denied without prejudice for a failure to meet and confer with the plaintiffs regarding the scope of the subpoena.

Following the denial of TCCB’s motion, counsel for TCCB and the plaintiffs met and conferred regarding the subpoena’s scope. The plaintiffs agreed to limit their request to the following search terms: SB8, SB 8, Fetal, Fetus, Embryonic, Embryo, Abortion, Aborted, Miscarriage, Unborn, and burial ministry. They also limited the documents requested to those sent or received by Ms. Allmon on or after January 1, 2016.

The Bishops maintained objections to these requests, but nevertheless conducted a search, which returned over 6,000 pages of records. The Bishops ultimately turned over to the plaintiffs 4,321 pages of records,<sup>4</sup> including responsive documents representing communications with third parties such as state officials, Catholic conferences in other states, and Catholic cemeteries participating in the burial ministry.

At a scheduling conference on Friday, June 8, the magistrate judge informed the Bishops that they must file any further motion to quash by 9 a.m. on Monday, June 11, and that the motion would be argued on Wednesday, June 13. Under this tight schedule, the Bishops renewed their objections under the First Amendment, RFRA, and Rule 45(d). At the June 13 hearing, the magistrate judge specified that the parties should limit the focus of their arguments to the free exercise and freedom of association issues.

The plaintiffs explained their need for the remaining documents—namely, the documents’ relevance for cross-examination purposes. The plaintiffs offered to withdraw their subpoena if Ms. Allmon withdrew as a voluntary witness. The Bishops produced a privilege log, identifying the documents—emails to or from Ms. Allmon—that it continued to withhold as privileged. The Bishops contended that the subpoena was an intimidation tactic to prevent TCCB from participating

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<sup>4</sup> TCCB estimates that, as of June 10, 2018, it had spent over 100 staff hours responding to the subpoena and accrued over \$20,000 in attorney’s fees and costs.

as a witness in the litigation. And they argued that the withheld documents were both privileged under the First Amendment and that the plaintiffs had no need for them. After the hearing, Ms. Allmon submitted to a three-hour deposition by the plaintiffs, during which they were able to ask about the facts relevant for trial.

The magistrate judge denied the Bishops' motion to quash later that day. Although the ordinary time to appeal such a denial is 14 days,<sup>5</sup> the district court *sua sponte* ordered the Bishops to file any appeal within approximately 24 hours. The court denied the Bishops' motion for an extension of time to file the appeal. The Bishops complied with the order and filed their appeal by noon on Thursday, June 14. The district court denied the appeal on Sunday, June 17, and ordered the Bishops to produce the remaining documents within 24 hours.

The Bishops appealed, filing a motion for a stay in the district court and an emergency motion for a stay in this court. The district court "generously" granted a 72-hour stay of its order, but this court also granted a stay pending appeal and set an expedited briefing schedule. On June 19, the plaintiffs moved this court to dismiss TCCB's appeal and to vacate the stay. The plaintiffs argued that this court lacked appellate jurisdiction to review the district court's pretrial discovery order. TCCB responded to the motion to dismiss on July 2.

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<sup>5</sup> See W.D. Tex. Local Rules, Appendix C, Rule 4(a).



## APPELLATE JURISDICTION

The plaintiffs contend that this court lacks appellate jurisdiction over this “interlocutory” discovery order. TCCB responds that because it is a third party to the litigation, it has no alternative avenue of appeal because having to await the conclusion of litigation by others, whenever and however that may occur, is out of its control and stymies its rights. Thus, while the court’s discovery order is not generally “final” within the contemplation of 28 U.S.C. § 1291, TCCB asserts its rights under the collateral order doctrine, which permits appeals of interlocutory decisions (a) that are conclusive, (b) that resolve important questions separate from the merits, and (c) that are effectively unreviewable on appeal from the final judgment. *Mohawk Industries v. Carpenter*, 558 U.S. 100, 106, 130 S. Ct. 599, 605 (2009). For several reasons, we conclude that we do have jurisdiction.

The standards of the collateral order doctrine are met here. There is no dispute that the district court’s discovery order was conclusive on TCCB, such that failure to comply with it may result in sanctions against TCCB or its witness. Further, the order resolves important and very novel issues separate from the merits of the litigation over the Texas statute concerning the disposal of fetal tissue remains. Finally, the plaintiffs do not have an answer to the argument that the consequence of forced discovery here is “effectively unreviewable” on appeal from the final judgment. Instead, they draw misplaced analogies.

First, they rely heavily, but inappositely, on *Mohawk Industries v. Carpenter*, in which the Supreme Court held that disputes over the discoverability of attorney-client communications are not subject to the collateral order doctrine. 558 U.S. at 114, 130 S. Ct. at 609. In *Mohawk*, the Court reasoned that as between parties, the appellate court can remedy erroneously ordered discovery by remanding the case for a new trial. *Id.* at 109, 130 S. Ct. at 606-07. From this standpoint, a discovery order breaching the attorney-client privilege is not “unreviewable on appeal.” This case is distinguishable: a new trial order can hardly avail a third-party witness who cannot benefit directly from such relief. *Mohawk* does not speak to the predicament of third parties, whose claims to reasonable protection from the courts have often been met with respect.

The Court also noted the general familiarity of courts with standards governing the attorney-client privilege, a fact that heightens courts’ ability to review materials for which privilege is claimed; mitigates the potential for lower court discovery errors; and lessens the novelty of the issues. *Id.* at 110, 130 S. Ct. at 607. This case, on the other hand, is practically *sui generis* from the standpoint of the type of discovery sought and the issues raised by TCCB. As discussed below, neither we nor the plaintiffs nor TCCB have found a case on point. TCCB’s claimed privileges, if applicable, go to the heart of the constitutional protection of religious belief and practice as well as citizens’ right to advocate sensitive policies in the public square, a square that embraces both the legislature and the courthouse.

Further, the courts have limited ability to assess the strength of religious groups' claims about their internal deliberations for purposes of monitoring discovery. Lacking guideposts from the legal arena, any such judicial attempt risks tension with the repeated judicial admonitions that courts stay out of the business of weighing the sincerity of religious beliefs and practices. *See, e.g., Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013). *Mohawk*, in short, does not prevent application of the collateral order doctrine in this case.

Moreover, on two occasions following *Mohawk*, this court has reaffirmed its precedent holding that interlocutory court orders bearing on First Amendment rights remain subject to appeal pursuant to the collateral order doctrine. *See Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 490 (5th Cir. 2013) (citing *Mohawk* in its treatment of the intersection of collateral review and the First Amendment); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168 (5th Cir. 2011); *see also Henry v. Lake Charles American Press, LLC*, 566 F.3d 164, 180-81 (5th Cir. 2009) (collateral order appeal of denial of anti-SLAPP dismissal permitted, *inter alia*, because of potential impact on First Amendment rights); *United States v. Brown*, 218 F.3d 415, 420-21 (5th Cir. 2000). These authorities support our appellate jurisdiction when comparable First Amendment claims are at issue.

Having failed to cite our precedents on appealability, the plaintiffs rely instead on two cases from other

circuits.<sup>6</sup> These cases, of course, must yield to our circuit precedent. In addition, neither *Perry* nor *In re Motor Fuel Sales Practices* involved discovery against a third party. *Perry*, in the end, upheld a qualified First Amendment privilege claim, while *In re Motor Fuel Sales Practices* is further distinguishable because the discovery sought information pertaining to potential fraud.

The plaintiffs finally reference a Fifth Circuit decision against a religiously affiliated college in a dispute over the enforceability of a charitable bequest. See *Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir. 1982). *Ambassador College* is a strange decision on several grounds, but it is not a decision about appellate jurisdiction. This court's jurisdiction was firmly predicated on the district court's final order dismissing the case. We DENY the plaintiffs' motion to dismiss.

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<sup>6</sup> In one, the Ninth Circuit, shortly after *Mohawk* was issued, confronted a discovery order covering the internal deliberations of a public interest group that was litigating on behalf of California's Prop 8. In an abundance of caution, the court rejected use of the collateral order doctrine as a jurisdictional basis, but it proceeded to determine the merits of the case as a mandamus petition. See *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010). The Tenth Circuit more recently decided that "discovery orders adverse to a claimed First Amendment privilege are not immediately appealable" under the collateral order doctrine. *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 484 (10th Cir. 2011).

## STANDARD OF REVIEW

Because trial is set to commence July 16, we elect to treat this appeal of the motion to quash on the merits. *See Doe v. Office of Refugee Resettlement*, 884 F.3d 269, 271 (5th Cir. 2018). We therefore pretermitt the considerations pertinent to a stay pending appeal.

We review the district court’s decision on a motion to quash for abuse of discretion. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817 (5th Cir. 2004). “The district court’s legal conclusions should be reviewed *de novo*, and its factual findings should not be disturbed unless they are clearly erroneous.” *Marceaux v. Lafayette City-Par. Consol. Gov’t*, 731 F.3d 488, 491 (5th Cir. 2013). A district court’s discovery rulings are generally affirmed unless they are “arbitrary or clearly unreasonable.” *United States v. Butler*, 429 F.3d 140, 148 (5th Cir. 2005). However, “in cases raising First Amendment issues[,] . . . an appellate 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 the field of free expression.” *Marceaux*, 731 F.3d at 491-92 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 729 (1964))).

## DISCUSSION

I. The district court’s order assumed, essentially, that this discovery dispute is like a garden variety

dispute over the necessity of discovery from a corporate representative designated as a trial witness. Thus, the court rather hastily concluded that because the withheld internal communications (to which Ms. Allmon was privy) fell within the scope of the parties' agreed search terms, they were relevant and necessary to preparing the plaintiffs' cross-examination. The court thus overruled TCCB's objections based on relevance, undue burden, and necessity under Fed. Rule Civ. Pro. 45(d)(3)(A).

The court held that TCCB waived any privilege claim based on RFRA by not having timely raised that issue in proceedings before the magistrate judge.

Addressing TCCB's claims of First Amendment privilege, the court first rejected free exercise and establishment clause arguments because any such privilege claim is necessarily qualified, not categorical. The court also concluded, based on the magistrate judge's review of a selected portion of the internal communications, that "[t]here has been no showing Plaintiffs' discovery request infringes on TCCB's right to control its own affairs or interferes with matters of church governance, faith, or doctrine."

