No. 18-622

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH; ET AL.,

Petitioners,

v.

TEXAS CATHOLIC CONFERENCE OF BISHOPS,

Respondent,

and

CHARLES SMITH, EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May federal appellate courts review an order denying First Amendment defenses and permitting an ideological opponent to use the third-party subpoena power to gratuitously troll through a religious body's private theological deliberations?

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INTRODUCTION

This appeal is about the separation of church and state, and how that principle applies to the tools of judicial process. May an ideological opponent of a religious body enlist the third-party subpoena power to troll through the religious body's private theological discussions? Both Religion Clauses of the First Amendment and the Religious Freedom Restoration Act say no, as does a common-sense understanding of the Rule 45 subpoena power. Most would agree that church-state relations will suffer if private impact-litigation plaintiffs are deputized to become latter-day nunnery inspectors.[1]

But for Petitioners and their amici, subpoenaing religious institutions' private theological debates is just a garden-variety discovery tactic, and the bishops of the Catholic Church in Texas might as well be just "a social club." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012). This is a crabbed and entirely incorrect view of the "special solicitude" that the Religion Clauses provide. *Ibid.*

It is also pernicious. If Petitioners had their way, no religious institution in the country—"left" or "right"—would be safe from weaponized discovery by their political opponents. And given the current polarized state of the nation, that would be a recipe for both societal discord and a massive increase in the federal courts' First Amendment docket.

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[1] Consistent with Respondent Bishops' religious affiliation and this Court's decisions, the Bishops use the term "church" as shorthand in describing religious groups of all faiths.

Moreover, forcing non-party religious bodies to obtain reversal of a subpoena on appeal *after* trial—as Petitioners demand—would be both difficult, due to mootness, and pointless, because the damage would already be done. In this sort of situation, the process itself is the constitutional violation. It thus behooves federal courts to tread carefully when they come close to the church-state line.

That is precisely why appellate courts facing this question have repeatedly permitted interlocutory appeals of denied church-autonomy defenses. Indeed, they have done so with such uniformity that there is no split in authority on the question. Thus, Petitioners' request for summary reversal comes entirely as a bid for error correction—which is not this Court's role.

This is not to say that governmental bodies cannot employ ordinary criminal process against religious organizations or that religious bodies are immune to discovery where they are parties to a civil lawsuit. But in the context of a subpoena directed at a third-party witness in a civil lawsuit, trolling through a religious body's internal theological debates is manifestly an undue burden under Rule 45(d).

That conclusion is only reinforced by the particularly uncommon facts here, where Petitioners engaged in a fishing expedition. The ostensible reason for the subpoena, Petitioners now admit, was to get impeachment evidence to undermine peripheral evidence that Petitioners' own stipulations had rendered irrelevant to their case. That kind of triply-unimportant evidence ought not be the stuff of church-state conflict, nor can it justify the kind of intrusion Petitioners sought below. Add the additional unusual fact that Petitioners

offered to withdraw their subpoena if the Bishops would agree not to testify for the State, and it becomes clear that this appeal is both fact-bound and a poor vehicle for this Court to decide any jurisdictional issue.

Finally, a word about the conduct of the district court. Whatever the district court's motivation for repeatedly setting very short compliance deadlines for the Bishops, it was not the right way to decide what the district court already knew to be a significant First Amendment issue, especially where the issue proved to be entirely irrelevant to the trial and its outcome. For example, opening court at noon on a Sunday to issue a 24-hour deadline to hand over contested documents is not just highly unusual district court practice, it also had the real prospect of denying all process to the Bishops by making an appeal practically infeasible. There is thus more than a whiff of chutzpah to Petitioners' request that the Court summarily reverse based on the Court's supervisory powers. Pet. 28. Indeed, if anything this Court should consider summarily affirming the Fifth Circuit's careful application of Rule 45, so as to discourage other impact plaintiffs from trying the gambit that failed here.

STATEMENT

A. The Texas Catholic Conference of Bishops

The Texas Catholic Conference of Bishops is an unincorporated ecclesiastical consultative association that furthers the religious ministry of the Roman Catholic bishops and archbishops in the State of Texas, particularly through advocacy for the social,

moral, and institutional concerns of the Catholic Church. R.2081.[2]

In Texas there are 13 dioceses, two archdioceses, and one ordinariate, all of which are led by over 20 Bishops. R.2372. The Bishops constitute the voting members of the board of the Conference. *Ibid*. The Conference also has eight staff members who are directly accountable to the Bishops and perform important religious functions for the Church, such as assisting in the performance of ministry, facilitating communication between the Bishops, and helping implement the Church's mission as it relates to matters of Catholic education, public policy, and other activities. R.2379-80. The Bishops directly appoint the Conference's Executive Director, who facilitates communication among the Bishops. R.2371.

Through the Conference, the Bishops discuss and decide how the Catholic Church in Texas should engage with issues of Catholic moral, theological, and social teaching, including topics of great public concern and controversy such as abortion, healthcare, Medicaid expansion, immigration, and refugee resettlement. R.2713-14. The Conference also supervises the state's Catholic schools to ensure fidelity to the Church's teachings and beliefs. R.2371-72.

To provide unified theological guidance and governance, the Bishops rely heavily on the ability to communicate as a group with each other and with the senior leadership of the Conference via email. R.2373. Given the Conference's size, both geographically and

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[2] Citations to "R.#" refer to pages of the Fifth Circuit electronic record on appeal.

in number of members, email is a critical tool that allows for the Bishops to engage in timely deliberations and reach a consensus. *Ibid.* These emails frequently include deliberations over theological and moral issues facing the Bishops' ministries. *Ibid.*

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

The Catholic Church teaches that directly intending to take innocent human life through abortion is gravely immoral and never permitted. R.2374; Catechism of the Catholic Church §§ 2270-75. Because of that belief, the Bishops have long been actively involved in public debate over laws regulating abortion in Texas. Underlying the Bishops' position is a belief in the need to respect the dignity of all human life. *Ibid.* Based on these beliefs, the Bishops advocate for the respectful disposition of fetal remains.

