No. 18-50484

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees

v.

CHARLES SMITH, in his official capacity,

Defendant-Appellee

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.)

BRIEF OF *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE LUTHERAN CHURCH—MISSOURI SYNOD, IOWA CATHOLIC CONFERENCE, LOUISIANA CONFERENCE OF CATHOLIC BISHOPS, MICHIGAN CATHOLIC CONFERENCE, AND NEW YORK STATE CATHOLIC CONFERENCE IN SUPPORT OF TEXAS CATHOLIC CONFERENCE OF BISHOPS AND REVERSAL

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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. Charles Smith 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-Appellees:

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Nova Health Systems, Inc.
Whole Woman's Health Alliance
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Iowa Catholic Conference
Louisiana Conference of Catholic Bishops
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Michigan Catholic Conference
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June 25, 2018

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INTERESTS OF THE *AMICI*[1]

The amici United States Conference of Catholic Bishops (USCCB) and four state Catholic Conferences (Iowa Catholic Conference, Louisiana Conference of Catholic Bishops, Michigan Catholic Conference and New York State Catholic Conference) have been organized by the Roman Catholic Bishops of the United States (for USCCB), or their respective states (for the rest), as the institution by which the Bishops speak cooperatively and collegially in the field of public policy and public affairs. The policy-advocacy activities of the USCCB are focused on the federal government, and those of the various state conferences are focused on their respective states.

These Catholic Conferences promote the common good of society based on the social teaching of the Catholic Church in such areas as education, family life, respect for human life, health care, social welfare, immigration, civil rights, criminal justice, the environment, and the economy. The Catholic Conferences engage in the education of

[1] Only counsel for *amici curiae* authored this brief. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. *See* 5th Cir. Rule 29(a)(4)(E)(i)-(iii).

Catholics and the general public, and carry out advocacy with legislative and executive officials of state and federal government on public policy matters that relate to these areas of interest.

When permitted by court rules and practice, the Catholic Conferences participate as parties or file briefs as *amici curiae* in litigation of importance to the Catholic Church and the common good of the people of the nation and respective states. This appeal, and particularly the Plaintiffs' attempt to compel production of internal communications of Church officials, involves issues of great interest to the Catholic Church in the United States and, thus, the USCCB and respective state Catholic Conferences.

The Catholic Church does not ask its people to separate themselves, their faith or their worship from cultural or political life in society. In fact, the Church encourages the integration of all aspects of life. The very heart of the mission of a Catholic Conference, therefore, is to serve the common good by serving the Church in matters of public concern. This involves the coordination of efforts of dioceses—whether across a state or across the nation—in matters of interest in which joint participation is desirable. Communication among Church officials,

clergy and laity, is required to carry out this mission. The identification of the needs of citizens in such areas as morality, health, welfare, education, human and civil rights; the formulation of policy positions on these matters; and then the representation of the Church before all branches of government, all require extensive and confidential internal deliberations on sensitive matters. In order to avoid confusion of the faithful, and in order to convey unity among bishops—which both expresses and reinforces the unity of our Church—the deliberations that precede the articulation of a public position routinely occur in private.

The Lutheran Church—Missouri Synod ("the Synod") has more than 6,000-member congregations with about 2 million baptized members throughout the United States. The Synod is divided into 35 Districts covering all 50 states and has 22,000 ordained and commissioned ministers. In addition to numerous Synod-wide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country. The Synod treasures religious freedom and

fully supports and promotes religious liberty and the preservation of all First Amendment protections, including the protection of church autonomy and the rights of the church to discuss church doctrine and policy without intrusion by the government.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 20 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. In the United States, the work of the church is divided between 51 conferences, eight union of conferences, the North American Division and finally the General Conference itself. All of these administrative levels of the church communicate among themselves on a variety of religious and ecclesiastical topics and have a strong interest in protecting their internal deliberations from government intrusion.