The court found TCCB's privilege claim based on the First Amendment right of association a closer, albeit unavailing, call. The court acknowledged "a limited [constitutional] right to associate with others for the common advancement of beliefs and ideas concerning political, economic, religious or cultural matters." The court's standard for the limited privilege accepted

that “[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Perry*, 591 F.3d at 1159 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984)). The court assumed that discovery requests in court meet the compelling interest test. It then held that although TCCB might have made a prima facie showing that enforcing production of the internal communications would chill the exercise of the body’s rights (principally by discouraging the use of emails for internal conversation within TCCB), such a showing did not outweigh the plaintiffs’ substantial interest in obtaining production. This weighing balanced the previous findings that the internal communications bear only on “facts” in issue at trial, against the relative “weakness” of TCCB’s invasion of privacy compared with cases involving the deterrence of membership or advocacy.

II. With due respect to the district court, its analysis was incorrectly dismissive of the seriousness of the issues raised by TCCB. It is no accident that we have found no case directly on point on the issue of compelling discovery of internal communications within a religious body concerning its activities in the public square to advance and protect its position on serious moral or political issues.<sup>7</sup> It is no accident that

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<sup>7</sup> *Williams v. Parker*, 843 F.3d 617, 622-23 (5th Cir. 2016) is not applicable, because there the plaintiffs made only a “bare

several religiously affiliated organizations have filed amicus briefs in support of TCCB's claim.<sup>8</sup>

The difficulties we perceive with the court's analysis of the First Amendment claims are as follows. The court erred in determining that TCCB waived its claim of protection under RFRA. The court's analysis of the free exercise and establishment clause claims begs the fundamental, novel issues presented under these circumstances. The court's rejection of the free speech, association, and petition claims too narrowly construes the nature of chilling effects on those rights while overbroadly interpreting the importance to the plaintiffs of the discovery sought here.

Together, the dearth of guiding case law and the importance of context in any resolution of these issues counsel strongly in favor of the doctrine of

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assertion" that their First Amendment rights had been violated, nor did they "explain how, precisely, their rights were curtailed."

<sup>8</sup> See Brief for the Jewish Coalition for Religious Liberty as Amici Curiae Supporting Appellants; Brief for the Ethics & Religious Liberty Commission of the Southern Baptist Convention and National Association of Evangelicals as Amici Curiae Supporting Appellants; Brief for the United States Conference of Catholic Bishops *et al.* as Amici Curiae Supporting Appellants.

No doubt, the tension about the religious claims that spawned the amicus briefs was heightened by two strange circumstances suggesting at least religious insensitivity: (a) that the plaintiffs chose to time their original subpoena, and the return date, to coincide with Holy Week, and (b) that the district court chose to issue its decision rejecting the motion to quash on a Sunday morning when TCCB's members and employees were almost surely in church. No obvious time constraint justified either of these choices.



constitutional avoidance. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47, 56 S. Ct. 466, 482-83 (1936) (Brandeis, J., concurring); *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 753-54 (5th Cir. 2008). Because a non-constitutional argument, founded on Rule 45(d)’s protection of parties subject to subpoenas, is here decisive, we need only sketch the problems inherent in the district court’s insensitive constitutional approach.<sup>9</sup>

To begin, Rule 45(d) states that a district court “must” quash a subpoena when it accepts a privilege claim, where “no exception or waiver applies.” TCCB did not “waive” its argument that RFRA should have applied to the discovery request. The issue was clearly stated in TCCB’s motion to quash. When the parties appeared before the magistrate judge, however, he advised them to focus on the First Amendment contentions. It cannot be waiver for TCCB to have acquiesced

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<sup>9</sup> Like the district court, the dissent would pigeonhole this dispute as simply another discovery tiff that is resolved simply by an *in camera* look at the documents. This truncation can only occur, however, based on the assumption, stated by the dissent, that the scope of any Free Exercise privilege here is limited to judicial intrusions on church leadership or internal management. The dissent wholly overlooks the RFRA argument made by TCCB. And the dissent again assumes its Freedom of Association conclusion—that no associational privilege exists—by arbitrarily cabin-ing the scope of “deliberative discussions” within TCCB. And by the way, this opinion only sets forth, *but does not rule on*, any of these substantial, novel claims. Instead, this opinion holds that the district court misapplied Rule 45(d), inflicted undue burden on TCCB, and in so doing abused its discretion.

in the judge's directions at oral argument on the motion to quash.

Had the district court considered RFRA, it would have confronted authority that holds the law applicable to court-ordered discovery, *i.e.*, a grand jury subpoena. The Third Circuit has held, consistent with the coverage of RFRA itself, that a grand jury subpoena can implicate free exercise claims. *See In re Grand Jury Empaneling*, 171 F.3d 826, 835 (3d Cir. 1999) (“Lest there be any confusion, we reiterate: in deciding whether to enforce a grand jury subpoena over a RFRA objection, the district court must satisfy itself that the witness’s testimony is necessary to serve a compelling state interest.”). With that support, a RFRA claim depends on three conditions: a sincere claim of religious belief; a “substantial burden” that will be imposed on the exercise of that belief by particular government action; and whether the government shows a “compelling need” for the imposition and utilizes “least restrictive means” to achieve its goal. *See Tagore*, 735 F.3d at 330.

No one challenges the sincerity of TCCB’s claim that the Church feels morally impelled to support humane (and “human”) treatment of fetal remains. The “substantial burden” here is from compelling TCCB to reveal wholly internal communications concerning its approach to this issue and participation in the issues surrounding the statute. This court has previously discussed handling issues about sincere religious belief and substantial burden with “a light touch.” *Moussazadeh v. Texas Dep’t of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), *as corrected* (Feb. 20, 2013). Moreover,

the burden here comes from compelling TCCB to produce internal communications as the price for providing a witness in support of this controversial law, and subjecting TCCB to a threat of sanctions, ranging from monetary to striking the witness to contempt, if it fails to comply.

As for the government's (*i.e.*, the court's or litigant's using the court) compelling need and least restrictive means, they are not satisfied merely because the Federal Rules ordinarily authorize broad discovery. The plaintiffs have not shown how Ms. Allmon's existing testimony failed adequately to reveal TCCB's position or exactly what they sought from the 298 emails that have not been turned over. Insofar as those communications may reveal internal deliberations about the implications of TCCB's position under canon law and Catholic doctrine, there is no compelling need whatsoever.

The plaintiffs and district court allege, however, that only "facts" relevant to this litigation from the internal communications are being subjected to discovery. But this decision begs two questions about the "compelling" nature of the "need." First, on what basis is the judiciary institutionally competent to discern which communications merely bear on the "facts" and which communications interfere with a religious body's free exercise? The district court assumed such competence exists. *But see, e.g., Moussazadeh*, 703 F.3d at 792 (judiciary should take a "light touch" with matters of religious belief and practice); *Tagore*, 735 F.3d at 328 (noting that "claims of sincere religious belief in

a particular practice have been accepted on little more than the plaintiff's credible assertions"); Brief for the Jewish Coalition for Religious Liberty as Amici Curiae Supporting Appellants at 14-18 (explaining how regulations concerning kosher standards and processes implicate nuanced and controversial doctrinal views despite superficially objective determinations). The second question is whether the judiciary's actual performance of any such sorting task itself invades the religious body's integrity. Courts have generally foresworn involvement in disputes internal to religious groups. *See Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 116, 73 S. Ct. 143, 154-55 (1952); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012).<sup>10</sup>

Finally, the least restrictive means seem to have been employed already. Ms. Allmon testified at the administrative hearing, the first preliminary injunction hearing, and in deposition only a few weeks ago, and she filed affidavits. TCCB voluntarily produced thousands of pages of documents reflecting external communications, at substantial cost in personnel time and attorney's fees.

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<sup>10</sup> As in the above discussion, the dissent's contention that TCCB forfeited its constitutional claims by voluntarily submitting documents for *in camera* inspection begs the questions about institutional competence and intrusion on internal religious governance. It is a clever argument that neither the district court nor the plaintiffs suggested.

We do not resolve these difficult questions, but no matter how you look at this RFRA claim, it was reasonable for TCCB to seek refuge under the federal law.

As for the free speech, free association, and petition claims under the First Amendment, the district court failed to afford sufficient scope to rights that should protect the inner workings of TCCB when it engages in activity in the public square. The district court seemed to limit the associational rights to the “chilling” of membership and tangible harassment. In *Perry*, however, the Ninth Circuit squarely considered these rights and exempted from discovery the internal communications of a citizens’ group that was supporting California Prop 8 (opposing gay marriage). 591 F.3d at 1165. The court understood that communications within such a group must be permitted to be broad, uninhibited, and fearless, and that protecting such deliberations is a seminal aspect of the freedom to associate.

*Perry*, to be sure, recognized a qualified privilege based on Supreme Court precedent. *See Perry*, 591 F.3d at 1155-56; *Flanagan v. United States*, 465 U.S. 259, 267-68, 104 S. Ct. 1051, 1055-57 (1984); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557, 83 S. Ct. 889, 899 (1963). That balancing approach reconciles *Perry* with cases like *Ambassador College v. Geotzke*,<sup>11</sup> which was a fraud case against a religious college, and *United States v. Holmes*,<sup>12</sup> which held

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<sup>11</sup> 675 F.2d 662, 664 (5th Cir. 1982).

<sup>12</sup> 614 F.2d 985, 989-90 (5th Cir. 1980).

religious groups may be subject to government inquiries to maintain tax exempt status.

Contrary to the district court, however, the explanation of how TCCB's activities—and the activities of any other religious institution forced to endure similar discovery—are “chilled” by enforcement of this subpoena seems self-evident. As TCCB describes, in addition to the significant cost of complying with the original subpoena (100 work hours and over \$20,000 in attorney's fees), TCCB has delayed and missed ministry opportunities; suffered in relationships with other Catholic ministries whose communications it was forced to disclose; was required to cancel internal ministry reports and training materials; TCCB bishops and staff were discouraged from engaging in other public policy activities; and Texas Catholic cemeteries were deterred from participating in the fetal remains registry. TCCB's ability to conduct frank internal dialogue and deliberations was undermined, and not only because enforcement of the subpoena inhibits the further use of email communications. Why the district court found “chilling” but not “severe” its discovery order's impact on TCCB's internal email communications, in this era of instant group communication, is hard to fathom. Even more disturbing, this discovery order forces TCCB to turn over *to a public policy opponent* its internal communications, setting a precedent that may be replicated in litigation anywhere.