In the spring of 2016, the Bishops became aware of efforts to change Texas law to more humanely dispose of embryonic and fetal tissue remains. Under existing regulations that were enacted in 1989, hospitals, clinics, and other regulated healthcare facilities were able to dispose of fetal remains in a variety of ways, including discharging the remains into the sewer system or dumping the remains into a mixed-use landfill. 25 Tex. Admin. Code § 1.136(a)(4)(B)(i) (2018).[3] Officials at the Texas Department of State Health Services (DSHS) began to work on revising the rules. DSHS determined that existing methods were incompatible with the state's "policy objective of ensuring dignity for

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

the unborn." 41 Tex. Reg. 9709 (Dec. 9, 2016). Accordingly, DSHS adopted amendments limiting the methods available for the disposal of fetal remains to cremation, entombment, burial, placement in a niche, or the scattering of ashes. *Id.* at 9733-34. Jennifer Allmon, the Conference's Executive Director, provided written and oral testimony on August 2, 2016, in favor of the revised rules, expressing the Bishops' belief that "[t]reating the dead with respect is a duty of the living and a right of the dead." R.437.

One of the primary objections to the proposed rule involved the purported cost of interment. After the August 2 hearing, the Bishops began exploring the possibility of helping to facilitate free burial services for fetal remains. R.437-38. In many dioceses across the state, the Bishops have long run a burial ministry in which Catholic cemeteries offer free burial for miscarried children. The existing burial ministry cooperates with many hospitals, families, and funeral homes to provide a respectful burial for children who die in utero. *Ibid.* The Bishops considered expanding these burial ministries to cover the burial of fetal remains throughout the state.

Deciding whether to offer such services was not merely a question of costs or logistics. Rather, it involved significant internal theological debate and discussion. R.2374. Catholic ministries must be careful not to impermissibly partner with abortion services or to offer any material cooperation whatsoever. *Ibid.* Catholic ministries must also avoid the danger of scandal (here, a doctrinal term of art, cf. Catechism of the Catholic Church § 2284) by association with abortion providers. *Ibid.* Determining whether it was ap-

propriate to offer burial services to the victims of abortion therefore involved lengthy private discussions regarding Catholic moral theology on the principle of material cooperation with evil. *Ibid*.

After months of extensive internal deliberations, the Conference announced on December 12, 2016 that it would work with Catholic cemeteries and funeral homes to expand the Bishops' burial ministry and offer the service to children who die by abortion throughout the state, at no charge. R.438. The only cost to healthcare facilities would be transportation of the remains. R.2730-31. There are more than 100 Catholic cemeteries in the state. R.2728.

C. Petitioners' Lawsuit

Petitioners are several licensed abortion providers. In addition to the law at issue in the underlying case here, Petitioners have challenged numerous other provisions of Texas law regulating abortion. See, *e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016); *Whole Woman's Health* v. *Paxton*, No. A-17-CV-690-LY (W.D. Tex. filed July 20, 2017); *Whole Woman's Health Alliance* v. *Paxton*, No. 18-00500 (W.D. Tex. filed June 14, 2018).

On December 12, 2016, Petitioners brought the lawsuit underlying this appeal against the Texas official charged with implementing the fetal-remains law. R.30. The Bishops are not and have never been a party to the underlying lawsuit.

At the initial preliminary injunction hearing, Allmon participated as a witness to testify that the Bishops had committed to facilitating burial services without cost to respond to the argument that the fetal

remains law would impose undue costs on abortion providers. R.2719. She testified that the Bishops would ensure that at least one Catholic cemetery in each of the State's 15 dioceses would participate in the cost free burial program, R.2728.

The district court issued a preliminary injunction on January 27, 2017, enjoining Texas's regulation. Texas appealed the preliminary injunction to the Fifth Circuit. *Whole Woman's Health* v. *Hellerstedt*, No. 17-50154 (5th Cir. docketed Mar. 1, 2017).

D. Legislative Enactment and Second Preliminary Injunction

Once the regulation was enjoined, the Texas legislature sought to enact a fetal remains statute. On April 28, 2017, the Texas House State Affairs Committee held a hearing on fetal remains disposal methods and the dignity of the human body. R.2723-24. Allmon testified in favor of the bill, stating that "respect for the remains of the human person should be given to those whose lives end before even taking a breath." R.437.

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

Petitioners moved for another preliminary injunction against the new law. R.1685. Their amended complaint still did not mention the Bishops and contained no Establishment Clause or Free Exercise Clause claims. Similarly, the second preliminary injunction motion did not mention the Bishops and only briefly

mentioned the plan to "turn[] over fetal tissue to religious institutions for religious disposition[.]" R.1706.

District Court Judge David Ezra granted the second preliminary injunction in part on January 29, 2018. R.1921. His opinion did not mention the Bishops.

E. The Subpoena and Motions to Quash

On February 7, 2018, Judge Ezra set a bench trial for July 16, 2018. R.1932. On March 21, 2018, Petitioners served the Bishops with a third-party subpoena requesting a wide array of communications. The subpoena required production of:

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

R.1962.

On its face, the subpoena required the Bishops to produce all communications concerning abortion since the formation of the Bishops' Conference in 1965. It also sought every communication the Bishops' Conference has ever had with Texas officials, regardless of their subject matter or relevance to Petitioners' case.

And it compelled production of all internal documents, no matter their confidentiality or religious content. The subpoena also sought to impose a continuing discovery obligation on the Bishops. R.1962. The subpoena and the requested response date came over Easter, making it "nearly impossible" for the Bishops' to respond. R.2081.

