No. _____

In The
Supreme Court of the United States

WHOLE WOMAN'S HEALTH; et al.,

Petitioners,

v.

TEXAS CATHOLIC CONFERENCE OF BISHOPS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MOLLY DUANE
AUTUMN KATZ
CAROLINE SACERDOTE
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038

PATRICK J. O'CONNELL
LAW OFFICES OF PATRICK J. O'CONNELL PLLC
2525 Wallingwood Drive, Bldg. 14
Austin, TX 78746

STEPHANIE TOTI
Counsel of Record
DAVID BROWN
LAWYERING PROJECT
25 Broadway, 9th Floor
New York, NY 10004
(646) 490-1083
stoti@lawyeringproject.org

J. ALEXANDER LAWRENCE
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

Attorneys for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

(1) Whether the court of appeals' decision to exercise jurisdiction over an interlocutory appeal from a discovery order rejecting a claim of privilege conflicts with this Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009).

(2) Whether this Court should exercise its supervisory power to vacate the court of appeals' decision given that it contains significant legal errors; opines at length about constitutional issues that do not form the basis of its decision; comments on the merits of Plaintiffs' underlying claims, which were still being litigated in the district court; and makes unfounded allegations of religious bias and witness intimidation against the district judge and Plaintiffs' counsel.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court of appeals were Plaintiff-Appellees Whole Woman's Health; Brookside Women's Medical Center, P.A., doing business as Brookside Women's Medical Center and Austin Women's Health Center; Lendol L. Davis, M.D.; Alamo City Surgery Center, P.L.L.C., doing business as Alamo Women's Reproductive Services; Whole Woman's Health Alliance; and Bhavik Kumar, M.D.; Movant-Appellant Texas Catholic Conference of Bishops; and Defendant-Appellee Charles Smith, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity.

None of the parties are publicly held corporations, none have parent corporations, and none issue stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The court of appeals' opinion is reported at 896 F.3d 362 and reprinted in the Appendix to the Petition ("App.") at 1a. The court of appeals' unpublished order announcing its decision is reprinted at App. 47a. The court of appeals' unpublished order granting an emergency stay of the district court's order and setting an expedited briefing schedule is reprinted at App. 49a. The district court's unpublished order affirming the magistrate judge's denial of Respondent's motion to quash is reprinted at App. 51a. The magistrate judge's unpublished order denying Respondent's motion to quash is reprinted at App. 74a.

JURISDICTION

The court of appeals entered judgment on July 15, 2018, App. 45a, and it denied Plaintiffs' petition for rehearing *en banc* on August 16, 2018, App. 82a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals is disputed.

PROVISIONS OF LAW INVOLVED

28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District

> Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Federal Rule of Civil Procedure 45 is reprinted at App. 84a.

INTRODUCTION

The court of appeals' decision should be summarily reversed because it contravenes more than one hundred years of settled precedent holding that a litigant may not take an immediate appeal from an order compelling discovery. *See, e.g.*, *Alexander v. United States*, 201 U.S. 117, 121-22 (1906). That precedent was reaffirmed most recently in *Mohawk*, where this Court held that discovery orders adverse to the attorney-client privilege do not warrant an exception to the longstanding rule that pretrial discovery orders are not immediately appealable under the collateral order doctrine. *See* 558 U.S. at 109-11.

This matter arose from a challenge to Texas laws (the "Challenged Laws") that would prevent many women who have abortions or miscarriages from disposing of embryonic and fetal tissue in accordance with their religious beliefs and personal values. The Texas Catholic Conference of Bishops ("TCCB") moved to

quash a discovery subpoena that Plaintiffs served on it after Defendant identified TCCB's Executive Director as a person likely to have discoverable information. The district court denied the motion, and TCCB appealed. The court of appeals exercised jurisdiction, over Plaintiffs' objection, pursuant to the collateral order doctrine.

Other mechanisms for seeking relief from the district court's order were available to TCCB, including mandamus petition and noncompliance followed by appeal of any court-imposed sanctions. By accepting a direct appeal, the court of appeals exceeded the jurisdiction granted to it by Congress and trampled on a century-old rule of law. Because the court of appeals' decision directly conflicts with this Court's controlling precedents concerning appellate jurisdiction, it should be summarily reversed.

Alternatively, the court of appeals' decision should be vacated and remanded for reconsideration because it contains significant legal errors and flagrant departures from judicial norms. These departures include commenting on the merits of Plaintiffs' claims in the underlying lawsuit, which had yet to go to trial, and making unfounded allegations of religious bias and witness intimidation against the district judge and Plaintiffs' counsel.