These burdens flow naturally into TCCB's arguments for a privilege based on the structural protection afforded religious organizations and practice under the

Constitution. “[I]t is easy to forget that the autonomy of religious groups . . . has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 199-200, 132 S. Ct. 694, 712 (Alito, J., concurring) (citing *Kedroff*, 344 U.S. at 116, 73 S. Ct. at 154-55). Both free exercise and establishment clause problems seem inherent in the court’s discovery order. That internal communications are to be revealed not only interferes with TCCB’s decision-making processes on a matter of intense doctrinal concern but also exposes those processes to an opponent and will induce similar ongoing intrusions against religious bodies’ self-government. Moreover, courts’ involvement in attempting to parse the internal communications and discern which are “facts” and which are “religious” seems tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause. The Supreme Court has noted that “it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . [A]nd an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.” *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336, 107 S. Ct. 2862, 2868 (1987). The amici here uniformly decry the potential for misuse of the district court’s

narrowly focused balancing test that denigrated the impacts of judicial discovery procedures on their internal communications, while potentially empowering certain interest groups to harass, impose disastrous costs on, and uniquely burden religious organizations. Yet the claim of religious organizations to maintain their internal organizational autonomy intact from ordinary discovery should be at least as secure as the protection constitutionally afforded other associations. Supreme Court decisions have protected religious organizations' internal deliberations and decision-making in numerous ways. *See, e.g., Hosanna-Tabor*, 565 U.S. at 199-200, 132 S. Ct. at 712. Although none have spoken directly to discovery orders in litigation, the importance of securing religious groups' institutional autonomy, while allowing them to enter the public square, cannot be understated and reflects consistent prior case law.

Another way to look at the scope of a qualified First Amendment privilege is through the lens of hypothetical involvement by an abortion rights organization in this litigation. Suppose the plaintiffs offered testimony of a representative of Abortion Rights Unlimited ("ARU") (a fictitious group) to testify about the national status of fetal remains statutes and their general impact on abortion providers. Suppose the State of Texas issued a subpoena for any/all documents representing communications among the Board of ARU and the witness concerning those matters of discussion. Or the State agreed to withdraw its subpoena if ARU withheld offering its witness testimony. As a third-party



witness, under the *Perry* balancing test, would the court subject ARU to such discovery? It seems the advocacy group would have a strong argument against forced disclosure of its internal communications as the price for its testimony on a matter of intense concern to the public and its members.

Assuming the seriousness of the chilling effects on their First Amendment rights, it is hard to see how the plaintiffs have borne their burden under *Perry* to show a substantial need for the documents that outweighs the intrusion into TCCB's constitutional rights. As noted in the next section, TCCB has already cooperated extensively in discovery in a way that minimizes any adverse impact on the plaintiffs' ability to cross-examine Ms. Allmon.

We need not and do not finally resolve whether the order enforcing discovery of the internal emails violated TCCB's constitutional rights, but the issues raised above should have given pause to the district court before it waved away TCCB's privilege claims.

III. The rule of constitutional avoidance prevents courts from issuing unnecessary and potentially overbroad or misleading rulings on constitutional issues. That rule forcefully counsels restraint in this case, where the issues are both novel and far-reaching and time is woefully short for thorough consideration.

We turn instead to applications of Rule 45(d), which states that a court "must" quash a subpoena to avoid "subject[ing] a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iii)-(iv). The district court applied the

balancing test described by this court in *Wiwa*. See 392 F.3d at 818-19 (listing balancing factors). *Wiwa* explains that “if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party.” 392 F.3d at 818. The court here concluded that no “undue burden” existed after eliminating the privilege claims and simply considering whether internal TCCB communications could provide “relevant facts” that the plaintiffs “need” to cross-examine Ms. Allmon about the “actual status” of TCCB’s commitment to provide cost-free interment services. TCCB contends, however, that the subpoena inflicts an undue burden in compelling the organization to disclose its internal communications when it has already been subjected to substantial discovery demands and raises substantial claims to constitutional and RFRA protection. Bearing in mind that TCCB is a third-party witness, we consider the strength of the court’s relevancy and need determinations, and we conclude that the court’s decision was an abuse of discretion.

First, the plaintiffs’ “need” to obtain these additional emails is questionable at best. TCCB has already produced over 4,000 pages of responsive discovery documents, and Ms. Allmon has testified thrice and furnished affidavits, all of which can be used in her cross-examination. The plaintiffs’ brief to this court discusses Ms. Allmon’s prior testimony in support of their discovery request, quoting it at length for three pages, and calling it “vague,” “contradictory” of her prior testimony, or downright inaccurate. Her recent

deposition is 125 pages long. Further document discovery of any kind would, without further explanation, be cumulative. The plaintiffs have furnished no such further explanation, and the opinions of the magistrate and district judges do not hint that important additional facts, not yet divulged by TCCB, are revealed in the internal emails. In sum, the groundwork for cross-examination appears to be laid, especially for purposes of a bench trial.

Perhaps most telling, as this appeal is being decided, the plaintiffs have moved the district court to strike Ms. Allmon's testimony. (If granted, the motion would effectively prevent TCCB from airing its position in support of the statute.) In doing so, the plaintiffs characterize Ms. Allmon's testimony as "cumulative and a waste of trial time." The more "cumulative," obviously, the less is the "need" for and "relevance" of cumulative document discovery.

Concerning relevance, the plaintiffs' burden at trial is to show that the statute poses an "undue burden" on women's access to abortion services. To do so, they will probably try to demonstrate that many women clients do not care what happens to fetal remains or would have objections to burial in Catholic cemeteries; that TCCB's offer of free burials is vague, not concrete in detail, and has been watered down as the litigation progressed; that complying with the women's desires and finding the appropriate burial grounds would pose significant logistical problems and hardship for the plaintiffs' provision of abortion services; and that other suitable burial locations are

unavailable. To the extent the plaintiffs seek to diminish the probative value of TCCB's offer, they have already gotten access to such ammunition. Catholic cemeteries, moreover, are but a small proportion of those statewide. Thus, TCCB's participation in facilitating the law cannot be the sole test of "burden" avoided or "burden" imposed for either party.

The small or non-existent incremental "need" for and "relevance" of this discovery alone impose a burden on TCCB, if it must produce documents unnecessary to the litigation. There is an additional burden on TCCB as a third party in this morally and politically consequential case: TCCB has been challenged by the plaintiffs to either produce internal communication documents or withdraw its witness. This looks like an act of intimidation. The demand places on TCCB the "Hobson's choice" of retreating from the public square or defending its position while creating a precedent (for the first time) that may open its internal deliberations to public scrutiny, or at least, ill-informed judicial scrutiny. This burden on TCCB's constitutional right to advocate in the public square cannot be ignored, nor can the burdens TCCB has shown were created by this intrusive discovery request: relations with other parties in the faith impaired, internal modes of discussion upended, and participation by some Catholic cemeteries deterred.

Finally, rather than reject all of TCCB's privilege claims, the district court should have acknowledged their novelty and far-reaching implications and interpreted the appropriate scope of document production

under Rule 45(d) in light of the principle of constitutional avoidance.

In sum, the district court discounted the burdens of production on TCCB and failed to require more than a minimal, if any, rationale for discovery of TCCB's internal communications. The court was too quick to reject TCCB's privilege claims. By acting in unnecessary haste, the court deprived TCCB of a fair opportunity to make its case for quashing the discovery. For these reasons, the district court erred and abused its discretion under Rule 45(d).

### CONCLUSION

The court's order denying the motion to quash and compelling discovery of internal communications within TCCB is **REVERSED**. The plaintiffs' motion to dismiss the appeal and vacate the stay is **DENIED**.

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JAMES C. HO, Circuit Judge, concurring:

It is hard to imagine a better example of how far we have strayed from the text and original understanding of the Constitution than this case.

The First Amendment expressly guarantees the free exercise of religion—including the right of the Bishops to express their profound objection to the moral tragedy of abortion, by offering free burial services for fetal remains. By contrast, nothing in the text or original understanding of the Constitution prevents

a state from requiring the proper burial of fetal remains.

But from the proceedings below, you would think the opposite were true.

Those proceedings are chronicled in Judge Jones’s comprehensive opinion for the Court. And they are troubling. They leave this Court to wonder why the district court saw the need to impose a 24-hour mandate on the Bishops on a Sunday (Father’s Day, no less), if not in an effort to either evade appellate review—or tax the Bishops and their counsel for seeking review. They leave this Court to wonder if this discovery is sought, *inter alia*, to retaliate against people of faith for not only believing in the sanctity of life—but also for wanting to do something about it. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

I join Judge Jones’s excellent opinion, with regret that the relief we grant today is even necessary. *See Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting from denial of certiorari) (“This case is an ominous sign. . . . If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.”).

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GREGG COSTA, Circuit Judge, dissenting:

The first step an appellate court is supposed to take in a case is reviewing the same materials the trial court considered. Only after that can it decide if that judge erred. In a stark departure from that norm, the majority opinion finds that the district court didn't just err but abused its discretion in balancing discovery factors without looking at the most critical part of the trial court record: the *in camera* production of documents that would show whether the First Amendment concerns that today's decision can only speculate about actually exist. Two judges—the magistrate and district judge—reviewed those documents. The magistrate concluded, and the district court agreed, that “the emails between Ms. Allmon and staff members of the TCCB have no religious focus, do not discuss church doctrine or governance, and are more or less routine discussions of the burial services at issue here.” In reversing the order to produce based on a categorical privilege that doesn't even allow for *in camera* review, the majority opinion offends the principle of constitutional avoidance it purports to invoke. True avoidance of difficult First Amendment questions would be to not opine on them when they are not properly before the court. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 408 (1995) (O'Connor, J., dissenting) (explaining that principles of appellate waiver “rest[] firmly upon a limited view of our judicial power” (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.))). That is true for the claim of categorical privilege that has been forfeited if not waived in light

of the Texas Catholic Conference of Bishops' submission to the trial court of documents for *in camera* production that it now argues even a court may not review. The result is an opinion filled with abstract propositions of First Amendment law—some of which I agree with—but that is divorced from the reality of this case. Before declaring that the judges who reviewed the records abused their discretion in concluding they did not pose the claimed harms, the appellate court should look at them.

