RECORD NO. 18–50484

In The
United States Court Of Appeals
For The Fifth Circuit

WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., d/b/a Brookside Women's Health Center & Austin Women's Health Center; LENDOL L. DAVIS, M.D.; ALAMO CITY SURGERY CENTER, P.L.L.C., d/b/a Alamo Women's Reproductive Services; WHOLE WOMAN'S HEALTH ALLIANCE; DR. BHAVIK KHUMAR,

Plaintiffs–Appellees,

v.

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

Defendant–Appellee,

v.

TEXAS CATHOLIC CONFERENCE,

Movant–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION (HON. DAVID ALAN GARZA, D.J.)

BRIEF OF *AMICI CURIAE* THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANTS AND VACATUR

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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.

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STATEMENT OF THE ISSUES

Whether this Court should vacate the District Court's discovery order?

INTEREST OF AMICUS CURIAE

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists and of all religious adherents nationwide.

Amici have a deep interest in the free exercise of religion and the role that religion plays in public life.[1]

SUMMARY OF ARGUMENT

This appeal stems from an order ("Discovery Order"), D.E. 168,[2] issued by the U.S District Court for the Western District of Texas directing the Texas Catholic Conference of Bishops to turn over certain internal documents to the Plaintiffs in the underlying case of *Whole*

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

[2] In the present document "D.E." refers to the Docket Entries in the District Court, whereas "App. D.E." refers to the Docket Entries in this Court.

Woman's Health v. Smith, No. 1:16–CV–1300–DAE (W.D. Tex., filed Dec. 12, 2016). The suit challenges a Texas regulation that governs the proper disposal of embryonic and fetal tissues. D.E. 1, at 2; D.E. 168 at 1–2.

The Discovery Order, which was entered at noon on Sunday, June 17, 2018 (the Christian Sabbath) directed the Texas Catholic Conference of Bishops ("TCCB"), a non–party to the underlying case, to produce certain internal documents within twenty–four hours. The District Court failed to fully consider the burden that its Order would impose on the TCCB and the Catholic Church, as well as the effect that the Order, if upheld, would have on other religious organizations and communities. This order shows a disregard for foundational principles of religious freedom, application of settled law and warrants a prompt reversal.

The District Court failed to take into account and fully consider the harm that the Discovery Order will cause to the TCCB and to other similarly situated communities. First, despite the Supreme Court's repeated admonitions that "religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them," *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696,

713 (1976), the District Court did not order the disclosure of internal deliberations over a religious matter for scrutiny in a civil court. D.E. 168. According to the District Court, the Discovery Order merely permits the plaintiffs in the underlying action "to gather facts on the Catholic Church's burial services offer — namely how, when, where, and for how long burial services will be provided." *Id.* at 9. However, those facts can be gathered without delving into the details of *how* the TCCB *arrived* at the particular answers to those questions. Instead of "accept[ing] the ecclesiastical decisions of church tribunals as it finds them," *Milivojevich*, 426 U.S. at 713, the District Court permitted the plaintiffs to probe for the reasons underpinning those decisions. That is a step too far. *Cf. Ex parte Bd. of Trustees/Directors &/or Deacons of Old Elam Baptist Church*, 983 So. 2d 1079 (Ala. 2007) (granting *mandamus* relief and quashing an order allowing the plaintiff to "inspect the business and financial records.")

The Discovery Order, if upheld, threatens to undermine the independence of religious organizations in their ecclesiastical affairs, because it threatens them with having all of their deliberations reviewed, questioned, taken out of context, and ridiculed by outsiders. This is

exactly what the First Amendment was designed to guard against. *Milivojevich*, 426 U.S. at 713.

Furthermore, the District Court's insistence on having its order complied with in 24 hours, despite the fact that it was issued on a Sunday afternoon, further illustrates the Court's failure to give due consideration to the religious obligations of the TCCB. The Court entered this order absent any emergency, and despite the fact that the trial in the underlying matter is not scheduled to begin for another month, D.E. 168 at 4, and notwithstanding that the injunction against the challenged regulations governing the disposal of fetal remains continues in force. *Id.* at 2–3. Religious beliefs often obligate the faithful to engage (or forego engagement) in certain activities during religious holidays. These obligations, in turn may temporarily limit the ability to comply with emergency court orders. Absent any actual emergency, such orders if endorsed by this Court, will impose a substantial and undue burden on religious communities that seek to both comply with their secular obligations and the tenets of their faith.