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

The Bishops filed a first motion to quash and for a protective order on April 2, 2018. R.1944. In addition to asserting relevance objections, the Bishops argued that the subpoena violated the First Amendment by infringing on their rights to religious liberty and to freedom of speech, assembly, and petition. R.1950. In addition, the Bishops argued that the subpoena violated the Religious Freedom Restoration Act ("RFRA") and was unduly burdensome under Fed. R. Civ. P. 45. R.1950-51. That motion was denied without prejudice a day later, on April 3, 2018. R.2019.

On April 3, the Bishops conferred with Petitioners regarding the scope of the subpoena. Petitioners insisted that the Bishops produce all internal communications that used the following terms: SB8, "SB 8," Fetal, Fetus, Embryonic, Embryo, Abortion, Aborted, Miscarriage, Unborn, or "burial ministry." R.2067. The Bishops objected to this search because it went beyond the scope of Petitioners' lawsuit, would produce voluminous documents, and would require time-consuming, expensive document review. The Bishops

also objected because the request would yield confidential internal deliberations among the Bishops themselves, which they said that they would not produce voluntarily.

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

In the absence of an agreement, and without waiving their objections to the Petitioners' search terms, the Bishops conducted a search. The search produced over 6,000 pages of records. Because of the confidentiality and sensitivity of the documents, Allmon reviewed each of the documents personally, in consultation with the Bishops' attorneys. R.2128. After reviewing the documents using Petitioners' terms, the Bishops ultimately produced 4,321 pages of documents. R.2288. Altogether, the Bishops had to spend over 360 staff hours responding to the subpoena and accrued over $60,000 in paid attorney's fees and costs. Mot. for Costs at 1, 6, 13, *Whole Woman's Health* v. *Smith*, No. 18-50484 (5th Cir. Oct. 3, 2018).

The Bishops produced all responsive documents involving communications with individuals external to the Conference. R.2083-84. This included all communications with state officials, external communica-

tions to Catholic conferences in other states, communications with Catholic cemeteries in Texas participating in the Bishops' burial ministry, and internal communications to lower-level Conference staff. *Ibid.*

Petitioners also deposed Allmon for more than three hours on June 13, 2018. At the deposition, Petitioners were able to ask questions about many of the fact issues they claimed required access to the contested internal emails. Pet. App. 8a, 27a.

Despite the Bishops' efforts, Petitioners insisted on more, demanding production of about 300 internal communications between the Bishops and Conference staff. These documents include confidential theological and moral deliberations of the Bishops. R.2381. Some are so sensitive that even most staff are not authorized to view them. *Ibid.* Because the Bishops would not voluntarily produce the communications containing these deliberations, Petitioners sought an informal hearing with the magistrate judge.

F. The Rulings Below

The informal hearing was held at 4:00 p.m. on Friday, June 8, 2018. At the end of the hearing, the magistrate unexpectedly ordered the Bishops to file a motion to quash by 9 a.m. on Monday, June 11, and set a hearing for June 13. R.2064. The Bishops complied with the accelerated timeframe. R.2065. In their renewed motion to quash, the Bishops once again raised objections under the First Amendment, RFRA, and the federal rules. R.2073.

On the morning of June 13, the magistrate held a hearing on the motion. While claiming that they were "only seeking the communications because [Allmon]

volunteered to testify in this case about the burial ministry," Petitioners then offered a bargain: if the Bishops' Conference "want[ed] to keep its internal communications confidential, it can simply withdraw Ms. Allmon's testimony." R.2984-86. In the same vein, Petitioners asked the court to "bar Ms. Allmon from testifying at trial" unless the contested private deliberative documents were produced. R.2986. In response, Texas stated that Allmon would be "subpoenaed like every other witness" testifying for the State. R.2993.

The magistrate acknowledged that "there's not going to be a production" of the internal records absent an appeal to Judge Ezra. R.2999. He suggested that a stay would be appropriate to allow the Bishops to seek review. *Ibid.* But he emphasized that the decision was not in his hands, and that Judge Ezra was "very committed—probably as committed as the bishops are to their position * * * to his July 19 trial date in the case." R.3001. After the hearing concluded, the parties immediately began Allmon's June 13 deposition. R.2999.

Later that day, the magistrate denied the Bishops' motion. R.2285. Before the magistrate entered that order on the docket, Judge Ezra *sua sponte* entered an order shortening the time for an appeal from the magistrate's decision from the normal 14 days to less than 24 hours, requiring the Bishops to file by noon the next day, June 14. Pet. App. 8a.

The Bishops moved for an extension of the deadline, which the district court denied a few hours later. R.2287-94. The Bishops then appealed the magistrate's order to the district judge, filing before noon on

Thursday, June 14. R.2295-2315. The district court denied the appeal at 12:01 p.m. on Sunday, June 17. R.2347-2363. At the same time, the court ordered the Bishops to turn over a specific set of documents within 24 hours of entry of its order. R.2362-63.

That same day, the Bishops appealed. R.2364-66. Also that day, they filed a motion for a stay in the district court, R.2367-69, and an emergency motion for a stay in the Fifth Circuit. Shortly before the noon deadline on June 18, the district court granted a 72-hour stay. R.2386. The Fifth Circuit granted a stay pending appeal and expedited the appeal, ordering the parties to file briefs within seven days. The next day, June 19, Petitioners filed a motion to dismiss the appeal for lack of jurisdiction.

The Bishops filed their opening brief in the Fifth Circuit on June 25. Three sets of *amici* filed briefs in support of the Bishops. See Pet. App. 16a (listing Brief of *Amicus Curiae* Jewish Coalition for Religious Liberty; Brief of *Amici Curiae* U.S. Conference of Catholic Bishops, *et al.*; Brief of *Amici Curiae* Ethics & Religious Liberty Comm. of the Southern Baptist Convention, *et al.*). Also on June 25, Texas subpoenaed Allmon to testify.

On June 19, the Bishops filed an opposition to Petitioners' motion to dismiss.