### I.

The rule requiring appellate preservation of error is not the only limit on our authority that the majority opinion overrides. It also engages in an unprecedented act by resolving a discovery dispute at the interlocutory stage. The court recognizes the ordinary rule that discovery disputes are not collateral orders subject to interlocutory appeal, but concludes that gives way when a First Amendment claim is at stake. If actually limited to that type of constitutional claim, our jurisdiction would be a close question. Although we have held that other types of rulings bearing on First Amendment rights are appealable collateral orders, *see, e.g., Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 180-81 (5th Cir. 2009) (order denying anti-SLAPP dismissal under Louisiana statute); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 172 (5th Cir. 2011) (order denying journalists access to a sentencing hearing), we have never confronted the tension between that principle and the general rule that discovery orders are not



collateral ones, *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009). The longstanding rule against such interlocutory review of discovery orders serves important interests: “Routine appeal from disputed discovery orders would disrupt the orderly progress of the litigation, swamp the courts of appeals, and substantially reduce the district court’s ability to control the discovery process.” 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.23 (2d ed. 1992); *see also Mohawk*, 558 U.S. at 112 (“Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals.”)

One circuit confronting the clash between the different rules governing interlocutory review of First Amendment claims and discovery orders concluded that the collateral order doctrine does not allow the immediate appeal of “discovery orders adverse to a claimed First Amendment privilege.” *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 484 (10th Cir. 2011). Another recognized the difficulty of the question, so avoided it and decided the First Amendment claim in the mandamus context. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1154-57 (9th Cir. 2010). That is another reason this is such a tough question. The majority opinion assumes that the collateral order doctrine is the only route to stopping a production before it happens. But a mandamus petition, which is just as available to a third party as to a litigant, is the typical way to protect a privilege when its

piercing will cause irreparable harm. *See In re Itron*, 883 F.3d 553, 567-68 (5th Cir. 2018); *In re Avantel*, 343 F.3d 311, 317 (5th Cir. 2003) (“Mandamus is an appropriate means of relief if a district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal.”); *see also Mohawk*, 558 U.S. at 110 (noting that there are “several potential avenues of review apart from the collateral order appeal, including mandamus, for a “novel privilege ruling”). Tellingly, that is the avenue for appellate relief the Conference originally planned to pursue. At the hearing on the privilege claim, its counsel asked the court “if you rule against us, that you give us time to mandamus the opinion.” But prevailing in the mandamus context requires showing a “clear and indisputable” right to relief, *Itron*, 883 F.3d at 567 (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)), which is difficult for any claim and especially a novel one.

Even if the reasoning in *Henry* supports recognizing the collateral order doctrine and not just mandamus as a path for interlocutory review of a First Amendment privilege claim, the problem is that the majority opinion soon becomes disconnected from this narrow jurisdictional hook. It proceeds to discuss whether the discovery request violates a federal statute (the Religious Freedom Restoration Act), and its ultimate ruling is that the district court abused its discretion in balancing the factors under Federal Rule of Civil Procedure 45, the type of judgment call weighing the benefits and burdens of discovery that trial judges

make on a daily basis. The majority opinion resorts to the discovery rule under the laudable goal of avoiding constitutional problems. But that doctrine requires a “substantial” constitutional concern. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 250 (2012); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (avoiding the constitutional issue because the competing interpretation would “raise serious constitutional doubts”). Much like we should not depart from the most obvious construction of a statute unless that interpretation would *likely* result in the law being unconstitutional, we should not allow piecemeal review of a discovery order unless that ruling raises a substantial constitutional concern.<sup>1</sup>

## II.

### A.

The Conference’s privilege claim does not present a substantial First Amendment concern for the reason mentioned at the outset: it did not argue in the trial court that the First Amendment barred *in camera*

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<sup>1</sup> These are two separate “constitutional avoidance” principles. The one that favors reading a statute in a manner (so long as its reasonable) that avoids constitutional difficulties is a canon of construction. The one applied in this case supports first addressing nonconstitutional grounds for a judicial decision. *See* SCALIA & GARNER, *supra*, at 251. But both rules should apply only when the constitutional claim is a difficult one, otherwise they would override other important principles like giving statutes their ordinary meaning or, in this case, not allowing interlocutory review of applications of the federal discovery rules.

inspection of its records, so it cannot do so now. And our failure to review the documents means we have no basis for disagreeing with the district court's assessment that they are constitutionally benign.

The Conference provided the documents at the discovery hearing. They are a representative sample it selected of the documents classified as privileged. Counsel for the Conference told the court, "Your Honor, I would like to submit to you the in-camera documents, examples." Neither that statement nor anything else said at the hearing hints at any discomfort with the *in camera* procedure and certainly no official objection. Counsel even helped facilitate the court's review by breaking down the privileged documents "into three types of internal communication."<sup>2</sup> The failure to object to the *in camera* inspection certainly forfeits an appellate challenge to it, and the affirmative act of producing the documents likely amounts to full-scale waiver. *See Freytag v. C.I.R.*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring) (discussing differences between forfeiture and waiver, the primary one being that the latter requires "intentional relinquishment or abandonment of a known right or privilege").

Even beyond those obstacles to our review, this may be a case of judicial estoppel. Arguing now that the inspection was improper after the Conference

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<sup>2</sup> Even if there were some suggestion that the Conference was uncomfortable with the *in camera* review and agreed to it only under compulsion, this appeal shows it knows exactly how to respond when ordered to do something it does not want to do: seek an emergency stay and file an interlocutory appeal.

willfully provided the documents to the trial court in the hope it would find them privileged has the flavor of the heads-I-win-tails-you-lose positioning that estoppel prohibits. *See generally New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). If the *in camera* review had resulted in the district court’s finding the documents privileged, the Conference would have prevailed. It did not, so the Conference now argues “[t]he very process of inquiry’ into the Bishops’ deliberations ‘impinge[s] on rights guaranteed by the Religion Clauses.’”

But at a minimum the production resulted in forfeiture, a bedrock limit on appellate review that applies no matter how weighty the interest asserted. Forfeiture, for example, routinely bars the assertion of protections found in the Bill of Rights in the criminal and civil rights cases that dominate our docket. And forfeiture in the context of an objection to *in camera* privilege review is justified by even more than the interests in restraint, full development of the record, and respect for the trial court that ordinary application of the rule of appellate preservation promotes. It means that the harm of judicial review that categorical privilege aims to protect cannot be undone. With two judges having already reviewed the documents, that cat is out of the bag.<sup>3</sup>

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<sup>3</sup> The forfeiture means we cannot consider the institutional ability of judges to review matters of First Amendment privilege. It is worth noting, however, that judges review privilege in all sorts of sensitive areas that unlike attorney-client privilege are not ones in which lawyers have particular expertise. *United States v. Nixon*, 418 U.S. 683 1039 (1974) (finding that “very important

We thus must evaluate the strength of the Conference’s privilege claim not based on hypotheticals we can create but in light of the real world documents at issue. And, given that it had no objection to the *in camera* procedure, the Conference had every incentive to provide the court with examples that presented the best case for privilege. Indeed, plaintiff noted at the hearing that it would not agree that the documents produced were a representative sample because it did not want a court finding of protection for what were likely the best documents for a privilege claim to automatically protect other documents.

## B.

The trial court’s undisturbed finding that the documents selected by the Conference did not “have [a] religious focus” or “discuss church doctrine or

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interest in confidentiality of Presidential communications” is not “significantly diminished” by allowing *in camera* inspection of documents); *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1051 (8th Cir. 2007) (discussing the magistrate’s *in camera* review of unredacted FBI files potentially subject to confidential informant privilege); *Stein v. Dep’t of Justice & Fed. Bureau of Investigation*, 662 F.2d 1245, 1254 (7th Cir. 1981) (basing a conclusion that the FBI may continue to withhold classified national security documents based on *in camera* review of material). This includes First Amendment claims involving reporters’ privilege. *United States v. Cuthbertson*, 630 F.2d 139, 149 (3d Cir. 1980) (affirming contempt citation for party that failed to produce documents for *in camera* inspection after asserting journalists’ First Amendment privilege). And judges conducting an *in camera* review do not have to guess in a vacuum at why the documents might be privileged; the party asserting that claim has the opportunity to explain it.

governance” means there is no close constitutional question. I’ll start with the Religion Clauses. Free exercise presents an uphill climb given the prevailing, if controversial, view that enforcing neutral laws of general applicability does not offend the Free Exercise Clause. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). So even neutral laws that criminalize or otherwise punish a religious practice do not offend free exercise. *Id.* The district court’s application of Federal Rule of Civil Procedure 45, which is the state action here, does not prohibit any religious practice. It seeks documents that the Conference contends discuss religious practices and beliefs. But it cannot be reasonably argued that subjecting the Conference to the same rules of civil procedure that everyone else faces in federal court is aimed at inhibiting the free exercise of religion.

Nor does the order of production amount to court involvement in church leadership decisions, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 194-95 (2012), or the internal management of a religious organization, *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971). Whether this line of cases is treated as a burden on the free exercise of religion or as state entanglement with the church under the Establishment Clause,<sup>4</sup> documents that “do not discuss

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<sup>4</sup> The Conference treats these cases primarily as ones arising under the Establishment Clause. The caselaw is admittedly confusing on which First Amendment clause is the main source of these decisions. A leading scholar argues that the appropriate way to view them is as free exercise cases addressing burdens on church autonomy. See Douglas Laycock, *Towards a General Theory of the*

church doctrine or governance” do not come close to the concerns this line of cases has addressed. What is more, a discovery order is not like the court orders typically involved in this line of cases—such as those requiring a religious organization to engage or not engage in any religious practice, make an employment decision, or alter its educational curriculum.

That leaves the right of association which can fit this context of an order requiring the production of documents. The district court thus correctly viewed this as the Conference’s strongest claim. Not, of course, the type of associational right at issue in the leading case recognizing this aspect of the First Amendment, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), which involved the disclosure of members of a group to the state with all its power to retaliate against those expressing unpopular views. But courts have also recognized a right to be protected from “other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010). This is where the majority opinion’s hypothetical concerns are most plausible. But the district court had the benefit of looking to see if the potential threat to associational activity was realized. It found that it wasn’t, and we have no basis for disturbing that finding.

Because the discovery order does not raise a close constitutional question, our jurisdiction does not extend

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*Religion Clauses: The Case of Church Labor Relations and Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).



to objections based on federal statutes or rules of procedure. The majority opinion is correct that I “wholly overlook[]” the RFRA argument. Faithful application of limits on our ability to hear piecemeal appeals of discovery rules requires that.<sup>5</sup> The majority opinion overlooks that important limitation on our appellate jurisdiction. Its eagerness to address all the issues raised by the Conference and supporting amici also resulted in its neglect of the rule that we do not consider claims that have been forfeited or waived. Adherence to these ordinary limits on our authority was particularly warranted for an expedited appeal that did not allow for oral argument. These rules limiting our authority do not mean that a court will never decide the issue that is not properly preserved. More often they ensure that when a court finally does confront the question, it does so with a full development of the record and law that promotes sound decisionmaking. See *Lebron*, 513 U.S. at 408 (O’Connor, J., dissenting) (recognizing that “patience in the judicial resolution of conflicts” leads to better decisions (quoting John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICIATURE 177, 183 (1982))).

