No. 18-50484

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

TEXAS CATHOLIC CONFERENCE OF BISHOPS,

Movant-Appellant.

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

EMERGENCY MOTION OF MOVANT-APPELLANT TEXAS CATHOLIC CONFERENCE OF BISHOPS FOR FED R. APP. P. 8 STAY PENDING APPEAL

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RULE 28.2.1 CERTIFICATE OF INTERESTED PERSONS

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

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

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs

Whole Woman's Health
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Nova Health Systems, Inc.
Whole Woman's Health Alliance
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Dated: June 18, 2018

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EMERGENCY MOTION

Movant-Appellant the Texas Catholic Conference of Bishops respectfully moves the Court for a Fed. R. App. P. 8 stay pending appeal of the district court's orders entered on June 13 and 17, Dkts. 161 and 168. Because the district court has ordered compliance by 12:01 p.m. on Monday, June 18, the Conference seeks a stay by **noon on June 18**. In the alternative, the Court should issue a temporary administrative stay pending full briefing of the stay motion.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal will decide how far the State may—in the name of document production—intrude upon the precincts of the Church. Plaintiffs have enlisted the district court to enforce a vastly overbroad third-party document subpoena against the 23 Roman Catholic bishops of the State of Texas, that, on its face, seeks all private correspondence among the bishops concerning the topic of abortion since 1965, among other things.

Not only have Plaintiffs gotten the district court to enforce Plaintiffs' fishing-expedition subpoena to a non-party. They have

also convinced the lower court to do so precipitously, giving the Conference just 24 hours—until 12:01 p.m. on June 18—to produce hundreds of its most sensitive documents.

The district court's orders would forcibly divulge private deliberations of the bishops on sensitive matters of religious doctrine, morals, and policy, all in contravention of the First Amendment, the Religious Freedom Restoration Act, and Fed. R. Civ. P. 45(d)(3). Absent a stay, the Conference will be subject to a contempt order, fines, and even the possibility of imprisonment unless it complies with an unlawful subpoena.

Enforcing production would effectively destroy any ability of the bishops to deliberate among themselves in writing over matters of great import. No one can freely deliberate while the government (or his or her opponents acting with government power) are looking in and writing everything down.

Indeed, just as this Court could not function properly if deliberations among its members (or draft opinions or bench memos) were made public, so too would the bishops be severely limited in their ability to decide matters of moral moment without

some ability to do so in private. Yet in the eyes of the district court, discussing the Catholic morals of whether and how Catholic entities can interact with abortion providers is "more or less routine[.]" That does not take the constitutional issues here seriously.

The district court's actions here are doubly baffling because of the extremely low stakes on the other side of the balance. Although this lawsuit started in 2016, and Plaintiffs have enjoyed the protection of a preliminary injunction ever since, the district court is proceeding as if there were some sudden urgency. There is a bench trial set for mid-July. But that can be no reason to repeatedly set briefing deadlines of 24 hours or less on matters of constitutional import. One can imagine why the Plaintiffs might want to railroad the Conference, but it is difficult to fathom why the district court would.

These facts easily meet the relaxed standard for a stay. The Conference has "present[ed] a substantial case on the merits" on "a serious legal question," and the lack of any prejudice to Plaintiffs shows that a stay is justified. *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014).

Accordingly, Appellants request that **by noon on June 18** this Court enter a stay pending appeal of Plaintiffs' subpoena against Appellants, and the district court's enforcement thereof requiring production by 12:01 on June 18. Alternatively, the Court should issue a temporary administrative stay to allow full briefing on the motion to stay to allow "a detailed and in depth examination of this serious legal issue." *Bryant*, 773 F.3d at 58. Pursuant to 5th Cir. R. 27.3, Appellant attempted to contact counsel for Plaintiffs but was unable to; Plaintiffs opposed a stay request in the district court, and are anticipated to oppose this stay request as well.[1]