On July 13, the Fifth Circuit issued an order reversing the order of the district court and stating that its opinion would be filed by July 15. Pet. App. 45a. On July 15, the panel issued its opinions.

Judge Ho joined Judge Jones's majority opinion denying the Petitioners' motion to dismiss and holding

that the subpoena imposed an "undue burden" on the Bishops under Rule 45 of the Federal Rules of Civil Procedure. Pet. App. 29a. The court held that it had jurisdiction under the collateral order doctrine because "the consequence of forced discovery" on rights that "go to the heart of the constitutional protection of religious belief and practice" would be "effectively unreviewable" without an interlocutory appeal. Pet. App. 9a-10a. On the merits, the panel found that it was unnecessary to decide the Bishops' constitutional and RFRA claims since it was enough to find that the district court's "analysis was incorrectly dismissive of the seriousness of the issues." Pet. App. 15a-17a. The panel then found that the district court had overvalued Petitioners' interest in the Bishops' internal documents, which was "questionable at best" in light of the Bishops' 4,000 pages of production, hours of deposition testimony, and Petitioners' admission that it viewed Allmon's testimony as "cumulative." Pet. App. 26a-27a. The panel found that the proper balancing of interests under Rule 45 clearly favored the Bishops.

Judge Ho concurred, expressing "regret that the relief" the court granted "is even necessary." Pet. App. 30a. Judge Costa dissented, arguing that the court "should not allow piecemeal review of a discovery order unless that ruling raises a substantial constitutional concern," Pet. App. 35a, and relying on the district court's finding that there was no "close constitutional question," Pet. App. 38a-39a.

On July 30, Petitioners filed a petition for rehearing en banc. It was denied on August 16, without either dissent or a request for a poll by any judge. Pet. App. 83a.

Two months later, following a five-day bench trial at which Allmon testified, the district court ruled for the Petitioners on the merits in the underlying action. That case is currently on appeal to the Fifth Circuit. See *Whole Woman's Health* v. *Charles Smith*, No. 18-50730 (5th Cir.).

On November 12, Petitioners sought certiorari.

REASONS FOR DENYING THE PETITION

I. There is no split of authority over the collateral order doctrine, which the Fifth Circuit correctly applied below.

Courts of appeals have jurisdiction over appeals of "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This jurisdiction includes a category of prejudgment orders that (1) conclusively determine the appealed issue, which (2) are "collateral to" the merits of an action and "too important" to be denied immediate review, and (3) would be effectively unreviewable on appeal from a final judgment. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); accord *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 103 (2009). Qualifying collateral orders include those that involve a party's "entitlement not to stand trial or face other burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), and those that implicate compelling interests of a constitutional dimension, see, *e.g.*, *Sell* v. *United States*, 539 U.S. 166 (2003) (privacy); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech or Debate Clause immunity); *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy). Indeed, this Court has stated that important rights "originating in the Constitution or statutes" receive

particular solicitude under its collateral order doctrine. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

1. Petitioners fail to identify a split over the collateral order doctrine's application to claims of Religion Clause immunity to government entanglement in internal religious affairs. For good reason: there is no such split. Rather, as explained below, all of the relevant case law supports the Fifth Circuit's decision. That is also why Petitioners' bald bid for error correction fails—they are simply wrong on the law.

The closest Petitioners come to identifying any sort of split with respect to their first question presented is their reliance on the Tenth Circuit's decision, *In re Motor Fuel Temperature Sales Practices Litigation*, 641 F.3d 470 (10th Cir. 2011). But, as also explained below, that case is distinguishable, and more recent Tenth Circuit precedent has undermined the purpose for which Petitioners raise it. See p.27, *infra*. Nor would a weak two-circuit split generally supply the basis to grant certiorari even for plenary review, much less for summary reversal. See, *e.g.*, *Mohawk*, 558 U.S. at 105 n.1 (granting plenary review of mature eight-circuit split that had developed over a decade).

2. In any case, the Fifth Circuit correctly applied this Court's precedents. The district court's order below is "on all fours" with orders that this Court has previously found appealable under the collateral order doctrine. *Mohawk*, 558 U.S. at 115 (Thomas, J., concurring). The order (1) conclusively rejected the Bishops' defenses to Petitioners' subpoena, (2) was entirely collateral to the merits of the Petitioners' underlying claims and instead concerned the Bishops' asserted

constitutional and statutory rights to privacy in internal religious communications and to institutional autonomy, and (3) was not the kind of order from which the nonparty Bishops could later obtain effective review that would address the irreparable harm of government interference in their internal affairs. See *id.* at 103 (listing factors); Pet. App. 9a (applying factors).

Petitioners failed to even raise—much less contest—the first two of the three *Cohen* factors below, thus waiving any reliance on them. See, *e.g.*, Pet. App. 9a. They also fail to the contest them here.

That failure is telling, especially since one of the most important *Cohen* factors *is* the importance of the right asserted. *Digital Equip.*, 511 U.S. at 879. And here, that cannot be questioned. The Bishops' asserted rights originate in the Establishment, Free Exercise, and Speech Clauses of the First Amendment, which itself gives "special solicitude" to the internal autonomy of the church. *Hosanna-Tabor*, 565 U.S. at 189. Moreover, defenses under the Religion Clauses serve not only as a protection for private religious groups like the Bishops, but also as a structural limitation against government entanglement in religious affairs, thus giving further basis for immediate appellate review. *Mohawk*, 558 U.S. at 113 n.4 (rights with a "structural constitutional grounding" are distinct). Hence the Fifth Circuit's finding that it had jurisdiction over defenses that "go to the heart of the constitutional protection of religious belief and practice[.]" Pet. App. 10a.

Petitioners make no better case regarding the single *Cohen* factor they do raise, effective unreviewabil-

ity. They fail to identify a single case denying interlocutory review to a claim of immunity grounded in the Religion and Speech Clauses of the First Amendment. Nor do they grapple with any of the many cases cited below which support the Fifth Circuit's holding.