ARGUMENT

I. If the Subpoena Power Is Construed to Compel Production of the Internal Church Communications Requested Here, the Chilling Effect on Protected First Amendment Activity Will Be Substantial and Widespread.

The principal brief of the Texas Catholic Conference of Bishops (the "TX Bishops") has explained well the chilling effect on their own First Amendment activity if the contested portion of plaintiffs' subpoena is upheld in this case. TX Bishops Br. Secs. I, III. *Amici* would add that the chilling effect of such a ruling would extend far beyond the TX Bishops and the present facts—it would chill religious speech and exercise as well as political speech, distorting the internal workings of all religious organizations that participate in public life; and it would threaten a new wave of abuse of the subpoena power against such organizations.

This is not just the TX Bishops' problem. State Catholic bishops' conferences across the United States—beginning most immediately with *amicus* Louisiana Conference of Catholic Bishops within the Fifth Circuit—will feel the impact if this Court were to affirm so broad and intrusive a construction of the subpoena power. As in Texas and Louisiana, state Catholic Conferences nationwide (including *amici* state

Conferences in Iowa, Michigan, New York), as well as *amicus* United States Conference of Catholic Bishops in Washington, DC, engage in a full range of *internal* moral and religious deliberations by which they shape and refine their *external* message on public affairs, including occasional public testimony. This is also true of other Christian groups, including *amici* The Lutheran Church—Missouri Synod and General Conference of Seventh-day Adventists. Moreover, although religious polities vary dramatically, and present *amici* certainly do not purport to speak on behalf of religious groups other than themselves, there are many other denominational and otherwise religious organizations that engage in similar public advocacy, which would suffer a similar impact.

In other words, all of these religious groups are expressive associations *par excellence*, vulnerable as any secular organization to governmental interference that might distort their sometimes-controversial contributions to "debate on public issues [that] should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). Accordingly, like any other expressive association, they enjoy the full protections the Free Speech Clause. *See Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC,* 565

U.S. 171, 189 (2012) ("The right to freedom of association is a right enjoyed by religious and secular groups alike."). *See also Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U.S. 753, 760 (1995) (because "a free-speech clause without religion would be Hamlet without the prince … we have not excluded from free-speech protections" various forms of religious expression).

Because *amici* are *also* religious organizations, government interference with their internal processes as they shape their external message raises *additional* concern under the Religion Clauses. As the Supreme Court has recently reaffirmed, the Religion Clauses have long protected the ability of religious organizations "'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor,* 565 U.S. at 186 (quoting *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Pervading this venerable line of cases is language that repeatedly emphasizes the special dangers—and corresponding prohibition under

the Religion Clauses—of government intrusion into the *internal affairs* of religious organizations.[2]

These Religion Clause protections should not be overlooked when Free Speech principles are also implicated, but instead recognized as a source of still greater constitutional concern. *See, e.g., Hosanna-Tabor,* 565 U.S. at 189 (rejecting as "untenable" the position that a religious organization's decision of who should speak for it should be protected only by expressive association principles under the Free Speech Clause, and not also by the Religion Clauses). *See also Employment Div.* v. *Smith,* 494 U.S. 872, 881-82 (1990) (explaining that even neutral and generally applicable laws have been struck down in the "hybrid situation" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech," and providing

[2] *See, e.g., Lee* v. *Weisman,* 505 U.S. 577, 599 (1992) (government may not "obtrude itself in the internal affairs of any religious institution") (Blackmun, J., concurring); *Corp. of Presiding Bishop* v. *Amos,* 483 U.S. 327, 341 (1987) ("religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: … define their own doctrines, resolve their own disputes, and run their own institutions") (Brennan, J., concurring). *See also NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 502 (1979) (noting that the "very process of inquiry leading to findings and conclusions" may "impinge on rights guaranteed by the Religion Clauses").

example where "challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns").