———♦———

STATEMENT OF THE CASE

I. Underlying Case History.

The principal lawsuit, filed on December 12, 2016, challenged revisions to Texas regulations governing the disposal of biohazardous materials, including embryonic and fetal tissue. *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 225 (W.D. Tex. 2017). Following an evidentiary hearing, the district court preliminarily enjoined enforcement of the revised regulations on January 27, 2017. *Id.* at 233. Defendant appealed the preliminary injunction, and at his request, the district court stayed further proceedings pending disposition of the appeal. *Whole Woman's Health v. Smith*, ___ F. Supp. 3d ___, No. A-16-CV-01300-DAE, 2018 WL 4225048, at *3 (W.D. Tex. Sept. 5, 2018), *appeal docketed*, No. 18-50730 (5th Cir. Sept. 7, 2018). While the appeal was pending, Texas enacted a statute that superseded the revised regulations, and it subsequently adopted implementing regulations. *Id.* at *3-4. As a result, the court of appeals dismissed the appeal, the district court lifted the stay, and Plaintiffs amended their complaint to challenge the newly enacted laws. *Id.* at *4. The district court issued a second preliminary injunction on January 29, 2018, enjoining enforcement of all Challenged Laws. *Id.*

II. Plaintiffs' Subpoena and TCCB's Motion to Quash.

On February 7, 2018, the magistrate judge entered an expedited scheduling order that directed the parties

to serve any amendments to their initial disclosures by March 1, 2018; and to complete discovery by June 15, 2018. Fifth Cir. R. on Appeal (18-50484) ("ROA-1") at 1931. The order set the case for trial beginning on July 16, 2018, and set a final pretrial conference for July 13, 2018. ROA-1 at 1932.

On March 1, 2018, Defendant served amended initial disclosures, identifying three individuals from TCCB, including its Executive Director, Jennifer Carr Allmon,[1] as people likely to have discoverable information. ROA-1 at 2237; *see* Fed. R. Civ. P. 26(a)(1) (prescribing the contents of initial disclosures). Altogether, Defendant's amended initial disclosures identified people from twenty-two entities that were neither parties nor experts as likely to have discoverable information. ROA-1 at 2235-42. Plaintiffs served discovery subpoenas on all of them. The subpoenas were served in three batches, based on the geographic location of the recipient. Subpoenas returnable to Austin were served on March 20, 2018; subpoenas returnable to Dallas, Houston, or Chicago were served on March 27, 2018; and subpoenas returnable to Laredo, Victoria, or San

[1] Ms. Allmon had previously testified in support of Defendant at the preliminary injunction hearing. ROA-1 at 2712-56. Defendant's amended initial disclosures described the subject matter of the discoverable information Ms. Allmon was likely to have as follows: "Please see Ms. Allmon's testimony from the previous preliminary injunction hearing in this lawsuit. She . . . [has] knowledge regarding the offer of the Texas Catholic Conference of Bishops to inter fetal remains statewide at no cost to healthcare facilities for such interment." ROA-1 at 2237. Defendant subsequently identified Ms. Allmon as a witness that he intended to call at trial. ROA-1 at 2031.

Angelo were served on March 30, 2018.[2] The TCCB subpoena was in the first batch.

On April 2, 2018, TCCB moved to quash the subpoena without first seeking to confer with Plaintiffs' counsel as required by the local rules of the district court and the scheduling order. *See* ROA-1 at 1931-32, 1944-53; W.D. Tex. R. CV-7(i). On April 3, 2018, the magistrate judge denied TCCB's motion without prejudice based on TCCB's failure to confer. ROA-1 at 2019. Subsequently, counsel for Plaintiffs and TCCB conferred, and Plaintiffs agreed to narrow the scope of the subpoena in response to TCCB's concerns about the volume of responsive documents.[3] TCCB made successive requests for extensions of time to respond to the subpoena as narrowed, and Plaintiffs accommodated each request.

On June 1, 2018, TCCB produced a subset of responsive documents comprised of ninety-one emails between Ms. Allmon and individuals external to TCCB. Pursuant to the Protective Order entered on December 29, 2016, ROA-1 at 467-77, TCCB designated its entire production as "confidential," which shielded the

---

[2] Pursuant to Federal Rule of Civil Procedure 45(c)(2)(A), a discovery subpoena may only command the production of documents "at a place within 100 miles of where the [recipient] resides, is employed, or regularly transacts business in person."

[3] Plaintiffs limited the subpoena to emails (1) sent to or from Ms. Allmon, (2) during a thirty-month period, (3) that included at least one of eleven search terms, and (4) related to the burial, cremation, or disposition of embryonic or fetal tissue. ROA-1 at 2350-51.

documents from public disclosure. Plaintiffs did not contest this designation.