A. Church autonomy defenses qualify for interlocutory review under the collateral order doctrine.

1. The Religion Clauses protect against government interference in internal church affairs, guaranteeing a heightened "independence" for churches "from secular control or manipulation." *Hosanna-Tabor*, 565 U.S. at 186. This guarantee provides substantive rights regarding, *inter alia*, a church's selection of its ministers, its internal structure, and its own internal beliefs. *Id.* at 186-88 (citing *Watson* v. *Jones*, 13 Wall. 649 (1872). The guarantee also provides related procedural protections to safeguard the church from unnecessary entanglement with the state, since the "very process of inquiry" can "impinge on rights guaranteed by the Religion Clauses." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979); see also *Serbian E. Orthodox Diocese for U.S. of Am. & Canada* v. *Milivojevich*, 426 U.S. 696, 717-18 (1976) (a court's "detailed review of the evidence" regarding internal church procedures was itself "impermissible" under the First Amendment).

These procedural protections apply to interference that can arise through intrusive uses of governmental power, including via civil discovery, to pry into internal church affairs. *U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988)

("[t]he judicial subpoena power * * * is subject to specific constitutional limitations"). Even in contexts less sensitive than those of church and state, this Court has "repeatedly" warned that governmentally "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976). It is thus "well established" that state power should not be lightly employed to "troll[ ] through a person's or institution's religious beliefs." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

Courts have long enforced these protections to, for instance, avoid the "kind of 'entanglement'" which "aris[es] out of the inquiry process" into "confidential communications among church officials." *Universidad Cent. de Bayamon* v. *NLRB*, 793 F.2d 383, 401-02 (1st Cir. 1985) (en banc) (Breyer, J., concurring); accord *Surinach* v. *Pesquera De Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) ("compelled disclosure" of internal church communications would "substantially infring[e]" church autonomy); see also *McRaney* v. *North Am. Mission Bd. of the S. Baptist Convention, Inc.*, No. 17-cv-80, 2018 WL 5839678 (N.D. Miss. Nov. 7, 2018) (quashing subpoena under the ministerial exception and ecclesiastical abstention doctrines); accord *Presbyterian Church (U.S.A.)* v. *Edwards*, ---S.W.3d---, 2018 WL 4628449, at *3 (Ky. Sept. 27, 2018) (reversing discovery order because church "should not be subjected to the broad-reaching discovery allowed under the trial court's order").[4]

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[4] Courts have also found that RFRA applies to discovery. See, *e.g.*, *In re Grand Jury Empaneling*, 171 F.3d 826 (3d Cir. 1999) (finding RFRA applicable to subpoena).

These protections avoid the entanglement and conflict created by a "protracted legal process pitting church and state as adversaries." *Rayburn* v. *Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Wilkinson, J.). And that is what often results from making church personnel and records "subject to subpoena, discovery, * * * [and] the full panoply of legal process designed to probe the mind of the church." *Ibid*.

A common manifestation of this limitation on discovery into internal church affairs arises in a subset of the church autonomy doctrine, the ministerial exception. See, *e.g.*, *Fratello* v. *Roman Catholic Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017) (noting district court restricted discovery); see also *Sterlinski* v. *Catholic Bishop of Chi.*, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017) (limiting "potentially intrusive merits discovery" that would result in "the very type of intrusion that the ministerial exception seeks to avoid"). Courts have even raised ministerial exception defenses *sua sponte* to avoid intruding on internal religious affairs. See, *e.g.*, *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 121 & n.4 (3d Cir. 2018) (affirming district court's *sua sponte* raising of defense); *Bethea* v. *Nation of Islam*, 248 F. App'x 331, 333 (3d Cir. 2007) (same).

2. In some rare instances, trial courts have rejected defenses under the Religion Clauses in a way that has exposed churches to unnecessary intrusion into their internal affairs. Appellate courts have regularly found that they have jurisdiction over those orders.

For instance, in *McCarthy* v. *Fuller*, the Seventh Circuit accepted an interlocutory appeal of a district

court ruling that required the jury to decide whether the plaintiff was a member of a Roman Catholic religious order. 714 F.3d 971, 974-76 (7th Cir. 2013) (Posner, J.). The Seventh Circuit explained that the First Amendment's rule against judicial interference in internal religious affairs was "closely akin" to a type of "official immunity," since it conferred "immunity from the travails of trial and not just from an adverse judgment." *Ibid.* The court further explained that the "harm of such a governmental intrusion into religious affairs would be irreparable, just as in the other types of cases in which the collateral order doctrine allows interlocutory appeals." *Ibid.*

Many other courts have reached the same result. See, *e.g.*, *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 608–09 (Ky. 2014); *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192, 1198-1200 (Conn. 2011); *Harris* v. *Matthews*, 643 S.E.2d 566, 568-69 (N.C. 2007); *United Methodist Church, Baltimore Annual Conference* v. *White*, 571 A.2d 790, 791-93 (D.C. 1990). These courts have repeatedly emphasized that part of the right is protection against discovery into internal church affairs. *Dayner*, 23 A.3d at 1199-1200 ("the very act of litigating a dispute that is subject to [a church autonomy defense] would result in the entanglement of the civil justice system with matters of religious policy, making the discovery * * * process itself a first amendment violation"); *White*, 571 A.2d at 792-93 ("[t]he First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery * * *under certain circumstances").

For this reason, courts have regularly compared church autonomy defenses to qualified immunity: surmountable on the merits, but a threshold legal issue that must be decided as a matter of law at the outset of a case and subject to appellate review when denied. *McCarthy*, 714 F.3d at 975; *Kirby*, 426 S.W.2d at 608-09; *Dayner*, 23 A.3d at 1198-1200; *Heard* v. *Johnson*, 810 A.2d 871, 876-77 (D.C. 2002); see also *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 302-03 (3d Cir. 2006) (making comparison); *Bryce* v. *Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002) (same). Academics have reached similar conclusions. See Peter Smith and Robert Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) (church autonomy "closely resembles qualified immunity for purposes of the collateral-order doctrine"); Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post-*Hosanna-Tabor, 10 First Amend. L. Rev. 233, 293-294 (2012).