[1] This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the district court's denial of the Conference's motion was an immediately appealable collateral order. *See Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 171, 177-78 (5th Cir. 2009). Here, the Conference's motion to quash was based on federal legal protection for its internal affairs, which are not just a defense from liability but also against "governmental intrusion into" a religious organization's "religious affairs," *McCarthy v. Fuller*, 714 F.3d 971-974-76 (7th Cir. 2013), that, like other immunities, is "effectively lost if a case is erroneously permitted" to proceed. *Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002); *see also, e.g., McCarthy*, 714 F.3d at 976 ("harm of such a[n] intrusion into religious affairs would be irreparable, just as in the other types of case in which the collateral order doctrine allows interlocutory appeals"); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011) (permitting interlocutory appeal of order concerning church autonomy rights).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Conference

The Conference is an unincorporated ecclesiastical consultative association that furthers the religious ministry of the Roman Catholic bishops and archbishops in the State of Texas, and their advocacy for the social, moral, and institutional concerns of the Catholic Church in Texas. *See* Affidavit of Jennifer Allmon, Dkt. 150-1 at 2 ¶ 2. In Catholic teaching, the Conference is considered a juridic entity within the Roman Catholic Church. *Id.*

B. The Lawsuit

This lawsuit is a challenge to the constitutionality of Texas's law restricting methods for the disposal of embryonic and fetal tissue remains (EFTR). The law is intended to "express the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.001. The Conference has agreed to provide free burial for embryonic and fetal tissue remains in Church cemeteries. *See* Declaration of Bishop Joe S. Vásquez, Dkt. 170-2 ¶ 22.

The Conference is not and has never been a party to the lawsuit since its filing in 2016. Before the subpoena, its only involvement was testimony by Allmon, in a declaration and at the hearing on Plaintiffs' motion for a preliminary injunction, regarding the Conference's efforts to facilitate free burial services throughout Texas. Dkt. 17-2.

C. The Subpoena

On March 21, 2018, Plaintiffs served the Conference with a third-party subpoena requesting a wide array of communications, as quoted below:

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

Dkt. 150 at 2; Dkt. 150-1 at 2 ¶ 4.

The Conference filed a first motion to quash and for protective order on April 2, 2018. Dkt. 120. That motion was denied without

prejudice on April 3, and the magistrate ordered the parties to confer. Dkt. 133. After conferring, Plaintiffs narrowed the scope of the subpoena, and the Conference produced 4,321 pages of documents. Dkt. 163 at 2. All relevant documents involving communications with people external to the Conference were produced. Dkt. 150-1 at 4 ¶ 8.

But Plaintiffs insisted on obtaining about 300 internal Conference communications among the Bishops and their ministerial staff. These documents include private theological and moral deliberations of the bishops. Declaration of Jennifer Allmon, Dkt. 170-2 ¶ 12. Some are so sensitive that even most Conference staff are not authorized to view them. *Id.*

On the afternoon of Friday, June 8, during an informal telephone conference with the magistrate judge, the magistrate ordered the Conference to file a motion to quash by 9 a.m. Monday, June 11, and set a hearing for June 13. The Conference complied. Dkt. 150.

On the morning of June 13, 2018, the magistrate held a hearing on the motion. Before the magistrate had even ruled, the district court *sua sponte* entered an order shortening the time for an appeal

from the normal 14 days down to less than 24 hours, requiring the Conference to file by noon the next day. Dkt. 158; *see also* 28 U.S.C. § 636(b); W.D. Tex. Magistrate Rule 4(a). The magistrate then denied the Conference's motion. Dkt. 161. The Conference moved for an extension of time, Dkt. 163, but the district court denied that motion, Dkt. 164.

Consistent with the accelerated timeframe, the Conference appealed the magistrate's order on June 14. Dkt. 165. The district court denied the motion at 12:01 p.m. on Sunday, June 17, 2018. In addition to refusing to quash the subpoena, the district court gave the Conference only 24 hours to comply with the subpoena, until 12:01 on Monday, June 18. Dkt. 168.