TCCB withheld 298 responsive emails between Ms. Allmon and individuals within TCCB, asserting a First Amendment privilege. ROA-1 at 2258-67. These emails included communications between Ms. Allmon and her staff about TCCB's offer to provide embryonic and fetal burial services to Texas healthcare providers. Following an informal mediation with the magistrate judge, TCCB again filed a motion to quash Plaintiffs' subpoena on June 11, 2018, nearly three months after service of the subpoena and four days prior to the close of discovery. ROA-1 at 2065-79.

The magistrate judge held a hearing on the motion on June 13, 2018. At the hearing, TCCB requested that the magistrate judge conduct an *in camera* review of a sample of the documents it was withholding. ROA-1 at 2987-88. Plaintiffs consented to this procedure, and the magistrate judge accepted the documents for review. ROA-1 at 2989-90. While the motion was pending with the magistrate judge, the district judge set an expedited briefing schedule for any appeal of the magistrate judge's order to him, given "the expedited scheduling order in place, and the imminent trial in this case." ROA-1 at 2277. It directed that any appeal to the district judge be filed by noon on June 14, 2018, and any response be filed by 11:59 p.m. on June 14, 2018. ROA-1 at 2277. At approximately 4:30 p.m. on June 13, 2018, the magistrate judge denied TCCB's motion to quash. ROA-1 at 2280-85. TCCB filed a

timely appeal with the district judge. ROA-1 at 2295-2323. At approximately noon on Sunday, June 17, 2018, the district judge affirmed the magistrate judge's ruling and directed TCCB to produce the documents that it had withheld from its prior productions within twenty-four hours. ROA-1 at 2362-63.

III. Proceedings in the Court of Appeals.

TCCB immediately filed a Notice of Appeal, ROA-1 at 2364-66, and emergency motions for a stay pending appeal in the district court, ROA-1 at 2367-85, and the court of appeals, Emergency Mot. of Movant-Appellant TCCB for Fed. R. App. P. 8 Stay Pending Appeal (5th Cir. Doc. No. 00514515540). The district court granted a seventy-two hour stay of its order, ROA-1 at 2394, and the court of appeals granted a stay of indefinite duration, Ct. Order (5th Cir. Doc. No. 00514517246). The court of appeals also directed Plaintiffs and TCCB to file simultaneous merits briefs within seven days. *Id.*

On June 19, 2018, Plaintiffs moved to dismiss the appeal and vacate the stay for lack of appellate jurisdiction, arguing that the order appealed from did not satisfy the criteria set forth in 28 U.S.C. § 1292 and was not reviewable under the collateral order doctrine. Appellees' Mot. to Dismiss the Appeal and Vacate the Stay Pending Appeal (5th Cir. Doc. No. 00514518550). TCCB responded on June 29, 2018, arguing that 28 U.S.C. § 1291 conferred jurisdiction on the court of appeals pursuant to the collateral order doctrine.

Movant-Appellant TCCB's Resp. in Opp'n to Pl.-Appellees' Mot. to Dismiss (5th Cir. Doc. No. 00514536244) at 1-13. TCCB distinguished *Mohawk* on the ground that, unlike the party asserting a claim of privilege in that case, TCCB enjoys *immunity* from discovery because it is a religious organization. *See id.* at 9 ("*Mohawk* turned on the conclusion that attorney-client privilege claims can be tested via contempt proceedings without sacrificing any element of the privilege. That conclusion . . . does not apply to privileges or immunities that protect from the burdens of discovery itself.").[4]

Pursuant to the court of appeals' directive, TCCB and Plaintiffs both filed merits briefs on June 25, 2018. TCCB argued that Plaintiffs' subpoena exceeded the scope of permissible discovery under Federal Rule of Civil Procedure 45, Opening Br. of Movant-Appellant TCCB (5th Cir. Doc. No. 00514528152) ("Appellant's Br.") at 28-42; that enforcing Plaintiffs' subpoena would violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb – 2000bb-4, Appellant's Br. at 42-47; and that enforcing Plaintiffs' subpoena would violate the First Amendment "by limiting the Conference's freedoms of assembly, association, and petition; intruding into internal church affairs; and entangling church and state," *id.* at 47-66.

---

[4] TCCB also argued that the court of appeals had jurisdiction under 28 U.S.C. § 1292 because the district court's order compelling the production of documents was akin to an injunction. *See id.* at 13-17.