For these reasons, I would affirm the district court.

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<sup>5</sup> That does not mean there is no outlet for the Conference to raise important statutory concerns. As mentioned, a petition for mandamus relief was a possibility assuming the RFRA issue was preserved.

## III.

Two additional observations are in order. The majority opinion ascribes “at least religious insensitivity” if not worse, as well as “intimidation” tactics, to plaintiff’s counsel. From this vantage point, it may seem like the stipulation that the plaintiff will not challenge the cost of the burial services as an undue burden means there is no role for the Conference at trial (though the reason trial judges are given considerable discretion in discovery matters is that they know the ins-and-outs of a case having lived with it, sometimes for years). But the plaintiff is not the reason the Conference is involved in this case. Indeed, the stipulation shows plaintiff’s willingness to avoid any issues involving the Conference. But the Conference, as is its right, voluntarily appeared at earlier stages of this litigation, and Texas has subpoenaed its witness for trial. What the majority opinion views as an improper threat—that the discovery request will go away if the Conference witness doesn’t appear—is just an obvious point that if there is no witness, then there is no need to request documents that might impeach her testimony. More fundamentally, even if this case presents yet another example of the discovery overkill that plagues civil litigation, there is no basis to view the discovery request (the scope of which the plaintiff and Conference worked to greatly narrow) and its timing as anything more than lawyers trying to fulfill their duty of zealous advocacy. The unusual behavior would be if a party did not seek documents from a witness it plans to cross examine at trial.

Even more troubling are the potshots directed at the district court, and the concurring opinion then piles on. That the pecking order of the system allows appellate judges' view of the law to ultimately prevail should be satisfaction enough for us. While vigorous disagreement about the law is part of the judicial function, there is no need to go beyond the identification of legal error by questioning the motives of our district court brethren. That is especially true when the legal issue is one that the majority opinion concedes is novel, and when the ill motives are pure conjecture. What is one of the sins of the trial court according to the majority opinion? Working and issuing orders on a weekend.

Our district court colleagues deserve most of the credit for the federal judiciary being the shining light that it is. They work under greater docket pressures, with greater time constraints, yet with fewer resources. And unlike appellate judges on a divided panel who can trade barbs back and forth, a district judge has no opportunity to respond to personal attacks in an appellate opinion. They deserve our respect and collegiality even when, or especially when, they err as we all do at times. Among the exemplary group of trial judges who serve our circuit, the one handling this case stands out: with over three decades of service, he is now essentially working for free as a senior judge, and volunteering to travel thousands of miles outside the district of his appointment to help with the heavy docket in the Western District of Texas. Speculating that malice is behind his decisions seeking to

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expedite a high profile case with a rapidly approaching trial date is not the award he is due.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 18-50484

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D.C. Docket No. 1:16-CV-1300

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. BHA-  
VIK 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

Before JONES, COSTA, and HO, Circuit Judges.

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JUDGMENT

(Filed Jul. 15, 2018)

This cause was considered on the record on appeal.

It is ordered and adjudged that the judgment of the District Court is reversed.

IT IS FURTHER ORDERED that appellees pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

JAMES C. HO, Circuit Judge, concurring.

GREGG COSTA, Circuit Judge, dissenting.

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 18-50484

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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. BHA-  
VIK 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

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Appeal from the United States District Court  
for the Western District of Texas

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(Filed Jul. 13, 2018)

Before JONES, COSTA, and HO, Circuit Judges.

For reasons to be explained, this court **REVERSES** the order of the district court denying Appellant's motion to quash and compelling discovery of internal communications within the Texas Conference of Catholic Bishops. Opinions to be filed no later than Sunday, July 15.<sup>1</sup>

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<sup>1</sup> Judge Costa dissents, opinion to follow.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 18-50484

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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. BHA-  
VIK KHUMAR,

Plaintiffs - Appellees

v.

CHARLES SMITH, Executive Commissioner of the  
Texas Health and Human Services Commission, in his  
official capacity; Et Al,

Defendants

TEXAS CATHOLIC CONFERENCE,

Movant - Appellant

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Appeal from the United States District Court  
for the Western District of Texas

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(Filed Jun. 18, 2018)

Before HIGGINBOTHAM, JONES, and COSTA, Cir-  
cuit Judges.

PER CURIAM:

IT IS ORDERED that the emergency motion for stay filed by the Texas Catholic Conference of Bishops is GRANTED pending further order of this court. Each interested party shall file briefs concerning their respective positions within seven days of this order.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**WHOLE WOMAN'S  
HEALTH, et al.,**

**Plaintiffs,**

**Case No.**

**-vs-**

**A-16-CA-1300**

**CHARLES SMITH,**

**Defendant.**

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**ORDER**

(Filed Jun. 17, 2018)

Before the Court is non-party Texas Catholic Conference of Bishops (TCCB)'s Rule 4(a) Statement of Appeal (Dkt. # 165), objecting to Magistrate Judge Austin's order denying TCCB's motion to quash. Plaintiffs have filed a response in opposition (Dkt # 167) and Defendant has filed a response in support (Dkt. # 166). Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the motion, the responses, the entire file in this action—including the documents submitted for *in camera* review—the Court **DENIES** TCCB's Appeal (Dkt. # 165) for the reasons that follow.

## BACKGROUND

**I. Case Context**

Plaintiffs are a variety of Texas medical providers who offer healthcare services to women. Dkt. # 93 ¶¶ 12–17. Plaintiffs challenge the constitutionality of rules and legislation restricting the disposal of fetal tissue under 42 U.S.C. § 1983 on behalf of themselves and their patients by bringing suit against Charles Smith, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity.

Previously in this case, United States District Judge Sam Sparks granted Plaintiffs’ motion for preliminary injunction, prohibiting amendments to Title 25 of the Texas Administrative Code §§ 1.132–1.136 (the Amendments) from taking effect. Dkt. # 49. Before the Amendments, healthcare providers could choose from seven methods to dispose of human tissue, regardless of whether the tissue resulted from “surgery, labor and delivery, autopsy, embalming, or a biopsy” or a “spontaneous or induced human abortion[.]” 25 TEX. ADMIN. CODE § 1.136(4)(A)(ii) (2015); 14 Tex. Reg. 1457, 1457–62 (adopted Mar. 14, 1989). The Amendments modified these rules, limiting disposal of fetal tissue to three methods regardless of gestational age: interment, incineration followed by interment, or steam disinfection followed by interment.” 41 Tex. Reg. 9709, 9738–39 (Dec. 9, 2016) (codified at 25 TEX. ADMIN. CODE § 1.136(a)(4)(A)(v)–(a)(4)(B)(I)). In enjoining the Amendments, Judge Sparks noted the evidence in the

record suggested “there may be only one facility, . . . in the entire State of Texas both willing and currently able to handle the disposal of fetal tissue as required by the Amendments.” Dkt. # 49 at 20.

Before enjoining the Amendments, Judge Sparks held a two-day evidentiary hearing on Plaintiffs’ motion. Ms. Jennifer Carr Allmon, executive director of TCCB, submitted a declaration in opposition to the preliminary injunction motion and testified on behalf of the Defendant at the evidentiary hearing. Dkt. # 17-2; Dkt. # 69 at 79–124. TCCB is an association of Roman Catholic bishops and archbishops in Texas and it advocates for the social, moral, and institutional concerns of the Catholic Church. Dkt. # 150 at 2. TCCB is operated by a staff of approximately eight people who receive direction from the Texas bishops.

At the hearing, Ms. Allmon’s testimony focused on TCCB’s efforts in support of the Amendments’ creation as well as the Catholic Church’s offer, communicated by TCCB, to provide free common burial of fetal remains in Catholic cemeteries throughout Texas coincident with the Amendments’ implementation. Dkt. # 69 at 79–124. While testifying, Ms. Allmon discussed the availability and willingness of Catholic cemeteries to bury fetal remains, the willingness of Catholic cemeteries to enter into contracts with abortion providers, and whether religious services would be conducted with the burial of fetal remains. *Id.*

Defendant appealed the preliminary injunction to the Fifth Circuit Court of Appeals, and Judge Sparks

stayed the case pending a decision from the appellate court. Dkt. # 56; Dkt. # 66. While appeal of the preliminary injunction was pending, Texas enacted Texas Senate Bill 8 (SB 8). *See* Act of June 6, 2017, 85th Leg., R.S., ch. 441, 2017 Tex. Sess. Law Serv. 1165 (West).<sup>1</sup> Among other things, SB 8 created a new chapter in the Texas Health and Safety Code, Chapter 697, which also modifies the Texas statutory scheme for disposal of fetal remains. *Id.* at § 13. Under Chapter 697, healthcare facilities must dispose of fetal remains by interment or cremation. *See id.* § 697.004(a).

On December 6, 2017, the Fifth Circuit dismissed the appeal of the preliminary injunction in light of Defendant's unopposed motion to voluntarily dismiss, Dkt. # 80, and Judge Sparks transferred this case to the undersigned. The undersigned lifted the stay, and Plaintiffs filed an amended complaint challenging the constitutionality of SB 8's disposal scheme as well as a second preliminary injunction motion.

On January 29, 2018, this Court issued a second preliminary injunction, preventing the provisions of Chapter 697 restricting the disposition of fetal remains from taking effect. Dkt. # 110. Significant here, the Court concluded the evidence in the record indicated Chapter 697 imposes an undue burden on abortion access because its burdens appear to outweigh its benefits. *Id.* The Court considered burdens such as logistical challenges, the limited number of vendors available to dispose of fetal remains as mandated by

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<sup>1</sup> The Court cites this act hereafter as SB 8.

Chapter 697, and the potential imposition on personal beliefs.<sup>2</sup> *Id.* The extent of these burdens remains a crucial issue for trial.