The facts of this case implicate still another First Amendment concern—the right to petition the government for redress of grievances—because the intrusion by subpoena into the internal affairs of the TX Bishops apparently arises in response to the provision of public testimony by their Executive Director in support of state legislation and regulation. To be sure, the jurisprudence under the Petition Clause is not as well developed, and because it is often asserted in conjunction with closely related First Amendment rights, such as the freedoms of speech and assembly, the precise measure of its incremental protection is unclear.[3] At the same time, the cases have made clear that the right to petition, though inextricably related to its

[3] *See Borough of Duryea* v. *Guarnieri,* 564 U.S. 379, 388 (2011) ("Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims."); *id.* at 389 ("There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.").

cognate rights in the First Amendment, is still distinct to some degree;[4] that it reinforces, among others, protections of religious and political expression by religious institutions;[5] and that it is of the highest order.[6]

In light of this, if a subpoena probing the internal deliberations of the TX Bishops were enforced here—where at least three distinct First Amendment rights would be chilled—it is difficult to imagine what third-party discovery of the TX Bishops (or other religious expressive organizations) could be barred by the First Amendment.

We would expect—indeed, fear—that chill to take on the following form. In general, the organizations are likely to curtail activities that are currently routine and characteristic of healthy religious (and secular) organizations that engage in public advocacy, but that would

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[4] *See Thomas* v. *Collins,* 323 U.S. 516, 530 (1945) (describing freedoms of speech, press, assembly, and petition as "not identical, [but] inseparable").

[5] *See id.* at 531 ("This conjunction of [First Amendment] liberties is not peculiar to religious activity and institutions alone."); *id.* ("The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones.").

[6] *See United Mine Workers of America* v. *Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967), (describing the right to petition for a redress of grievances as "among the most precious of the liberties safeguarded by the Bill of Rights.").

increase the risk of an intrusive subpoena. That would include, among other things:

- Providing less frequent or thorough testimony or comments before the political branches;
- Reducing fewer internal discussions of sensitive moral and religious matters to writing, reserving those discussions instead to phone calls or in-person meetings;
- Involving lawyers in the preparation of any such documents that remain, and inserting lawyers into any live conversations on the same matters, all in order to establish privilege in anticipation of possible litigation;
- Exploring reciprocal use of third-party subpoenas, both to avoid any comparative disadvantage in litigation and public policy advocacy, and to assure that courts will treat religious organizations evenhandedly in determining whether discovery of internal deliberative materials may be compelled by subpoena.[7]

[7] *See Masterpiece Cakeshop Ltd.* v. *Colo. Civ. Rts. Comm'n,* 584 U.S. ___, 2018 WL 2465172, at *10-*11 (June 4, 2018) (discussing impermissible differential treatment of religious adherents in analogous cases brought before state civil rights commission). *See also id.* at *14-*20 (Gorsuch, J. concurring) (same).

In short, expressive associations *on all sides* of the public issues of the day—not just the TX Bishops, and not just Roman Catholic, Protestant, and other religious advocacy organizations—would be forced to redirect their energies away from formulating and communicating their views on those issues, both internally and externally, and toward defending their associations against their ideological opponents' intrusive use of the subpoena power. The net result would be not only a pervasive chill on First Amendment activity—less public debate that is more inhibited, less robust, and less wide-open, *cf. New York Times Co.,* 376 U.S. at 270—but also an incentive to renew guerilla warfare among the institutions that should otherwise be advancing that debate.[8] This would be a tragedy for our public life, and this Court should decline plaintiffs' invitation to help bring it about.

[8] Some anomalous litigation along these lines was pursued against the USCCB's predecessor organization about thirty-five years ago, but that litigation was eventually stopped. *See U.S. Catholic Conference* v. *Abortion Rights Mobilization,* 487 U.S. 72, 75 (1988) (describing procedural history extending back to 1982).

II. At the Barest Minimum, Constitutional Avoidance Principles Compel a Narrower Construction of the Subpoena Power and Reversal of the Decision Below.