If anything, church autonomy defenses are a form of souped-up qualified immunity, since their grounding in the Religion Clauses make them equal parts personal right for the church and structural limitation on the state. *Bryce*, 289 F.3d at 654 n.1 (noting qualified immunity is rooted in efficiency considerations while church autonomy doctrine is grounded in the First Amendment). The personal right "protects a religious group's right to shape its own faith and mission" free from government interference. *Hosanna-Tabor*, 565 U.S. at 188. And the "structural" limitation "prohibits federal and state governments from becoming involved" in internal religious matters. *Sixth Mount Zion*, 903 F.3d at 121 & n.4 (quoting *Conlon* v.

InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015)). For instance, in *McCarthy*, interlocutory appeal was permitted both because of the threatened "irreparable harm" to the freedom of religious groups to govern their internal affairs *and* the government's transgression of its First Amendment limitations. 714 F.3d at 976.[5]

3. Thus, the interests protected by the Fifth Circuit weren't just the Bishops', but also the judiciary's. *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (Posner, J.) (a "federal court [should] not allow itself to get dragged into religious controversy"). By immediately reviewing the legal issues presented, the Fifth Circuit was able to determine whether a direct confrontation between internal church autonomy and the exercise of state power was unavoidable, and thus avert unnecessary interference with internal church affairs.

B. ***Mohawk*** is not to the contrary, nor is the law of any other Circuit.

Petitioners' argument to the contrary hangs on treating the common-law attorney-client privilege as identical to the Bishops' claim of Religion-Clause-based immunity, and on distinguishing the many other cases which have permitted interlocutory appeals to safeguard related First Amendment values. Neither effort succeeds.

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[5] Evaluating an immunity claim's merit is, of course, a distinct question. And immunities and privileges operate differently in different contexts, such as in the criminal context. See *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 384 (2004); *Branzburg* v. *Hayes,* 408 U.S. 665, 700 (1972). But that is not at issue here.

1. As to the first attempt, Petitioners and their amici try to frame the Bishops' appeal as solely a disclosure-related discovery dispute of the kind rejected in *Mohawk*. Pet. 22; Law Professors Br. 3. But *Mohawk* merely dealt with an appeal of a district court order denying attorney-client privilege, a denial this Court found was redressable via means such as contempt proceedings or an appeal from final judgment on the merits. It goes without saying, though, that such mechanisms cannot protect rights that guard against having to undergo contempt proceedings or await vindication after final judgment. See *Los Lobos Renewable Power, LLC* v. *Americulture*, 885 F.3d 659, 667 (10th Cir. 2018) ("a right to reduce the time and expense of litigation is poorly suited to satisfaction through *more* litigation"), cert. denied, No. 18-89 (Dec. 3, 2018).

Further, *Mohawk* is not applicable because it concerned a common-law privilege, whereas the Bishops were asserting an immunity grounded in sensitive First Amendment rights. See *Digital Equip.*, 511 U.S. at 879 (collateral order doctrine provides heightened protection for rights "originating in the Constitution or statutes"); *NCDR, LLC* v. *Mauze & Bagby, PLLC*, 745 F.3d 742, 752 (5th Cir. 2014) ("constitutional rights deserve particular solicitude within the framework of the collateral order doctrine"). *Mohawk* expressly declined to address rights with a "structural constitutional grounding." 558 U.S. at 113 n.4. And that is the kind of right at issue here: a "structural limitation imposed on the government by the Religion Clauses" which forbids it from "'*interfer[ing] with the internal governance of the church*.'" *Conlon*, 777 F.3d

at 836 (quoting *Hosanna-Tabor*, 565 U.S. at 188) (emphasis in original).

Mohawk is also distinguishable on several practical grounds. For one, *Mohawk* dealt with a dispute between parties which could have been remedied by a new trial, but this case deals with a third-party subpoena and harms that cannot be so remedied. For another, *Mohawk* was in part motivated by this Court's concern that, because attorney-client privilege disputes are common, permitting their immediate appeal would "swamp the court of appeals." 558 U.S. at 112. By stark contrast, First Amendment defenses are "rarely invoked." *Perry* v. *Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010). Relatedly, as the Fifth Circuit explained below, the routine familiarity of attorney-client privilege assertions "mitigates the potential for lower court discovery errors" and "lessens the novelty of the issues." Pet. App. 10a (citing *Mohawk*, 558 U.S. at 110). But the rarity and sensitivity of First Amendment defenses make constitutional error more likely and review more necessary. Pet. App. 10a-11a.; *Conlon*, 777 F.3d at 833 (church autonomy defenses present "pure question[s] of law" that a court must decide "for itself").

2. Petitioners are also wrong that the panel opinion was out of step with previous Fifth Circuit opinions (which is both somewhat beside the point when it comes to certworthiness and doubtful given the denial of en banc review below). The Fifth Circuit has "repeatedly" found that the collateral order doctrine "applies in cases in which pre-trial orders arguably infringe on First Amendment rights." *Marceaux* v. *Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 490 (5th

Cir. 2013). It has likewise found that "denials of various forms of immunity are immediately-appealable collateral orders," since undergoing discovery would undermine the right. *Henry* v. *Lake Charles Am. Press, LLC*, 566 F.3d 164, 177 (5th Cir. 2009) (listing nine forms of immunity eligible for interlocutory review). And where both considerations converge—where a form of immunity protects First Amendment rights—the circuit has firmly granted interlocutory appeal, finding that protecting "the exercise of First Amendment rights" from "the chilling effect" caused by "the burden and expense of litigation" "weighs profoundly in favor of appealability." *Id* at 178, 180.