In the same order, the Court also referred the case to Magistrate Judge Andrew W. Austin for the purpose of setting an expedited scheduling order and discovery schedule and resolving all nondispositive discovery matters. *Id.* On February 7, 2018, the Magistrate Judge entered a scheduling order in this case. Dkt. # 115. Particularly relevant here, the parties were ordered to complete all discovery by June 15, 2018, and trial was set for July 16, 2018. *Id.*

## **II. Motion to Quash**

On March 1, 2018, Defendant identified Ms. Allmon as a trial witness. On March 20, 2018, Plaintiffs served a subpoena for documents on the TCCB, and TCCB filed a motion to quash the subpoena on April 2, 2018. One day later, the Magistrate Judge denied the motion to quash without prejudice for failing to contain a certificate of conference as required by Local Rule CV-7(i) and for failing to follow the scheduling order.<sup>3</sup>

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<sup>2</sup> The parties have stipulated that neither party will argue the challenged laws are unconstitutional due to any monetary costs of compliance. Dkt. # 119.

<sup>3</sup> The scheduling order entered in the case requires any discovery disputes be submitted for an informal conference prior to the filing of any motion. Dkt. # 115.

Plaintiffs and TCCB were unable to reach a full agreement on the subpoena. However, the parties agreed to limit the scope of the subpoena to documents including the following eight search terms: SB8, “SB 8”, Fetal, Fetus, Embryonic, Embryo, Abortion, Aborted, Miscarriage, unborn, and “burial ministry”. Dkt. # 156-6. Furthermore, Plaintiffs represent that they are requesting TCCB only produce emails sent to or received by Ms. Allmon where: (1) the emails or attachments to those emails include any of the agreed upon search terms, (2) the emails were sent or received on or after January 1, 2016; and (3) the emails or attachments relate to the burial, cremation, or disposition of fetal or embryonic tissue. Dkt. # 167. TCCB produced the emails sent or received by Ms. Allmon sent to or received from an external email address. In total, TCCB produced 91 external emails to or from Ms. Allmon dating between November 29, 2016 and January 29, 2018. TCCB refuses to produce the corresponding 298 internal emails.

On June 11, 2018, TCCB filed a second motion to quash. On June 13, 2018, the Magistrate Judge held a hearing on the pending motion and subsequently issued an order denying TCCB’s motion to quash.<sup>4</sup> TCCB filed a motion objecting to and appealing from the

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<sup>4</sup> Based TCCB’s representations it would appeal denial of its motion to quash to the undersigned, the Court issued an expedited briefing schedule for any party seeking appeal of the Magistrate Judge’s decision in keeping with the expedited schedule in place in this case and the upcoming trial. Dkt. # 158.



Magistrate Judge's Order. Plaintiffs responded in opposition and Defendant responded in support.

### LEGAL STANDARD

TCCB appeals from the Magistrate Judge's order denying TCCB's motion to quash, which is a non-dispositive discovery motion. *See Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995) (considering pre-trial discovery motions to be non-dispositive). Accordingly, the Court must review the Magistrate Judge's order under the "clearly erroneous or contrary to law" standard of review. *See* 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a); Local Rules App. C, Rule 4(a); *see also Castillo*, 70 F.3d at 385.

The first standard stated in § 636(b)(A)—"clearly erroneous"—applies to review of a magistrate judge's factual findings. *Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014). A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948). This standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *see also, e.g., Brinkley v. Comm'r*, 808 F.3d 657, 664–65 (5th Cir. 2015) (explicating the same standard).

The second standard—“contrary to law”—pertains to review of the magistrate judge’s legal conclusions. *Moore*, 755 F.3d at 806. As commonly construed, this standard authorizes plenary and thus de novo review, *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993), although “[f]rivolous, conclusive or general objections need not be considered by the district court,” *Battle v. U.S. Parole Comm’n*, 834 F.2d 419, 421 (5th Cir. 1987).

In sum, the clearly erroneous or contrary to law standard of review is a “highly deferential standard” and requires the court “to affirm the decision of the magistrate judge unless ‘on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.’” *Baylor Health Care Sys. v. Equitable Plan Servs., Inc.*, 955 F. Supp. 2d 678, 689 (N.D. Tex. 2013) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

## DISCUSSION

TCCB argues this Court should grant its appeal and quash Plaintiffs’ subpoena because (1) TCCB’s internal communications are privileged under the First Amendment; (2) enforcement of the subpoena would violate the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4; and (3) enforcing the subpoena violates Rule 45 of the Federal Rules of Civil Procedure. Dkt. # 165.

As a threshold matter, for the first time on appeal, TCCB argues requiring production of its internal communications violates RFRA. *See* Dkt. # 120; Dkt. # 150, Dkt. # 157.<sup>5</sup> Consequently, the TCCB’s RFRA argument is waived. *See McGregory v. City of Jackson, Miss.*, 335 F. App’x 446, 449 (5th Cir. 2009) (“Arguments not made below are generally waived and cannot be raised for the first time on appeal.”); *Cantu v. TitleMax, Inc.*, No. 5:14-CV-628 RP, 2015 WL 5944258, at \*5 (W.D. Tex. Oct. 9, 2015) (holding party’s failure to assert work product protection in proceedings before the magistrate judge waived ability to assert work product protection in appeal to district court); *Silva v. City & Cty. of Honolulu*, No. CV 11-00561 LEK-RLP, 2012 WL 12891431, at \*4 (D. Haw. Dec. 31, 2012) (holding argument raised for the first time on appeal to district court comes too late). Under the clearly erroneous or contrary to law standard of review, the Court will not consider new objections to the subpoena not raised before the Magistrate Judge. The Court reviews TCCB’s remaining arguments below.

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<sup>5</sup> The Court also reviewed the audio recording of the hearing on the motion to quash. After the Magistrate Judge indicated he found TCCB’s relevance argument unpersuasive, TCCB characterized its remaining arguments as deriving from the First Amendment concerning religion and association.

## I. First Amendment Privilege<sup>6</sup>

TCCB contends requiring production of its internal communications would infringe on its First Amendment rights, those guaranteed by the Free Exercise Clause and the Establishment Clause as well as under the freedom of association. In objecting to Plaintiff's subpoena as an infringement on First Amendment rights, TCCB asserts a First Amendment privilege. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009) (citing *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), *cert. granted and vacated as moot*, 458 U.S. 1118 (1982)).

The Magistrate Judge rejected TCCB's First Amendment privilege claim. The Magistrate Judge relied on *Ambassador College v. Goetzke*, 675 F.2d 662 (5th Cir. 1982) in concluding this case presented "no danger of the government seeking to monitor or regulate a religious group" and thus there were no free exercise violations here. Dkt. # 161 at 3.<sup>7</sup> In evaluating

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<sup>6</sup> The Court notes the Fifth Circuit has observed, "in cases raising First Amendment issues . . . an appellate 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 the field of free expression.'" *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 491 (5th Cir. 2013) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). Thus, the Court has conducted a review of the entire record in this case to appropriately place the discovery dispute in context.

<sup>7</sup> The TCCB did not differentiate its free exercise and establishment arguments and instead blended the two arguments in both its motion to quash and the hearing before the Magistrate Judge.

TCCB's associational rights argument, the Magistrate Judge applied *Perry v. Schwarzenegger*. He determined TCCB failed to make a *prima facie* showing production would chill the associational rights of TCCB members and any chilling effect was outweighed by Plaintiffs' interest. *Id.* at 3–5. The Magistrate Judge expressly based his conclusions on “the narrow scope of the requested documents,” which address a central factual issue: “what burial services are available, and will remain available, to abortion providers in Texas.” *Id.* at 3, 5.

#### **A. Free Exercise and Establishment Clauses**

TCCB argues the Free Exercise and Establishment Clauses together shield a church's internal affairs and thus TCCB's internal communications should be protected from discovery. TCCB argues the Magistrate Judge erred by impermissibly evaluating whether the internal communications, specifically those provided for *in camera* review, had a religious focus. Dkt. # 165 at 5–7 (citing Dkt. # 161 at 5 n.2). TCCB asserts mere adjudication of whether the internal communications were religious or not poses problems for religious autonomy and entanglement of church and state. *Id.*

TCCB correctly asserts “[t]he Supreme Court has recognized the right of religious organizations to control their own affairs.” *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) (citing *Watson v. Jones*, 80 U.S. 679, 727 (1872)). That right “includes

the freedom to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine and the right of religious organizations to select their own leaders.” *Id.* (internal citations and quotations omitted). As a result, courts have recognized religious organizations’ right to choose their clergy, control employment related to religious mission, and direct matters of church governance and religious doctrine. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 495–501 (1979).

However, the right to control internal affairs has not been construed to shield all of a church’s internal documents from discovery. *See Goetzke*, 675 F.2d at 664–65 (finding, in the context of an alleged fraud, “the church must respond to discovery requests, as any other similarly situated litigant would be required”); *United States v. Holmes*, 614 F.2d 985 (5th Cir. 1980) (holding church was required to permit government to access information on the church’s tax exempt status).

Here, context plays a key role in whether the Free Exercise and Establishment Clauses are implicated. TCCB is communicating and coordinating the Catholic Church’s offer to serve as a viable vendor for burying fetal remains in compliance with the Amendments and Chapter 697. *See* Dkt. # 17-2; Dkt. # 69 at 79–124. The government is not requesting documents and does not seek to monitor or evaluate TCCB’s religious activities. Instead, private entities providing healthcare services to seek to gather facts on the Catholic Church’s burial

services offer—namely how, when, where, and for how long burial services will be provided. The fact TCCB is a religious organization does not immunize its internal communications regarding those services from discovery.

There has been no showing Plaintiffs’ discovery request infringes on TCCB’s right to control its own affairs or interferes with matters of church government, faith, or doctrine. Plaintiffs do not seek to unmask the deliberative process by which TCCB arrived at the decision to support SB 8 or TCCB’s strategy for showing that support. The danger of government interference with doctrinal decisions or church management, against which the Free Exercise and Establishment Clauses guard, is not present here. *Cf. McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972) (“[L]egislation that regulates church administration, the operation of the churches [or] the appointment of clergy . . . prohibits the free exercise of religion.” (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 107 (1952))); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (remarking that the ministerial exception is a structural protection that “categorically prohibits federal and state governments from becoming involved in religious leadership disputes”). Thus, production of TCCB’s internal communications, tailored to the fact issue to be addressed at trial, does not trigger the Free Exercise and Establishment Clauses or a privilege asserted thereunder.