ARGUMENT

I. Courts Must Proceed Deliberately when their Orders may Intrude on the Inner Workings of Religious Institutions

It is a well–established that "the First Amendment prohibits secular courts from such intrusions into ecclesiastical affairs." *Phillips v. Marist Soc. of Washington Province*, 80 F.3d 274, 275 (8th Cir. 1996); *see also Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008). Courts may not "encroach[] on the ability of a church to manage its internal affairs." *Combs v. Cent. Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) (citations omitted); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (holding that the "Establishment Clause [] prohibits government involvement in such ecclesiastical decisions."). Underlying these prohibitions on government interference in ecclesiastical affairs is a constitutionally guaranteed "freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

To be sure, religious entities are not immune from civil suits or exempt from the procedural requirements attending litigation. *See generally*, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 885 (7th Cir. 1954) (holding that a church is subject to the Fair Labor Standards Act's requirements regarding minimum wage and that a suit can be maintained to enforce those requirements); *see also McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (recognizing that the Salvation Army, though a church, is subject to suit under Title VII of the Civil Rights Act, but rejecting that particular suit under the ministerial exception doctrine). At the same time, judicial "incursions [into church matters must be] cautiously made so as not to interfere with the doctrinal beliefs and internal decisions of the religious society." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). This cautious approach is particularly important for minority faiths.

A. Historically, Benign Governmental Involvement in Jewish Religious Matters Works to the Ultimate Detriment of the Jewish Community.

At the outset, it should be made clear that the *amici* do not believe that the District Court harbors any ill will towards religion in general or any faith in particular. However, the First Amendment serves as a

safeguard even against benign governmental interference in religious matters. History has repeatedly shown how seemingly neutral involvement can quickly devolve into biased oppression. *See Hosanna–Tabor*, 565 U.S. at 182–87 (recounting the history of governmental interference in church affairs and the constitutional safeguards against this practice); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8–15 (1947) (recounting the history and purpose of the Religion Clauses). These concerns are of particular salience to *amici*.

For millennia, secular authorities have interfered with Jewish matters of faith. As early as third century BCE, King Ptolemy II Philadelphus ordered seventy–two Jewish sages, working separately, to translate the Mosaic Bible into Greek. *See* Ammiel Hirsch & Yosef Reinman*, One People, Two Worlds: A Reform Rabbi and an Orthodox Rabbi Explore the Issues That Divide Them* 188 (2002). On its surface, this edict was a benign request: the secular government simply sought the knowledge contained in sacred Jewish texts. *See* Henry St. John Thackeray, *Translation of the Letter Of Aristeas*, 15 Jewish Q. Rev. 337, 365 (1903) ("I believe that most men have some curiosity about the regulations in the law concerning meats and drinks and the animals

which are considered unclean.");[3] *cf.* Ari Z. Bryen, *Judging Empire: Courts and Culture in Rome's Eastern Provinces*, 30 Law & Hist. Rev. 771, 811 (2012) (suggesting that at least one of the goals was to have each ethnic and religious community codify their laws so that the members of those communities could be judged in accordance with those laws). In reality, however, the purpose of the request was to embarrass the Jewish community. *See generally*, The Union of Orthodox Jewish Congregations of America, *The Translation of the Seventy*, https://bit.ly/2MVzwO2 ("To non–Jews, however, any dispute in interpreting the Torah would cast blemish on the Torah, and on the Torah Scholars who interpret it."). The Greeks hoped that the various translations would differ, thus illustrating that the Torah is not the word of G–d, but mere superstition of "lesser" people.[4] *Id.*

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[3] The Letter of Aristeas is a "celebrated document [which] professes to give a contemporary account of the translation of the Pentateuch into Greek in the time of Ptolemy Philadelphus (285–247 B.C.)," but was likely written at least a century later. Thackeray, 15 Jewish Q. Rev. at 337.

[4] The Talmud teaches that miraculously each of the sages composed an identical translation. Whether or not one believes this version of the events, the point remains: even seemingly neutral demands that the secular government places on religious communities can mask much more sinister motives. Indeed, though King Ptolemy's plan failed, and "[d]espite the miracles, the rabbis viewed this event as one of the darkest days in Jewish history, comparing it to the day the Jews made the golden calf." Chabad.org, *What Is Asarah B'Tevet (Tevet 10)*, https://bit.ly/2MkMH9V.