Amici fully support the TX Bishops' argument that enforcing the subpoena to reach the internal deliberations of a third-party religious expressive association regarding its potential legislative or regulatory advocacy squarely violates the Religion Clauses and other First Amendment protections. TX Bishops Br. Sec. III. *Amici* also support the TX Bishops' argument that, even part from constitutional considerations, Fed. R. Civ. P. Rule 45(d) does not allow, least of all require, compulsion of a third party to produce the internal documents of the TX Bishops at issue on this appeal. TX Bishops Br. Sec. I. *Amici* would add that, even if each of these arguments were rejected standing alone, this Court should still rule for the TX Bishops based on principles of constitutional avoidance.

That is, even if this Court has doubts as to whether the case presents an actual violation of the Constitution (though *amici* firmly believe it does), and even if the Court read Rule 45(d) as potentially encompassing the contested internal documents apart from constitutional considerations (though it does not), the Court fairly may,

and therefore should, construe Rule 45(d) more narrowly to exclude the documents from its scope, thereby avoiding the constitutional issues entirely. Notably, the court below simply failed to consider this venerable principle of constitutional avoidance in construing Rule 45(d),[9] hastening instead to reach and reject the TX Bishops' constitutional claims. This error alone warrants reversal.

In *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the Supreme Court offered guidance on the application of constitutional avoidance principles in the particular context of the Religion Clauses. First, courts should assess whether the proposed application of the statute raises "serious constitutional questions." *Id.* at 501. Second, if the application does raise such questions, the court should determine whether Congress has made a "clear expression of an affirmative intention" that the statute should apply in that circumstance. *Id.* at 504. Third, if Congress has clearly expressed such an intention, then

[9] *See Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932)).

and only then should the court determine whether that particular application of the statute violates the Constitution. *Id.* at 507.

The answer to the first question is plainly yes—application of Rule 45(d) to compel production of the internal deliberations of a third-party religious expressive association regarding its advocacy in support of state legislation and regulation raises a wide range of "serious constitutional questions." These are detailed in the preceding section of this brief, *see supra* Section I, and in the TX Bishops' own brief. TX Bishops Br. Sec. III.

The answer to the second question is just as plainly no. The Federal Rules of Civil Procedure, including Rule 45(d), are promulgated by the U.S. Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 *et seq.*, subject to a congressional veto within seven months. *See id.* § 2074(a). Nothing in that Act, of course, speaks to any particular application of Rule 45(d), nor did Congress reject the Rule when most recently promulgated by the Supreme Court.

Importantly, however, the key language of the Rule, which Congress initially authorized and ultimately allowed to go into effect, includes malleable terms—particularly "undue burden." This language

cannot reasonably be described as a "clear expression of an affirmative intention" by Congress to compel production in this (or any) particular case. Instead, the language appears designed precisely to confer discretion on judges to apply the rule in a fact-sensitive manner—discretion the court below could readily have used to avoid the "serious constitutional questions" posed by compelling production in this case.

Indeed, it is an understatement to say that it is "fairly possible" to apply the "undue burden" language of Rule 45(d) to the present facts in a manner "by which the [constitutional] question may be avoided." *Ashwander,* 297 U.S. at 348. For example, even standing alone, the various chilling effects on First Amendment activity enumerated above amount to an "undue burden" on the TX Bishops—not just "fairly possibly," which is all that is required here, but manifestly.

In the absence of Congress' "clear expression of an affirmative intention" to apply Rule 45(d) to compel production in circumstances like these, the lower court should have construed the Rule not to compel that production, thereby avoiding "serious constitutional issues." The court failed to do so. This was error and should be reversed.

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed.

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CERTIFICATION OF COMPLIANCE

This document complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and FED. R. APP. P. 32(a)(7)(b), as well as 5th Cir. Rule 29.3, because it contains 3,124 words, excluding the parts of the brief exempted by FED. R. APP. P. 32.

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June 25, 2018