The Magistrate Judge’s *in camera* review of the sample of TCCB’s internal communications strengthened his conclusion the communications should be produced because they included “routine discussions of the burial services at issue here.” Dkt. # 161 at 5 n.2. The Magistrate did not engage in forbidden line-drawing regarding religious beliefs or second-guess church doctrine. *Cf. Cannata*, 700 F.3d at 174 (reiterating that requiring a church to justify termination of its minister would cause “a civil factfinder to sit[] in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission”); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008) (noting interpreting the phrase “religious convocations or services” threatened to “embroil the government in line-drawing and second-guessing about which it has neither competence or legitimacy”). The Magistrate Judge merely remarked on the general focus of the mails between Ms. Allmon and other TCCB staff: burial services for fetal remains.

Accordingly, the Court overrules TCCB’s objections concerning the Free Exercise and Establishment Clauses.

### **B. Associational Rights**

TCCB claims the Magistrate Judge erred in finding TCCB failed to make a *prima facie* showing of a chilling effect on the exercise of associational rights by narrowly defining “chill.” Dkt. # 165 at 10–11. According to TCCB, within the context of associational rights,



the chilling analysis must also take into account impact on members' right to speak freely within the association. *Id.* And, TCCB contends, requiring production of TCCB's internal communications would chill conversations between the Catholic bishops concerning sensitive matters of church doctrine. *Id.*

The First Amendment protects a limited right to associate with others for the common advancement of beliefs and ideas concerning political, economic, religious or cultural matters. *See Perry*, 591 F.3d at 1159 (“The right to associate for expressive purposes is not, however, absolute.” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))); *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958) (“[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . .”). “Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Perry*, 591 F.3d at 1159 (quoting *Roberts*, 468 U.S. at 623).

A party asserting First Amendment privilege based on associational rights must make a *prima facie* showing of an objectively reasonable probability of a chilling effect on their associational rights if the discovery is permitted. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm’n*, No. A-15-CV-134-RP, 2016 WL 5922315, at \*6 (W.D. Tex. Oct. 11, 2016) (citing *Perry*, 591 F.3d at 1160–61); *see also In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 488

(10th Cir. 2011) (“[T]he weight of existing authority instructs that the party claiming a First Amendment privilege in an objection to a discovery request bears the burden to make a *prima facie* showing of the privilege’s applicability.”). This means the party must show enforcement of the discovery requests “will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” *Perry*, 591 F.3d at 1160; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010) (“[W]e have explained that those resisting disclosure can prevail under the First Amendment if they can show ‘a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.’” (alteration in original) (citations omitted))).

If the party claiming the privilege can make the necessary *prima facie* showing, the burden shifts to the party seeking the discovery to demonstrate “an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association.” *Id.* at 1161 (quoting *NAACP*, 357 U.S. at 463 (alternations in original)); *In re Motor Fuel*, 641 F.3d at 488. In evaluating whether the interest in disclosure justifies the deterrent effect, courts conduct a balancing test considering factors such as the importance of the litigation, the centrality of the information sought to issues in the case, less intrusive

means of obtaining information, and the substantiality of the First Amendment interests at stake. *Perry*, 591 F.3d at 1161 (surveying cases for factors). In order for disclosure to be ordered, the party seeking the information must show it is “highly relevant” to the litigation, the request is “carefully tailored to avoid unnecessary interference with protected activities,” and the information is “otherwise unavailable.” *Id.*

As the Ninth Circuit has noted, “[i]mplicit 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. Based on this conclusion, there are at least two ways compelled disclosure of internal campaign communications can deter protected activities: (1) by chilling participation and (2) by muting the internal exchange of ideas. *Id.* at 1163. As the Magistrate Judge determined, there is no indication the first danger exists here. TCCB’s members are unlikely to experience threats, harassment, or reprisal. There is no evidence TCCB members will withdraw their membership or reduce their exercise of petition rights on any issue if production is ordered.

However, the second danger may be present. There is some evidence in the record—a conclusory statement by Ms. Allmon—TCCB members have already reduced their use of electronic communications out of fear their communications could later be shared. Dkt. # 165-1 at ¶ 9. Although lacking in detail, such a statement raises a reasonable inference that disclosure of

TCCB's internal communications would inhibit internal conversations essential to the private exchange of ideas, a cornerstone of the freedom of association and expression. But a chilling effect that dampens internal communications is not as serious as cases where group members have been subjected to violence, economic reprisals, and police or private harassment. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 97 (1982) ("Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals. . . ."); *NAACP*, 357 U.S. at 462 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."). Such a difference "speaks to the strength of the First Amendment interests asserted, not their existence." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 176 (D.C. Cir. 2003). Thus, TCCB has made a *prima facie* showing of arguable chilling effect on its associational rights if the disclosure is permitted.

Although this Court's conclusion differs from the Magistrate Judge's, such a difference is nonprejudicial here. Even though the Magistrate Judge concluded TCCB failed to make a *prima facie* showing of a chilling effect, he nevertheless balanced Plaintiffs' interest in the disclosures with any deterrent effect on TCCB. *See* Dkt. # 161 at 5.

Conducting its own balancing test, the Court agrees with the Magistrate Judge's analysis: any chilling effect felt by TCCB through the release of its 298 emails is outweighed by Plaintiffs' interest in obtaining them. This case raises the questions concerning the constitutionality of laws restricting the disposal of fetal remains, not the least of which is whether the restrictions are an undue burden on abortion access. Through negotiation with the TCCB, Plaintiffs have narrowed their disclosure request to emails about the specifics of the burial services the Catholic Church has offered to provide, as communicated and coordinated by the TCCB. This evidence concerns a key factual issue to be addressed at trial—the availability and nature of burial services for abortion providers in Texas. Moreover, Plaintiffs highlight how TCCB has held itself out as coordinating the availability of and procedure for burial services, and thus TCCB's internal communications include facts about the burial services not available elsewhere. Dkt. # 167 at 5–6. Plaintiffs do not request all of TCCB's internal communications concerning fetal remains or discussion of beliefs concerning the termination of pregnancy but have endeavored to limit inquiry to the offer to provide burial services. As a result, Plaintiffs present a strong interest in obtaining the internal emails.

On the other hand, TCCB presented a relatively weak interest in shielding the emails. There is no indication TCCB's members will withdraw their membership or be deterred from advocating for their position on abortion or the treatment of fetal remains. Instead,

TCCB only argues it will experience a limited invasion of privacy and a reduction in its electronic communications.

Balancing the interest and the harm, the Court finds Plaintiffs's interest in disclosure substantially outweighs the deterrent effect on TCCB's exercise of the right of association. Plaintiffs have shown their request is highly relevant to the litigation, carefully tailored to avoid unnecessary interference with protected activities, and the information sought is otherwise unavailable. Therefore, the Court overrules TCCB's objection relating to TCCB's associational rights.

In sum, the Court finds the Magistrate Judge's conclusion that TCCB failed to prove a First Amendment privilege shielding its 298 internal emails from disclosure was not clearly erroneous or contrary to law.

## **II. Rule 45**

TCCB further argues Plaintiffs' subpoena should be quashed under Rule 45 of the Federal Rules of Civil Procedure. The Magistrate Judge concluded the narrowed discovery request, limited to the issue on which Ms. Allmon will testify, sought documents that "are plainly relevant and discoverable." Dkt. # 161 at 2. TCCB argues the Magistrate Judge erred in denying the motion to quash because the subpoena requires the disclosure of privileged information and would subject TCCB to an undue burden. Dkt. # 165 at 16–20.

Rule 45 requires a court to quash a subpoena if it requires disclosure of privileged or other protected matter or subjects a person to an undue burden. FED. R. CIV. P. 45(d)(3)(A). The party resisting discovery bears the burden of proof to substantiate its privilege claim or demonstrate compliance with the subpoena would be unreasonable and oppressive. *See In re Equal Emp't Opportunity Comm'n*, 207 F. App'x 426, 431 (5th Cir. 2006); *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004).

First, TCCB's privilege argument repeats TCCB's assertion of First Amendment privilege. The Court already addressed this argument above. TCCB has not shown the subpoena, as narrowed, requires information protected by First Amendment privilege or any other privilege.

Second, TCCB has not shown producing the remaining 298 emails it identified as responsive to Plaintiffs' discovery request is an undue burden. To determine whether the subpoena presents an undue burden, a court considers the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. *Wiwa*, 392 F.3d at 818. As the Magistrate Judge concluded and this Court discussed above, the internal emails are relevant to a key factual issue in this case and Plaintiffs' have carefully narrowed their request to that fact issue. Furthermore, the Court finds

production of the 298 emails does not impose a significant burden on the TCCB. TCCB has failed to prove complying with the narrowed subpoena would be unreasonable or oppressive.

Accordingly, the Court overrules TCCB's objections made under Rule 45. The Magistrate Judge's finding that the narrowed subpoena requests relevant and discoverable documents was not clearly erroneous or contrary to law.

### CONCLUSION

Upon its own review, the Court finds the Magistrate Judge's order was not clearly erroneous or contrary to law. The Court is not left with a definite and firm conviction that a mistake has been committed. For the foregoing reasons, the Court **DENIES** Texas Catholic Conference of Bishops's Rule 4(a) Statement of Appeal (Dkt. # 165). The Court **FURTHER ORDERS** the Texas Conference of Catholic Bishops to produce, within TWENTY-FOUR (24) HOURS of the entry of this order, emails sent to or received by Ms. Allmon, where: (1) the emails or attachments to those emails include any of the agreed upon search terms, (2) the emails were sent or received on or after January 1, 2016; and (3) the emails or attachments relate to the burial, cremation, or disposition of fetal or embryonic tissue.

**IT IS SO ORDERED.**



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**DATE:** Austin, Texas, June 17, 2018.

/s/

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DAVID ALAN EZRA  
SENIOR UNITED STATES  
DISTRICT JUDGE

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

<b>WHOLE WOMAN'S</b>	§	
<b>HEALTH, et al.</b>	§	
<b>V.</b>	§	<b>A-16-CV-1309-DAE</b>
	§	
<b>CHARLES SMITH, et al.</b>	§	

**ORDER**

Before the Court is the Texas Catholic Conference of Bishops' Opposed Motion to Quash (Dkt. No. 150), Plaintiffs' Opposition (Dkt. No. 156), and the TCCB's Reply (Dkt. No. 157). The Court held a hearing on the motion on June 13, 2018.