Throughout Jewish history, secular authorities have demanded that Jewish communities "account for themselves." In the Middle Ages, secular authorities often required rabbis to engage in religious "disputations" with Christian theologians. *See generally* Hyam Maccoby, *Judaism on Trial: Jewish-Christian Disputations in the Middle Ages* (1993). Ostensibly, the purpose of such disputations was to win adherents to the Catholic position not through force, but through intellectual pursuit and debate. *See id.* at 62. Of course, the disputants, in pressing their points, had to refer to contested Biblical and Talmudic passages. *See* Judah M. Rosenthal, *The Talmud on Trial: The Disputation at Paris in the Year 1240*, 47 Jewish Q. Rev. 58, 62 (1956) (noting that the Church "established special courses in Hebrew and employed Jews and converts as teachers … who put their knowledge of the Talmud and their zeal for conversion at the disposal of the Church …."). As a result, various Jewish writings had to be turned over to the authorities for study. *Id.* at 71 ("[I]n Paris [] on Saturday, March 3, 1240 Jewish books were seized and handed over to the Dominicans, and on Monday, June 25, 1240 the first public trial against the Talmud and its most popular commentary, that by Rashi, was opened in the royal court

in Paris in the presence of many church–dignitaries and noblemen."). The disputations were often triggered by the allegations that passages in the Talmud or another Jewish religious text blasphemed Christianity. *Id.* at 67. The tenor and consequences of these events are not surprising: the most likely outcome was the condemnation of the Jewish faith, and its holy books. Thus, in the Disputation of Paris, held on the orders of King Louis IX in 1240, the Talmud was accused of blasphemy and obscene folklore. Though four of the leading rabbis defended the Talmud against the accusations, the Dispute resulted in the burning of Jewish religious texts. Maccoby, *Judaism on Trial*, *supra* at 19–38.

In 1263, King James I of Aragon ordered a similar disputation in Barcelona. This incident was perhaps the fairest such debate. Afterwards, King James remarked that Rabbi Nachmanides's defense of Judaism represented the first time that he heard "an unjust cause so nobly defended." The King even awarded the Rabbi a prize of 300 gold coins. Yet, shortly afterwards, the Rabbi was forced to flee Aragon and the King ordered the "offensive" passages in the Talmud censored. *Id.* at 39–75.

These types of events continued for several centuries with a common thread: Jewish religious materials were examined out of proper context in order to achieve secular[5] (and often nefarious) ends.

This trend of behavior continued into modern times. For example, in post–Communist Russia there have been several petitions presented to the Office of Procurator General calling for an investigation, and possibly ban on certain Jewish groups and Jewish literature, including the *Shulchan Aruch* — the most authoritative compilation of the Jewish law which was written in the 16th century. *See* Ora R. Sheinson, *Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate*, 26 Colum. J. Envtl. L. 483, 530 n.43 (2001) (noting that the *Shulchan Aruch* is "the most authoritative code of Jewish law, which was accepted throughout the Jewish world, and served as the basis for all future development of Jewish law."). In support of these demands, the petitioners excerpted, out of context, the description of several Jewish laws and customs and claimed that in light of these quotes, this

[5] Although on the surface, these disputes were religious rather than secular in nature, "[t]he Fourth Lateran Council … put *on the secular power* the responsibility and the obligation of being the guardian against blaspheming the name of Jesus, the Holy Mother and Christianity in general." Rosenthal, *Talmud on Trial*, *supra* at 68 (emphasis added).

foundational Jewish religious text is actually guilty of spreading religious hatred. *See* U.S. Dep't of State, Country Reports on Human Rights Practices for 2007 at 1576 (2007), https://bit.ly/2KjtJQm. Similarly, in 2015, under the guise of enforcing Russian law against "offending religious convictions and feelings," local prosecutors in Yekaterinburg and Novgorod raided Jewish educational institutions and seized religious books (including copies of the Torah) in order to examine whether the books comply with Russian laws. *See* Jewish Telegraphic Agency, *Russian Prosecutors Raid Second Jewish Educational Institution* (June 15, 2015), https://bit.ly/2MaHHEN.