That same day, the Conference filed a notice of appeal and a motion for a stay in the district court.

STANDARD OF REVIEW

A stay pending appeal "maintain[s] the status quo pending a final determination on the merits of the suit." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981). A party seeking a stay therefore "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs in favor of granting a stay." *Bryant*, 773 F.3d at 57. A stay is proper "where relative harm and the uncertainty of final disposition justify it." *Ruiz*, 650 F.2d at 565.

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

ARGUMENT

I. The Conference has made a substantial case on the merits.

A. The First Amendment prohibits enforcing the subpoena.

Enforcing the subpoena would violate the First Amendment in three ways: by intruding into internal church affairs, entangling church and state, and limiting the Conference's freedom of assembly.

1. The Religion Clauses prohibit enforcing the subpoena.

Plaintiffs' subpoena should be quashed because enforcing it will require both substantive and procedural intrusion into internal church affairs, in violation of controlling law. The First Amendment's Religion Clauses protect "the right of religious organizations to control their internal affairs." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012). This right not only includes autonomy in their selection of religious leaders, but also "the freedom to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Cannata*, 700 F.3d at 172 (internal quotation

omitted); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) (listing applications of the right to membership, property, and other internal church governance matters). The Establishment and Free Exercise Clauses together "radiate a spirit of freedom for religious organizations, an independence from secular manipulation or control" that places "matters of church government and administration beyond the purview of civil authorities." *McClure v. Salvation Army*, 460 F.2d 553, 559-60 (5th Cir. 1972). And this rule has benefits for both church and state—it protects the church from government control or coercion, and it structurally safeguards the state from getting entangled in internal church matters. *Id.* at 560.

The Religion Clauses' protection of internal church autonomy is "best understood" as "marking a boundary between two separate polities, the secular and the religious." *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013). This boundary reflects "a structural limitation imposed on the government by the Religion Clauses," which "categorically prohibits . . . governments from becoming involved" in internal church matters. *Conlon v. InterVarsity*

Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015). The restraint applies to all branches of government: legislative, executive, or—as here—judicial. *McClure*, 460 F.2d at 559-60.

One crucial application of this doctrine is to broadly safeguard internal church deliberations and decision-making. Indeed, "[t]he church autonomy doctrine is *rooted* in the protection of the First Amendment rights of the church to discuss "church doctrine and policy." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002) (emphasis supplied). Courts accordingly and emphatically forbid any "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 188.

This Court has recognized that the right to internal governance and deliberations safeguards against two types of concerns, either of which "alone is enough to bar the involvement of the civil courts." *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). The first concern arises where "secular authorities would be involved in evaluating or interpreting religious doctrine." *Id.* The "second quite independent concern" is

that the investigation itself "would necessarily intrude into church governance in a manner that would be inherently coercive," even if the alleged subject of inquiry "were purely nondoctrinal." *Id.*

Both problems arise from the orders below. First, the district court held that the Bishops' internal communications are not sufficiently religious or sensitive to merit protection. Dkt. 161 at 5 n.2; Dkt 168 at 10. But that determination requires forbidden evaluations of religious doctrine. What the district court believed were simply discussions about "providing healthcare services," *id.*, were, to the Bishops, matters of important and sensitive religious ministry that *inherently* have a "religious focus." Dkt. 170-1 ¶¶ 27-29; *accord* Dkt. 150-1 at 4 ¶ 8. Nor is it clear what criteria or authority a judge could use to gainsay what the bishops believe would "embarrass the church." Dkt. 161 at 5 n.2; *see Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008) (government "has neither competence or legitimacy" in such matters); Dkt. 150-1 at 4 ¶ 8 (disclosure could cause "confusion and dispute within the Catholic Church"). Such determinations "impermissibly permit the state to second-guess church doctrine" and place the "civil factfinder

. . . in ultimate judgment of what the [bishops] really believe[], and how important that belief is to the church's overall mission." *Cannata*, 700 F.3d at 179; *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (examining religious beliefs requires "a light touch" and "judicial shyness").