3. The law of other circuits also does not help Petitioners' bid for summary reversal. Following *Mohawk*, several circuits have, like the Fifth Circuit, permitted interlocutory appeals of claims that protect "important First Amendment interests" from the discovery process. *Royalty Network, Inc.* v. *Harris*, 756 F.3d 1351, 1356-57 (11th Cir. 2014); accord *Liberty Synergistics Inc.* v. *Microflo Ltd.*, 718 F.3d 138, 150 (2d Cir. 2013); *Godin* v. *Schencks*, 629 F.3d 79, 85 (1st Cir. 2010). Those circuits include the Tenth Circuit, which joined their ranks last year. *Los Lobos*, 885 F.3d at 666. And while the Ninth Circuit did not decide the issue in its *Perry* v. *Schwarzenegger* decision, its analysis of a First Amendment free-association defense—which does not even share the same claim to non-entanglement immunity as a Religion Clause defense—is fully consistent with the panel's conclusion below. 591 F.3d at 1156.

Petitioners point to *In re Motor Fuel*, where the Tenth Circuit declined to permit interlocutory appeal of a free association defense to a subpoena. 641 F.3d

at 476. But, again, that case did not include any kind of claim to immunity. Rather, the court found that the claimed interest was "nearly identical" to the one in *Mohawk*: preventing disclosure of information. 641 F.3d at 483. And *Los Lobos* undermines any suggestion that *In re Motor Fuel* set a broad rule barring all appeals seeking to protect First Amendment interests from harms caused by the civil discovery process.

C. Petitioners' suggested alternatives to interlocutory appeal are insufficient.

1. Petitioners' final argument is that, because the Bishops could have obtained appellate review via mandamus or after contempt proceedings, *Mohawk* bars the door to the collateral order doctrine. But *Mohawk* says no such thing. As Judge Tymkovich explained in *Los Lobos*, "[s]uch a holding would have rendered the doctrine a nullity." 885 F.3d at 667. After all, if mandamus is good enough for the Bishops' First Amendment rights, it could also be good enough for the government officials who regularly obtain interlocutory review under the judicially-created qualified immunity doctrine.

The same point holds true for Petitioners' contempt argument, only more so. *Prolonging* litigation is not an adequate alternative remedy for a claimed right to *avoid* litigation. *Los Lobos*, 885 F.3d at 667. Worse, contempt proceedings over Petitioners' gratuitous demand for sensitive internal church communications are precisely the kind of "protracted legal process pitting church and state as adversaries" that the Religion Clauses forbid. *Rayburn*, 772 F.2d at 1171. The whole point of such proceedings is to have the kind of "coercive effect" on the church's internal affairs that is "the

very opposite of that separation of church and State contemplated by the First Amendment." *McClure* v. *Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

Moreover, what Petitioners sought below was not a contempt order for failure to disclose, but rather disqualification of the Bishops as a witness. Had Petitioners obtained that relief, there would have been no contempt sanction to appeal from.

2. Petitioners' amici fret that the Fifth Circuit's opinion "opens the door" to a "deluge of interlocutory appeals," suggesting that it might reverse the recent decrease in federal appeals. Law Professors Br. 7, 19-20.

Not so. Interlocutory appeals over First Amendment defenses are rare. *Perry*, 591 F.3d at 1156. The subset of Religion Clauses-rooted interlocutory appeals are rarer yet. For instance, only two have arisen in the nearly 30 years since the District of Columbia first permitted interlocutory appeals of such defenses. *Heard*, 810 A.2d at 876-77 (listing cases).

Further, while efficiency interests may be sufficient to delay review of certain privileges, the First Amendment demands more. See, *e.g.*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 747 (2011) ("the First Amendment does not permit the State to sacrifice speech for efficiency")); *Royalty Network*, 756 F.3d at 1356-57 (granting interlocutory appeal to protect "important First Amendment interests"). Indeed, amici concede the propriety of other cases permitting immediate appeal of orders implicating First Amendment rights. Law Professors Br. 17-18. Only religious autonomy claims, it seems, are given no room at the inn.

II. This case does not warrant the exercise of this Court's supervisory powers.

In their second question presented, Petitioners ask this Court to exercise its supervisory power over a panel of the Fifth Circuit with a laundry list of complaints aimed at two goals: nitpicking the Fifth Circuit's decision and taking the side of the district court judge in an unusually public disagreement between a district court and a court of appeals. Pet. 28-35. Petitioners cite no precedent to support their request, likely because the decision below does not come anywhere near warranting this Court's supervisory power. Supervisory power is employed only when the court of appeals has "departed from the accepted and usual course of judicial proceedings" so as to call for this Court's intervention. Sup. Ct. R. 10(a). That is normally restricted to, for instance, cases of "government[ ] misconduct," *United States* v. *Payner*, 447 U.S. 727, 745 (1980), or cases that compromise the "validity of the composition of the Court of Appeals," *Nguyen* v. *United States*, 539 U.S. 69, 81, (2003). In this case, however, if anything the Fifth Circuit panel should be summarily affirmed for heading off a judicial intrusion into the internal deliberations of a church body.

1. The unusual circumstances of the case led to an unusual appellate decision below, but it was a decision that corrected significant error, not one that created it. Following a series of "unnecessarily hast[y]" deadlines imposed on the Bishops, Pet. App. 7a-8a, 28a, the district court judge ordered the Bishops to comply with the subpoena within 24 hours of noon Sunday, June 17, when many of the Bishops were celebrating Father's Day mass. See Pet. App. 7a-8a. That short-fuse order led immediately to this appeal.

On appeal, and following principles of constitutional avoidance, the court of appeals declined to rule on the Bishops' constitutional claims. Instead, it found that the district court imposed an undue burden on the Bishops by not carefully balancing Petitioners' vanishingly small interest in additional production against the Bishops' credible RFRA and First Amendment claims and the significant burdens already imposed by Petitioners' subpoena. Pet. App. 21a-28a. In "set[ting] forth" those constitutional issues, the court explained the undue burden on the Bishops and provided guidance for future courts to avoid burdening the constitutional rights of litigants in discovery. Pet. App. 17a n.9.