These events, which span across centuries and continents, teach a fundamental lesson: When secular authorities demand an examination of religious texts and internal debates on the matters of faith and doctrine, even when such an examination does not seek to directly affect those deliberations, the consequences to the religious community can be dire. This lesson is especially apt when a minority religious community's practices are put under a microscope. To reiterate, *amici* do not claim that the District Court had, when it ordered the production of the TCCB's internal communications, any nefarious purpose. Nonetheless, the Court

did not treat seriously the concern that the production of such documents would intrude too deeply and impermissibly on the Church's internal deliberations. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, __ S. Ct. __, slip op. at 12 (June 4, 2018) (holding that religious claims are "entitled to the neutral and respectful consideration."). Nor did the Court consider the harm to the Church that might occur from any misrepresentation of the subpoenaed documents that any third party may be tempted to engage in. Of course, the District Court cannot be held responsible for poor behavior of third parties, should such behavior occur. At the same time, in issuing its orders the Court should take into account the harm that may be occasioned by improper use of the mandated disclosures. *See In re Halkin*, 598 F.2d 176, 192 (D.C. Cir. 1979), *overruled on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) ("If parties are to be forthcoming in responding to requests for discovery, they must have fair assurance that legitimate countervailing interests will be protected ....").

At a minimum, this court should vacate the Discovery Order so that the District Court can engage in the required "neutral and respectful consideration" of Church's "legitimate countervailing interests."

B. Religious Communities Need the Ability to Address Internal Affairs without Fear that their Deliberations will be Disclosed.

Religious communities often employ internal methods to resolve disputes in a manner consistent their faith and moral obligations. If adherents have to worry that their internal discussions may become available to the public, these internal resolution processes would likely suffer a significant diminution in their effectiveness.

Consider the Jewish dietary laws, known as the law of *kashrut*. Although several thousand years old, the debate about the proper interpretation of the various requirements is still ongoing. For example, there is *still* an ongoing debate as to whether the Muscovy duck is or is not kosher. *See* The Union of Orthodox Jewish Congregations of America, *OU Position on Certifying Specific Animals and Birds*, https://bit.ly/2KiqgSn ("It is clear that many authoritative *poskim* [scholars of Jewish law] permitted it, and others did not. In such a case, OU certification will not be given."); Rabbi Ari Zivotofsky & Zohar Amar, *Clarifying Why the Muscovy Duck is Kosher: A Factually Accurate Response*, 11 Hakirah: The Flatbush J. Jewish L. & Thought 159, 159 (2011) (noting that the Muscovy duck has for a century been "accepted as kosher in Israel, France and South America [but] not accepted in the

US."). Similarly, just a few months ago, Israel's Chief Rabbinate ruled that artichokes — "a dish that for centuries has been the symbol, specialty and cash crop of the 2,000–year–old Jewish community in Rome" — can never be kosher. *See* Jason Horowitz, *In Defense of Jewish Artichokes.* N.Y. Times at D1 (May 2, 2018). The rabbis of Rome disagreed, announcing that Jews "are the people of the artichoke, not only the people of the Holocaust." *Id.* As the saying goes, "Two Jews, three opinions." The Union of Orthodox Jewish Congregations of America, Rabbi Dr. Tzvi Hersh Weinreb, *Rabbi Weinreb's Parsha Column, Korach: "Two Jews, Three Opinions,"* http://bit.ly/2MNQygV.

Furthermore, unlike the Catholic Church, Judaism is not hierarchal. *See* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 Geo. Wash. L. Rev. 951, 975 (1997); *Wolf v. Rose Hill Cemetery Ass'n*, 914 P.2d 468, 472 (Colo. App. 1995) (recounting testimony of a "rabbinical expert [who] … testified that Judaism is not a hierarchical religion and that a determination rendered by any one of the tribunals is not binding on the Orthodox Jewish community."). Often disputes arise within different communities concerning not only the proper meaning of certain religious

injunctions, but also whether these injunctions have been appropriately complied with. Thus, debates as to whether a particular authority that certifies compliance with the *kashrut* requirements is too lax or too strict are quite common. *See, e.g.*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1027–28 (8th Cir. 2014) (alleging that some Hebrew National beef products are not, as the label reads, "100% kosher," and that a Triangle K certification agency's "kosher inspection process [is] defective and unreliable."); *see also Wolf*, 914 P.2d at 472 (recognizing that a Jewish religious tribunal determination of a contested religious issue "is not an authoritative or binding interpretation of Orthodox Jewish law."); Paul Vitello, *Label Says Kosher; Ethics Suggest Otherwise*, N.Y. Times at A47 (Dec. 10, 2008) (recounting "a subdued and scholarly discussion about ritual law, Jewish ethics and what to do if you suspect that the kosher meat on your table has been butchered and packed by 16–year–old Guatemalan girls forced to work 20–hour days under threat of deportation.").