In its motion, the TCCB seeks to quash a document subpoena served on it by Plaintiffs. The subpoena was originally served in late March 2018, and the TCCB filed a motion to quash the subpoena on April 2, 2018. The next day the undersigned denied the motion without prejudice, and directed the parties to confer on the motion and seek to resolve the dispute by agreement. Dkt. No. 133. The Court also requested the TCCB to follow the directives of the Scheduling Order (which called for an informal conference with the undersigned) in the event the parties were unable to reach agreement on the matter. The Court held such a

conference on Friday, June 1, 2018, and ultimately granted the TCCB permission to file its motion.<sup>1</sup>

Though the original subpoena sought a broader category of documents, through discussions the scope of the subpoena has been narrowed significantly. First, the parties agreed to a set of eight search terms that were used to identify potentially responsive documents. From that universe of documents, Plaintiffs are only requesting that the TCCB produce those which meet all of the following criteria:

- (1) they are emails either sent or received by TCCB Executive Director, Jennifer Allmon;
- (2) the emails were sent or received on or after January 1, 2016; and
- (3) the emails or attachments relate to the burial, cremation, or disposition of fetal or embryonic tissue.

As noted, Ms. Allmon is the Executive Director of the TCCB. She has provided both live and affidavit testimony in this case, in support of the challenged legislation. The State intends to call her as a witness at trial as well. The primary focus of her testimony has been on the TCCB's intention to provide cost-free burial for fetal or embryonic tissue, and on TCCB's attempts to identify cemeteries or funeral directors that will

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<sup>1</sup> The Court set an expedited briefing schedule for the motion, as the case is set for trial on July 19, 2018, and the discovery deadline for the case is June 15, 2018.

provide such services. The availability of such services will be a central issue at trial.

Though the TCCB raises a relevance objection to the documents, that is not the main focus of this dispute. Regardless, as noted at the hearing, the Court overrules this objection. As narrowed, the documents requested by the subpoena are plainly within the scope of the discovery permitted by the Federal Rules, as they are limited to documents either sent or received by Ms. Allmon, who will be a trial witness, and are further limited to the relevant time frame and the issue on which she will testify. These documents are plainly relevant and discoverable.

Instead, the primary focus of the TCCB's objection to producing the documents are two arguments based on the First Amendment. First, TCCB raises an objection based on the Free Exercise Clause, and second it objects on the ground that the discovery infringes on the TCCB's First Amendment right peaceably to assemble and petition the government.

The TCCB's Free Exercise argument is elusive. Though it cites a number of cases, those cases are largely inapposite. The central theme of all of the cited cases is that, as the TCCB itself notes, "religious doctrine and teaching be left to the free choice of churches and believers, and cannot be controlled by government." Dkt. No. 150 at 11. Thus, courts have refused to intervene in such matters as disputes regarding the appointment or firing of clergy, the unionization of church employees, or similar matters that would cause

a court to interfere in matters of church governance or religious doctrine. *See, e.g., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Importantly, however, the Fifth Circuit has held that the Free Exercise Clause does not provide a blanket privilege for all communications of a religious organization. *Ambassador Coll. v. Goetzke*, 675 F.2d 662 (5th Cir. 1982). In *Goetzke* the Circuit noted that there was “no danger of the government seeking to monitor or regulate a religious group” in that case, and thus there were “simply no free exercise considerations of even arguable validity.” *Id.* at 664. Given the narrow scope of the requested documents, the same is the case here. The documents requested do not address religious doctrine or church governance, but instead relate directly to a factual issue that will be central at trial: precisely what burial services are available, and will remain available, to abortion providers in Texas. That the primary organization presently offering to make those services available is a church does not make the relevant facts immune from discovery.

Though the TCCB’s second objection has more potential merit than its first, it still falls short. As the undersigned noted in a 2016 decision,

Courts recognize a qualified discovery privilege under the First Amendment, based primarily on the right to peaceably assemble and the right to petition the government found in that amendment. . . . The privilege arising out of the First Amendment is not absolute, however, as it only protects a party from

compelled disclosure that would chill the associational rights at issue. Thus, a party asserting the privilege must make a prima facie showing of an objectively reasonable probability of a chilling effect on their First Amendment rights if the discovery is permitted. This means that the party must show that disclosure will deter members of the association from maintaining membership due to fears of threats, harassment, or reprisal from either government officials or private parties.

*Wal-Mart Stores, Inc. v. Tex. Alc. Bev. Comm'n*, 2016 WL 5922315 \* \_\_\_\_ (W.D. Tex. Oct. 11, 2016) (citations omitted). Here, the TCCB has failed to make that showing. Indeed, as noted by its counsel at the hearing, the TCCB members are extremely committed to their position on abortion, and on providing burial services for fetal and embryonic tissue, and there is very little that would chill the exercise of their associational and petition rights on these issues. Further, there is no evidence that producing the limited group of documents discussed above would expose the bishops or other members of the TCCB to threats, harassment, or reprisal. Thus, while the TCCB does have a qualified discovery privilege derived from the First Amendment rights to assemble and petition, that privilege does not apply to the documents requested by the subpoena.

At the hearing, the TCCB made the argument that, as noted in the Ninth Circuit's decision in *Perry v. Schwarzenegger*, there is a difference for purposes of the qualified associational privilege between communications with third parties, and communications

internal to the association. 591 F.3d 1147 (9th Cir. 2009). The TCCB’s suggestion is that the latter—internal communications—are entitled to a higher level of protection, and perhaps are even exempt from disclosure altogether. But as *Perry* itself notes, though disclosure of internal communications of an organization is more likely to cause the sort of chilling effect the privilege addresses, even those communications are not beyond discovery. Rather, as has already been discussed, the associational privilege is a *qualified* privilege, and is subject to a balancing analysis:

the second step of the analysis is meant to make discovery that impacts First Amendment associational rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it. The question is therefore whether the party seeking the discovery “has demonstrated an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association.”

*Perry*, 591 F.3d at 1161 (quoting *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)). Thus, even if there would be some chilling effect on the members of the TCCB if the subpoenaed documents are produced—and that is doubtful—the Plaintiffs’ interest in obtaining the documents is sufficient to outweigh any such impact. Indeed, given that the documents are limited to those directly addressing the specific *factual* question at issue—the availability of burial services for fetal tissue—it is highly unlikely that any chilling impact will

be felt. But even if one is felt, *see* Dkt. No. 150-1 at ¶ 9, the need for the documents in this litigation outweighs any deterrent effect the discovery might have on TCCB. Finally, it is also notable that in *Perry* the documents specifically requested were aimed at the internal strategic discussions of a political campaign, whereas here the subpoena (as revised) only seeks documents discussing burial services, a topic that is neither sensitive nor strategic.<sup>2</sup>

The Court is sensitive to the First Amendment concerns that the TCCB has raised here. Accordingly, this order is expressly limited to the facts before the Court, and specifically is based on the narrowed subpoena, as described at the outset. Because the documents sought go to the heart of the issues that will be the focus of the trial, and because that issue is a fact issue, not one of religion, the Court is comfortable in requiring the TCCB to respond to the subpoena. But nothing herein should be taken as suggesting that a religious entity is subject to discovery without limit, and the Court's ruling is a limited one.

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<sup>2</sup> The TCCB submitted a small number of documents for *in camera* review, intended to provide examples of the concerns it raises in its motion to quash. The Court's review of those documents does not change the opinion stated in the text. Indeed, the emails between Ms. Allmon and staff members of the TCCB have no religious focus, do not discuss church doctrine or governance, and are more or less routine discussions of the burial services at issue here. Nor are they communications that, if made public, would embarrass the church or subject it to threats or reprisals.



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Accordingly, the Texas Catholic Conference of Bishops' Opposed Motion to Quash (Dkt. No. 150) is **DENIED**.

SIGNED this 13th day of June, 2018.

/s/ A W Austin  
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ANDREW W. AUSTIN  
UNITED STATES  
MAGISTRATE JUDGE

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 18-50484

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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. BHA-  
VIK 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

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Appeal from the United States District Court  
for the Western District of Texas

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ON PETITION FOR REHEARING EN BANC

(Filed Aug. 16, 2018)

(Opinion 7/15/2018, 5 Cir. \_\_\_, \_\_\_, F.3d \_\_\_)

Before JONES, COSTA, and HO, Circuit Judges.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

This order in no way disturbs the court's orders filed July 31, 2018, granting a stay of the mandate issuance and extension for bill of costs as prescribed therein.

ENTERED FOR THE COURT:

/s/ Edith H. Jones  
UNITED STATES CIRCUIT JUDGE

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## Fed. R. Civ. P. Rule 45. Subpoena

**(a) In General.****(1) *Form and Contents.***

**(A) *Requirements – In General.*** Every subpoena must:

- (i)** state the court from which it issued;
- (ii)** state the title of the action and its civil-action number;
- (iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and
- (iv)** set out the text of Rule 45(d) and (e).

**(B) *Command to Attend a Deposition – Notice of the Recording Method.*** A subpoena commanding attendance at a deposition must state the method for recording the testimony.

**(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.*** A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may

be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

**(D) *Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

**(2) *Issuing Court.*** A subpoena must issue from the court where the action is pending.

**(3) *Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

**(4) *Notice to Other Parties Before Service.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

**(b) Service.**

**(1) *By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the

mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

**(2) *Service in the United States.*** A subpoena may be served at any place within the United States.

**(3) *Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

**(4) *Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

**(c) Place of Compliance.**

**(1) *For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

**(A)** within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

**(B)** within the state where the person resides, is employed, or regularly transacts business in person, if the person

**(i)** is a party or a party's officer; or

**(ii)** is commanded to attend a trial and would not incur substantial expense.

**(2) *For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

**(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.

**(2) *Command to Produce Materials or Permit inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) *Objections.*** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

**(i)** At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

**(ii)** These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(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.

**(B) *When Permitted.*** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

**(i)** disclosing a trade secret or other confidential research, development, or commercial information; or

**(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) *Specifying Conditions as an Alternative.*** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

**(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

**(ii)** ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) *Producing Documents or Electronically Stored Information.*** These procedures apply to

producing documents or electronically stored information:

**(A) *Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) *Form for Producing Electronically Stored Information Not Specified.*** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) *Electronically Stored Information Produced in Only One Form.*** The person responding need not produce the same electronically stored information in more than one form.

**(D) *Inaccessible Electronically Stored Information.*** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) *Claiming Privilege or Protection.***

**(A) *Information Withheld.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i)** expressly make the claim; and
- (ii)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) *Information Produced.*** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(f) *Transferring a Subpoena-Related Motion.***  
When the court where compliance is required did not

issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

**(g) Contempt.** The court for the district where compliance is required – and also, after a motion is transferred, the issuing court – may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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