In response to the panel opinion, the district court judge made repeated and unusually strong public statements criticizing the ruling. For instance, he called the majority opinion "pejorative," "wrong on the facts," and "difficult to discern." Trial Tr. 07/16/18, ECF No. 244, 5-6. He said he would "absolutely ignore" portions of it, and called the concurrence "strident" and "disturbing." *Id.* at 8-9, 27. His written opinion on the merits described the opinion as "unlike any other the undersigned has seen in his thirty years on the bench." *Whole Woman's Health* v. *Smith*, 338 F. Supp. 3d 606, 618 n.10 (W.D. Tex. 2018); see also Debra Cassens Weiss, *Trial on fetal burial law begins with judge's defense of his motives,* ABA Journal (July 17, 2018), https://bit.ly/2KZCnIl.

2. In this context, Petitioners' claims of judicial misconduct *against the Fifth Circuit* are off-base. The court of appeals itself has "supervisory powers" to provide guidance to district courts. See *Frazier* v. *Heebe*, 482 U.S. 641, 651 (1987) ("Such a power * * * inheres

in any appellate court called upon 'to review proceedings of trial courts'" (citation omitted)). The court of appeals did nothing that should incur this Court's interference with those powers.

First, Petitioners' accusation that the majority opinion commented on the merits of the case by describing the law in question as "specifying legitimate methods of disposing of fetal remains," Pet. 31, is manifestly wrong. It borders on bad faith to impose a normative meaning on the panel's neutral description of the law's function to support a claim of misconduct.

Most of Petitioners' ire is reserved for the two-page concurring opinion of Judge Ho. But he merely made some factually accurate observations, expressed regret that the case proceeded in the manner it had, and (accurately) described the point of view of the Bishops. He gave no instructions to the lower court and did not step out of bounds of the role of a nonbinding concurring opinion, which unsurprisingly may reveal a judge's views about a case.

Petitioners also complain of the panel "opin[ing] at length" about issues that "did not form the basis of its decision." Pet. 31. On the contrary, the court was careful to exercise constitutional avoidance while providing needed guidance on how to balance credible claims of sensitive First Amendment rights against "questionable at best" discovery requests. Pet. App. 26a.

Finally, Petitioners claim that the panel's suggestion of religious insensitivity by the trial court was insensitive itself. How that baseless finger-pointing helps bring about any more "courtesy and respect" to this case is a mystery. Pet. 33. In any case, Petitioners are wrong that the decision reflected judicial bias.

Here, a nonparty that is defined by its religious faith was required to undergo months of litigation, often at religiously sensitive times, to defend its internal religious affairs and deliberations from gratuitous prying by a public policy opponent. The court of appeals' correct observation that the Bishops should not be disadvantaged because of their religious identity does not "pit[] people of faith against nonbelievers." *Ibid.* Nor does it mean that issuing a decision on a Sunday always constitutes religious bias, Pet. 32, a very different prospect from imposing a 24-hour production deadline on a nonparty during its known sabbath.

3. Petitioners' arguments that the court of appeals made legal errors that require summary reversal are also unavailing. First, the Petitioners complain that the decision conflicted with other Fifth Circuit opinions. But no judge on the Fifth Circuit agreed with that interpretation enough to ask for a vote for *en banc* review. That is likely because that precedent is quite distinguishable. See p.26, *supra*.

Second, Petitioners criticize the panel for "inadvertently creat[ing] a circuit split" by mistaking the facts of the Tenth Circuit's *Motor Fuels* case. Pet. 29. But circuits are not so easily split. As discussed above, *Motor Fuels* is distinguishable as not involving immunity claims rooted in church autonomy. See p. 27, *supra*. Further, it is also different for the reasons explained by the Fifth Circuit, including that fraud was at issue in *Motor Fuels* and is not here. Pet. App. 12a. And *Motor Fuels* did not involve the kind of discovery request against a third party at issue here, including because the requested communications there were also in the possession of the defendants and could be sufficiently opposed by them. 641 F.3d at 477, 484. But

the Bishops had *already* turned over their communications with the defendant, and Petitioners demanded even more. In any event, Petitioners tellingly do not even ask this Court to resolve their purported split, which is consistent with their half-hearted claim.

Petitioners further quibble over the standard of review. Pet. 29-30. They object that the court of appeals should have employed the abuse of discretion standard to analyze the district court's treatment of claimed constitutional rights. That argument fails because constitutional rights are necessarily legal conclusions that are reviewed *de novo*. Pet. App. 13a. Petitioners complain that the district court should not have been expected to know of the existence of that right when it "was not established by precedent." Pet. 30. But the Bishops cited plenty of authority that internal church deliberations are protected. It is the subpoena that was unprecedented—an ideological opponent using civil discovery powers to unnecessarily delve into a nonparty church's internal documents.

The final item in Petitioners' grab bag is their objection that the panel accepted the Bishops' factual contentions and rejected the district court's. Pet. 30. But the only example they provide is the panel's recognition of the significant burden the Bishops suffered in defending the discovery dispute, an issue the district court did not even address and which has never been in dispute. Pet. App. 71a-72a. In any case, the court of appeals was satisfying its obligation to "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citation omitted).

Completely absent from Petitioners' request to vacate the decision below is any description of how they were prejudiced. See, *e.g.*, *Nguyen*, 539 U.S. at 81 (2003) ("As a general rule, federal courts may not use their supervisory powers to circumvent the obligation to assess trial errors for their prejudicial effect."). They successfully obtained thousands of pages of discovery and hours of testimony from the Bishops, and they won their case in the trial court without access to the Bishops' internal deliberations. The error correction they request would not change that outcome.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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