An allegation that someone has been skirting the strict laws of kashrut may be ruinous not only to an individual's business, but to his personal reputation within the community. *See* Heather Doyle, *Rabbis*

Urge Public: Don't Rush to Judgment in Kosher Scandal, Syosset Patch (Feb. 15, 2012), https://bit.ly/2lptSXB. Moreover, the Jewish law explicitly forbids embarrassing someone in public. *See* Elie Mischel, *"Thou Shalt Not Go About As A Talebearer Among Thy People": Jewish Law and the Private Facts Tort*, 24 Cardozo Arts & Ent. L.J. 811, 831 (2006) (citing The Babylonian Talmud, Bava Metzia 59a). It is therefore imperative that when questions about individual's or business's compliance with the religious law are raised that, at least initially, they should be handled internally. Subjecting the preliminary results of these investigations and debates to disclosure would undermine the community's attempt to self–regulate its own religious affairs and will risk, in direct violation of the religious prohibition, publicly embarrassing the investigated person.

The traditional form of seeking rabbinical advice known as *responsa* further demonstrates the importance of safeguarding intra–communal religious debates from outsiders' prying eyes. Oftentimes, Jews seeking to properly carry out the commandments of the Jewish law, write to rabbinical authorities with questions regarding the application of that law to unforeseen, modern day situations. *See, e.g.*, Rabbi Louis

Jacobs, The Jewish Religion: A Companion 202 (1995), *reprinted at* https://bit.ly/2KgWU6y. Often these questions concern extraordinarily private matters, and the guidance sought touches on issues of family life, child rearing, healthcare decisions, and the like. *See* Stephen J. Werber, *Cloning: A Jewish Law Perspective with A Comparative Study of Other Abrahamic Traditions*, 30 Seton Hall L. Rev. 1114, 1126 (2000). Understandably, the individuals who seek religious guidance would often not wish their queries to be disclosed to anyone beyond the question's addressee. If such communications were to be routinely disclosed, the ability of the faithful to seek guidance of their spiritual leaders would be severely impaired.[6]

There are countless examples where internal communications within the community are necessary and where they would lose their effectiveness if disclosed to secular authorities. For example: how to evaluate a family's commitment to Judaism in the context of distributing

[6] Given the small, and often tight–knit nature of religious Jewish communities, even redacting identifying information may not help, for often times, the individual may be identified by the nature of the question asked. *See, e.g.*, Rosenberg v. Avila, No. B268320, 2017 WL 1488689, at *2 (Cal. Ct. App. Apr. 26, 2017) (recounting a concern of one of the litigants that the mere entry of a restraining order would disclose his identity to the rest of the "'very small' ultra-orthodox Jewish community" of which he was a member).

financial aid to Jewish school attendees; how to treat religious milestones in gay families; whether to recognize a conversion performed by rabbis who adhere to somewhat different traditions. These questions all implicate extraordinarily sensitive topics which religious Jewish communities continue to debate. Their answers remain in flux. These debates and the ability of the Jewish communities to practice their faith according to their own best understanding of the religious requirements will be jeopardized should the state demand that the records of the debates be turned over to the secular authorities.

The District Court failed to properly consider the harm that the Discovery Order could wreak not just on the litigants in this case, but on religious communities as a whole.

II. The Short Timeframe for Compliance with the Discovery Order Raises Significant Concerns.

The Discovery Order was entered on a Sunday (the Christian Sabbath) and gave the Church only 24 hours to comply. D.E. 168. Later–issued stays (both from the District Court, D.E. 172, and this Court, App. D.E. 16) have relieved the Church of the obligation of immediate compliance with an order of questionable validity. Yet, the

extraordinarily compressed timeframe adopted by the District Court should not pass without judicial scrutiny. If such procedures are sanctioned, and become widely adopted, religious Jewish communities will be negatively impacted. Orders that impose excessively short timelines would pose significant compliance problems for religious Jewish communities for several reasons.