Second, the process of prying into the mind of the church would itself "pose grave problems for religious autonomy." *Cannata*, 700 F.3d at 174. "It is not only the conclusions that may be reached by [the government] which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to the findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). This is because using the judicial subpoena power to compel "investigation and review of such matters of church administration and government . . . could only produce by its coercive effects the very opposite of the separation of church and State contemplated by the First Amendment." *McClure*, 460, F.2d at 560; *accord Combs*, 173 F.3d at 350.

Thus, courts have warned against allowing "[c]hurch personnel and records" to "become subject to subpoena" and "the full panoply

of legal process designed to probe the mind of the church." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). Churches facing such probes would inevitably begin making internal church decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments." *Id.* That would reflect an unconstitutional "chilling of the decision making process" for churches. *Weaver*, 534 F.3d at 1264; *accord Westbrook*, 231 S.W.3d at 400 (same).

That is precisely what happened here: the "Bishops and staff" at the Conference are "reticent to communicate or share documents electronically" due to the chill caused by Plaintiffs' subpoena. Dkt. 150-1 at 5 ¶ 9. Internal church decision-making has suffered. Dkt. 170-1 ¶¶ 29-33; Dkt. 170-2 ¶¶ 14-19. And future decisions will likewise be chilled, as the bishops are concerned that engaging in the public square on other matters of public concern may again open their internal deliberations to subpoenas. Dkt. 170-1 ¶¶ 32-35; Dkt. 170-2 ¶¶ 20-25.

For reasons like these, courts have repeatedly refused to allow

governmental inquiries into internal church affairs. For example, the First Circuit rejected the government's "compelled disclosure" of a church school's information, finding that the church's "ability to make decisions" regarding its "mission of religious education" would suffer "chilling" and be "substantially infring[ed]." *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 78 (1st Cir. 1979). The Eighth Circuit rejected IRS discovery requests because "disclosure of certain information will infringe upon a church's First Amendment freedoms" to the "free exercise of religion." *Baldwin v. C.I.R.*, 648 F.2d 483, 487 (8th Cir. 1981); *cf.* Church Audit Procedures Act, 26 U.S.C. § 7611. And the D.C. Circuit rejected an NLRB inquiry procedure that allowed it to require religious schools to answer questions about their "curricular and policies choices and policies and 'respond to doubts'" about their religious devotion. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002); *see also Port v. Heard*, 764 F.2d 423, 432 (5th Cir. 1985) (analyzing protection in individual rights context).

In sum, allowing enforcement of the subpoena would irreparably violate the Conference's "first amendment immunity" from

unconstitutional "burdens of litigation" that intrude on its internal affairs. *Dayner*, 23 A.3d at 1200; *see also* n.1, *supra*. Thus, the orders below should be stayed.

2. Enforcing the subpoena would also violate the Establishment Clause.

Enforcing the subpoena would separately violate the Establishment Clause's rule against entanglement between church and state. The Supreme Court has long recognized that "state inspection" of religious organizations "is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. 602, 619–20 (1971). Similarly, "it is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality).

Entanglement can happen in several ways. It can be "substantive—where the government is placed in the position of deciding between competing religious views" or "procedural—where the state and church are pitted against one another in a protracted legal battle." *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006). Or it can arise more broadly where the claims and defenses

require "government involvement in . . . ecclesiastical decisions" concerning "which individuals will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 189; *accord Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 426 (2d Cir. 2018) (forbidding "excessive entanglement with 'ecclesiastical decisions'").