First, although the TCCB was given 24 hours to comply with the Discovery Order (already an unreasonably short time), because the order was issued on a Sunday, *in practice* the time to comply was shortened by several hours. Whatever the District Court's motivation for such an order in this case, orders like that are likely to have a disparate impact on religious communities, particularly minority ones. For instance, the "Jewish faith … requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday." *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961). "Work" includes activities like writing, using electricity (*i.e.*, computers, cell phones, and other electronic devices), in many cases carrying items outside the home, etc. *See* Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. Davis L. Rev. 1617, 1629 (2015). In

addition to Saturdays, observant Jews have at least thirteen additional days each calendar year where similar restrictions apply.[7] Jessica H. Ressler, *Adjudicating Custody and Visitation Matters Involving Jewish Families: What You Didn't Know!*, 40 Westchester B.J. 43, 51 (2015). An order requiring production of documents within 24 hours has a high chance of putting members of a religious Jewish community in an untenable situation. If they comply with their religious obligations, they may be subject to court–imposed sanctions. Or even worse, they could choose to comply with a court order, but at a cost of engaging in activities prohibited by the faith. This Hobbesian choice would impose a substantial and impermissible burden on religious exercise. *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

Indeed, litigants can *deliberately* seek emergency relief at a time when religious institutions are unable to work, and thus unable to mount a vigorous defense of their beliefs. For example, animal rights activists

[7] These are two days of Rosh Hashanah (the Jewish New Year), Yom Kippur (the Day of Atonement), first and last two days of Sukkot (festival of the harvest), first and last two days of Passover, and two days of Shavuot (festival celebrating the giving of the Torah, and known in English as the Festival of Weeks). Ressler, *Adjudicating Custody*, *supra* at 51.

challenged the Jewish ritual known as *Kapparot*[8] on Thursday, September 29, 2016. *United Poultry Concerns v. Chabad of Irvine*, No. 1:16–CV–01810–AB, 2017 WL 2903263, at *1 (C.D. Cal. May 12, 2017). This suit, which could have been brought at any time over the prior year, was timed in a way to maximize confusion: the Jewish Sabbath began the following day, and the holiday of Rosh Hashanah commenced on Sunday, October 2. *See also* Emma Green, *Animal-Rights Groups Are Targeting a Jewish Ritual on Yom Kippur*, The Atlantic (Oct. 11, 2016), https://theatln.tc/2ltrmQd. Even more remarkably, seventy–two hours before the holiday of Yom Kippur began, the District Court issued an *ex parte* Temporary Restraining Order, barring the Chabad of Irvine from practicing their ritual. After the last–minute intervention from the First

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[8] *Kapparot* (sometimes spelled as *Kaporos*),

> [I]s a customary Jewish ritual … [that] dates back to biblical times and occurs only once a year, the few days immediately preceding the holiday of Yom Kippur. … The ritual entails grasping a live chicken and swinging the bird three times overhead while saying a prayer that symbolically asks God to transfer the practitioners' sins to the birds. Upon completion of the prayer, the chicken is killed in accordance with the kosher dietary laws, by slitting the chicken's throat. Its meat is then required to be donated to the poor and others in the community.

All. to End Chickens as Kaporos v. New York City Police Dep't, 55 N.Y.S.3d 31, 33 (N.Y. App. Div. 2017).

Liberty Institute, a Texas–based legal organization that focuses on religious freedoms, the judge dissolved his injunction but at that point it was too late to perform the ritual. *See* Josh Blackman, *Chabad's Ritual is a Clear Example of the Free Exercise of Religion*, L.A. Times (Oct. 20, 2016), https://lat.ms/2Kg9uGB. The chronology of this case illustrates with precision the danger of courts imposing excessively short timelines on religious institutions, without due consideration for their unique missions. The two week span beginning a few days prior to Rosh Hashanah and lasting through Yom Kippur is one of the most hectic periods on the Jewish calendar. It is a time of repentance, introspection, and deep prayers. *See* Judaism 101, *The Month of Elil and Selichot*, http://www.jewfaq.org/elul.htm. Yet, the plaintiffs in *United Poultry* served their motion for a TRO on a Saturday, when religious Jews cannot conduct any business. Making matters worse still, in 2016, Rosh Hashanah fell on a Sunday and Monday, meaning that the Chabad of Irvine could not respond to the plaintiffs' motion until three days later. On Friday (just before the next Jewish Sabbath was to begin), the District Court granted the TRO. The Court ultimately scheduled the arguments on the eve of Yom Kippur, but did not dissolve the TRO until it was too