The kind of intrusive discovery Plaintiffs seek here would produce impermissible procedural entanglement. *Petruska*, 462 F.3d at 311. Just as it would impermissibly infringe the church's autonomy, the "very process of inquiry" into the Bishops' deliberations would also "impinge on rights guaranteed by the Religion Clauses" by creating "excessive entanglement." *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (quoting *Catholic Bishop*, 440 U.S. at 502); *accord Bryce*, 289 F.3d at 658; *Rayburn*, 772 F.2d at 1171 ("protracted legal process" can create procedural entanglement).

3. Enforcing the subpoena would violate the Conference's rights to assemble and associate freely.

As the district court recognized, enforcing the subpoena also raises serious questions about the freedom of assembly and the concomitant freedom of religious association. The magistrate

rejected the Conference's freedom of association arguments, finding that the subpoena would not be likely to chill the Conference's freedom of association. Dkt. 161 at 3-4. The district court, however, found that the Conference had made a *prima facie* freedom of association showing, because forcing it to disclose sensitive internal documents would "mut[e] the internal exchange of ideas." Dkt. 168 at 11-14.

But the district court found that the need for the disclosures outweighed the chill on speech—in the process drastically underestimating the impact of the chill. Of course the bishops will not give up their Catholic faith or stop being bishops as a result of having their private deliberations subject to discovery. But the question is whether they feel they can speak freely. The bishops cannot speak freely to one another about sensitive matters of Church doctrine if they know every word may be read by others. Dkt. 170-1 ¶¶ 35-37; Dkt. 170-2 ¶¶ 20-24.

The right to the "inviolability of privacy in group association" has been declared to be "indispensable to preservation of freedom of association" in many situations. *NAACP v. State of Alabama ex rel.*

Patterson, 357 U.S. 449, 462 (1958). The freedom of association claim standing alone would support a stay. The district court acknowledged that there was a constitutional injury and that injury shifted the burden to the Plaintiffs. That suffices to "present a substantial case on the merits." *Bryant*, 773 F.3d at 57.

B. Enforcing the subpoena against the Conference would violate RFRA.

Enforcing the subpoena would also violate RFRA. Under RFRA, "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental relief." 42 U.S.C. § 2000bb-1. Enforcing the subpoena against the Conference would be an act of the government that substantially burdens the Conference's sincere religious beliefs. *Id.* (defining "government" as a "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States."); *see In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir.), *cert. denied*, 525 U.S. 811

(1998) (RFRA applies to "implementation of federal bankruptcy law" by "federal courts," which "are a branch of the United States").

Enforcing the subpoena against the Conference violates RFRA by imposing a substantial burden on the Bishops' religious exercise of free internal deliberation among bishops and other ministers regarding religious beliefs and ministry. Internal deliberations among religious leaders have been foundational to the most important theological developments in the Catholic Church from the Council of Chalcedon to the Second Vatican Council. Dkt. 170-1 ¶ 39. This religious exercise of internal deliberation requires the freedom to deliberate privately, and to determine when and how the fruit of internal religious deliberations should be communicated to the Church at large and to the public. Part of that religious exercise is necessarily internal communication about how to apply the Conference's faith to pressing issues in its community; in this case, Texas. Dkt. 170-2 ¶¶ 23-25. Being forced by a federal court to hand over internal deliberations, and do so after the deliberations are concluded and without any notice or reason to believe that they would be so forcibly released, substantially burdens the Bishops'

religious exercise. Dkt. 170-1 ¶¶ 29-38.

Under RFRA, once a party has shown a sincere religious exercise, it must next show that the government action imposes a "substantial[] burden" on that exercise. 42 U.S.C. § 2000bb-1. A substantial burden exists when the government "truly pressures the adherent to significantly modify his religious behavior," *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), or imposes a significant cost to avoid violating belief. *Tagore*, 735 F.3d at 330.