late for the religious Jews to engage in the *Kapparot* ritual. *See generally* Josh Blackman's Blog, *Dissolving the Temporary Restraining Order in United Poultry Concerns v. Chabad of Irvine* (Oct. 13, 2016) (discussing the timeline of the litigation), http://bit.ly/2Inu0jz. Thus, by manipulating the timing of motions and orders, the litigants were able to achieve what they could not hope to achieve on the merits. *See United Poultry*, *supra* at *6 (dismissing the complaint with prejudice). Though the suit itself was ultimately found to be without merit, *id.*, the unnecessarily tight deadlines did impose a significant burden on the Jewish community.

It is unexceptional to note that Sunday is a special day to the Catholics. *See, e.g.*, Corpus Juris Canonici § 1246 ("Sunday . . . is to be observed as the foremost holy day of obligation in the universal Church."); *id.* § 1247 ("On Sundays … the faithful are bound to participate in the Mass; they are also to abstain from those labors and business concerns which impede the worship to be rendered to God …."). *See also Holy Name Soc'y v. Horn*, No. 1:97–CV–804, 2001 WL 959408, at *4, n.7 (E.D. Pa. Aug. 21, 2001) (recognizing that the Canon Law imposes special obligations on Catholics on Sundays).

Lastly, unlike the Catholic Church, which though consisting of individual parishes is ultimately a single hierarchical institution with commensurate resources, *see* Corpus Juris Canonici § 515 (defining the role of parishes), *id.* §§ 331–33 (conferring "supreme, full, immediate, and universal ordinary power in the Church" on the Roman Pontiff), Jewish religious communities are much smaller, individualized entities. *See* Judaism 101, *Synagogues, Shuls and Temples*, http://www.jewfaq.org/shul.htm ("Synagogues are, for the most part, independent community organizations. In the United States, at least, individual synagogues do not answer to any central authority."). A given synagogue may have little more than a dozen regular members. *See, e.g.*, Ryan Schuessler, *The Last of Iowa's Small–town Synagogues: Seven Members Still Praying*, The Guardian (Feb. 24, 2016), https://bit.ly/2tr6GwR. Smaller communities rarely have any full–time staff, much less a General Counsel or an Executive Director. *Id.* (noting that the synagogue only has a lay, *de facto* rabbi). Quite often, these entities do not have their own computer servers, but instead rely on free email providers such as Google, Yahoo, MSN, and the like. There are often no procedures for preserving the electronic or other

communications, because these religious communities are not necessarily incorporated. In a very real sense, these institutions are little more than a gathering of individuals and families bound together by common faith and tradition. A near–immediate demand to comply with an order to turn over documents may well be unmanageable for a small religious community like many Jewish congregations are. In most cases, communities would be presented with an intractable dilemma: violate the court order or disregard other countervailing duties to protect (and redact) private information. Given such a short timeframe, compliance would become a near impossibility.

Though the courts need not be bound by religious doctrine, our most basic laws embrace procedural delays due to the Sabbath. In our Constitution, the Presentment Clause excludes Sundays from the "ten days" with which the President has to sign or veto a bill. U.S. Const. Art. I, § 7, Cl. 2. Likewise, the Federal Rules of Civil Procedure make allowances for Saturdays, Sundays, and other legal holidays. *See, e.g.*, Fed. R. Civ. P. 6(a)(1)(C). A failure to even acknowledge the heavy burden that the Discovery Order placed on the Church is yet another indication that the District Court failed to duly consider the harm that

its Order could impose not just on the litigants in this case, but on the religious communities in general. This Court should, at a minimum, vacate the order below and remand with instructions to reconsider the matter while taking into account the burden that would be imposed on the Church. *Cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987) ("[T]he government may (*and sometimes must*) accommodate religious practices ....") (emphasis added).

CONCLUSION

For these reasons, the Court should vacate the Discovery Order.

June 25, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 35(b)(2)(A) because this brief contains 5,525 words, excluding the parts of the brief exempted by FED. R. APP. P. 32.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2013 12.2.8 in 14-point font size in Century Schoolbook.

Dated: June 25, 2018

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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