The Conference has incurred both kinds of costs. The bishops have already incurred over $20,000 in legal costs to avoid having to turn over internal documents, before even factoring in the time Conference employees have spent. Dkt. 150-1 at 5 ¶ 10. The Conference also faces contempt of court if it does not comply with the subpoena. Forcing the Conference to choose between obeying a court order and protecting its internal religious deliberations imposes a substantial burden. *See Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) ("Where the state . . . put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.").

For this reason, the Third Circuit has recognized that imposing a subpoena can be a substantial burden on religious beliefs under RFRA. *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826, 835 (3d Cir. 1999) (in order to "enforce[] a . . . subpoena over a RFRA objection," it must be "necessary to serve a compelling state interest"). Other courts have likewise found that discovery can violate RFRA. *Perez v. Paragon Contractor's Corp.*, 2014 WL 4628572, at *3-4 (D. Utah 2014) (sustaining subpoenaed witness's RFRA objection to questions about internal church affairs); *see also Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531 (9th Cir. 1997), *overruled on other grounds*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (prison's secret taping of criminal confession violated priest's RFRA rights).

RFRA thus requires that the subpoena further a compelling governmental interest, and be the least restrictive means of pursuing that interest. *Tagore*, 735 F.3d at 330. Only "interests of the highest order" are considered compelling. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). And "RFRA requires the government to explain" the compelling interest

"to the person whose sincere exercise of religion is being seriously impaired," not just in the abstract. *McAllen*, 764 F.3d at 472. Thus far, neither Plaintiffs nor the district court have claimed any compelling governmental interest.

Plaintiffs also founder on the "exceptionally demanding" least-restrictive-means prong. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). That prong requires that government "must" use any available less restrictive means of accomplishing its purpose. *Id.* Here, the Conference has submitted over 4,000 pages of responsive documents, and the Conference's executive director has testified to the "factual" questions Plaintiffs and the district court have identified as relevant. Dkt. 161 at 5; *Mockaitis*, 104 F.3d at 1530. Plaintiffs have not identified the specific need to see additional internal deliberations of the Conference.

The sole rationale identified by Plaintiffs and the district court for ignoring RFRA was that the Conference waived it by not raising it. Dkt. 167 at 7 n.9; Dkt. 168 at 6. But courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Petruska*, 462 F.3d at 309; *Korte*, 735 F.3d at

666 ("RFRA protects First Amendment free-exercise rights"). Here, the Conference explicitly raised RFRA as a defense in both its initial and its renewed motion to quash. Dkt. 120 at 7; Dkt. 150 at 9. And RFRA is closely linked to the First Amendment arguments that were considered below. *See Gonzales v. O Centro*, 546 U.S. 418, 424 (2006) (noting that RFRA "adopts a statutory rule comparable to the constitutional rule"). Indeed, Plaintiffs admitted that the arguments were "substantially the same." Dkt. 167 at 7 n.9. Yet, far from indulging every presumption in favor of protecting important civil rights, the district court improperly ignored a fully-briefed argument for why RFRA applied. That was clear error.

C. The subpoena fails under Rule 45(d).

Enforcing the subpoena would also violate Fed. R. Civ. P. 45(d)(3), which requires courts to quash subpoenas that are unduly burdensome or that require the disclosure of privileged information. These grounds for quashing must be read expansively to avoid serious constitutional doubts. *See McClure*, 460 F.2d at 560-61.

Privileged or Protected Matter. A subpoena must be quashed

if it "requires disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(d). The compelled disclosure of church communications severely curtails church autonomy as well as freedom of assembly and association. *See* Section I, *supra*. "[E]videntiary privilege is a necessary prophylactic" to protect these important First Amendment concerns. *See United States v. Craig*, 528 F.2d 773, 778 (7th Cir.), *affirmed on reh'g,* 537 F.2d 957 (7th Cir. 1976). These exemptions have been applied broadly to protect the weighty interests at stake. *See, e.g., Scott v. Hammock*, 133 F.R.D. 610, 619 (D. Utah 1990) (First Amendment interests counseled interpreting priest-penitent privilege to quash subpoena that sought "intra-faith communications from one ecclesiastical officer to another").

Thus, the privilege extends to religious communications that are made for "doctrinal, spiritual, or religious purposes." *Ellis v. United States*, 922 F. Supp. 539, 543 (D. Utah 1996). In such circumstances, the burden rests on the party seeking production to prove that the privilege claim is mistaken. *Cimijotti*, 219 F. Supp. at 625. That is especially true when, as here, forced disclosure

"could interfere seriously with . . . religious duties and objectives." *Surinach*, 604 F.2d at 77.

Undue Burden. Under Rule 45(d)(3)(A)(iv), courts are especially sensitive to burdens imposed on non-parties like the Conference. *Watts v. S.E.C.*, 482 F.3d 501, 509 (D.C. Cir. 2007).

The subpoena here imposes an undue burden because it is "unreasonably cumulative and duplicative" and "obtainable from some other source that is more convenient [or] less burdensome"—any conceivably relevant information that might be acquired from the Conference's internal communications can also be gleaned from the external communications already produced. *Phillips & Cohen, LLP v. Thorpe*, 300 F.R.D. 16, 18 (D.D.C. 2013).

Additionally, "the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* The contested documents are either irrelevant or easily replaceable by other available evidence. The constitutionality of the Texas statute does not turn on how or why the bishops arrived at their position. By contrast, disclosure of particularly sensitive information imposes an undue burden. *See Nw. Memorial Hospital v. Ashcroft*, 362 F.3d 923, 924 (7th Cir.

2004) ("fierce emotions" over abortion were "combustible" and cautioned against the release of sensitive documents).

Finally, courts must consider the "cumulative impact" of requiring compliance with a particular subpoena. *Watts*, 482 F.3d at 509. Enforcing the subpoena here would incentivize discovery into the churches' internal governance, resulting in increasing entanglement and other church-state conflicts "that follow in the train of . . . legal processes." *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

II. The balance of harms strongly supports a stay

"[T]he loss of First Amendment freedoms for even minimal periods of time, constitutes irreparable injury." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). Once the Bishops' confidential internal deliberations are disclosed, there is no way to repair that breach. Information contained in the documents could be used to harass the Conference. Dkt 170-1 ¶¶ 20-29; Dkt. 170-2 ¶¶14-18. And aside from the documents' content, the government-enforced intrusion into the Bishops' internal deliberations would itself be an irreparable harm. Dkt. 170-1 ¶¶ 19,

31-38; Dkt. 170-2 ¶¶ 14-24. But if the Conference refuses to comply while it continues to pursue its appeal, it faces fines, sanctions, and even potential incarceration.

By contrast, Plaintiffs will suffer little harm from a stay. Plaintiffs have 4,000 pages of external communications and the Allmon deposition. Moreover, since Plaintiffs already enjoy a preliminary injunction against the law they challenge, they are by definition unharmed.

Finally, the public interest is "always" served by orders "protecting First Amendment freedoms." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012).

CONCLUSION

The emergency motion for a stay pending appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 18, 2018, this motion was (1) served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Bitdefender Endpoint Security and is free of viruses.

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FED. R. APP. P. 8(A) CERTIFICATE

In accordance with Fed. R. App. P. 8(a), the Conference has also moved for a stay pending appeal before the district court. The district court has not yet had an opportunity to rule on that motion. Given the time constraints at issue and the ongoing risk of contempt charges being brought against the Conference, the Conference believes waiting for a ruling on that motion is "impracticable." *See* Fed. R. App. P. 8(a); *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (not requiring the filing of a motion for injunction in the district court due to the "immediacy of the problem and the district court's legal error concerning the First Amendment").

/s/ *Eric C. Rassbach*
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CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 5,174 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook 14 pt.) using Microsoft Word 2013.

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Dated: June 18, 2018