In their merits brief, Plaintiffs renewed their challenge to the court of appeals' jurisdiction. Appellees' Br. (5th Cir. Doc. No. 00514528094) at 15-18. They further argued that the subpoena's requests for production were relevant and not unduly burdensome, *id.* at 19-20; that the sword and shield doctrine prevented TCCB from shielding communications directly related to the substance of its Executive Director's trial testimony, *id.* at 20-21; that the documents sought by Plaintiffs' subpoena were not privileged under the First Amendment, *id.* at 21-31; and that TCCB had waived its RFRA arguments by failing to preserve them in the district court, *id.* at 31 n.7.

On Friday, July 13, 2018, during the final pretrial conference, a divided panel of the court of appeals issued an order announcing its decision to reverse the district court's order denying TCCB's motion to quash. Ct. Order (5th Cir. Doc. No. 00514553422). On Sunday, July 15, 2018, the day before the trial began, the panel issued a set of opinions explaining its order, which included a majority opinion authored by Judge Jones, in which Judge Ho joined; a concurring opinion by Judge Ho; and a dissenting opinion by Judge Costa.[5] *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018).

The majority held that the court of appeals had jurisdiction over TCCB's appeal pursuant to 28 U.S.C. § 1291 because "[t]he standards of the collateral order doctrine are met here." *Whole Woman's Health*, 896

[5] The court of appeals issued a revised opinion, containing non-substantive revisions, on July 17, 2018.

F.3d at 367. It distinguished this Court's decision in *Mohawk* on two bases. First, it reasoned that the litigant asserting a claim of privilege in *Mohawk* was a party to the proceedings whereas TCCB is a nonparty. *See id.* at 367-68. "In *Mohawk*," the majority stated, "the Court reasoned that as between parties, the appellate court can remedy erroneously ordered discovery by remanding the case for a new trial. . . . This case is distinguishable: a new trial order can hardly avail a third-party witness who cannot benefit directly from such relief." *Id.* The majority did not address the portion of *Mohawk* explaining that "litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal," including petitioning for a writ of mandamus, and noncompliance followed by appeal of any court-imposed sanctions. *Mohawk*, 558 U.S. at 110-11.

Second, the majority reasoned that the nature of the privileges claimed by TCCB distinguished this case from *Mohawk*. *See Whole Woman's Health*, 896 F.3d at 368. It stopped short of adopting TCCB's immunity theory, but it expressed the view that, while courts are generally competent to assess claims of attorney-client privilege, courts are not competent to assess claims of privilege concerning religious liberty. In particular, the majority stated that: "TCCB's claimed privileges . . . go to the heart of the constitutional protection of religious belief and practice as well as citizens' right to advocate sensitive policies in the public square, a square that embraces both the legislature and the courthouse." *Id.*

at 368. "Further, the courts have limited ability to assess the strength of religious groups' claims about their internal deliberations for purposes of monitoring discovery. . . . [A]ny such judicial attempt risks tension with the repeated judicial admonitions that courts stay out of the business of weighing the sincerity of religious beliefs and practices." *Id.* The majority did not address why this lack of judicial competence would render mandamus petition or noncompliance ineffective means of obtaining appellate review of a district court's order.

The majority also noted that, "on two occasions following *Mohawk*, this court has reaffirmed its precedent holding that interlocutory court orders bearing on First Amendment rights remain subject to appeal pursuant to the collateral order doctrine." *Id.* (citing *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488 (5th Cir. 2013) and *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168 (5th Cir. 2011)). Neither of those cases concerned appeals from an order compelling discovery, however. *See Marceaux*, 731 F.3d at 490 (appeal from pretrial order directing the plaintiffs to suspend a website critical of the police department); *In re Hearst Newspapers*, 641 F.3d at 174 (appeal from order barring the press and general public from a sentencing hearing). Additionally, the majority distinguished a pair of conflicting cases from the Ninth and Tenth Circuits on the ground that neither case "involved discovery against a third party." *Whole Woman's Health*, 896 F.3d at 368 (discussing *In re Motor Fuel Temp. Sales Practices Litig.*, 641 F.3d 470 (10th Cir. 2011) and *Perry*

v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010)). The Tenth Circuit case did, however, involve discovery against a nonparty. *See In re Motor Fuel*, 641 F.3d at 476 ("The appellants, who include . . . non-party, retail motor fuel trade associations . . . seek reversal of the district court's discovery order directing them to disclose information that they claim is privileged under the First Amendment.").

On the merits, the majority held that the doctrine of constitutional avoidance weighed against resolving TCCB's First Amendment and RFRA claims. *See Whole Woman's Health*, 896 F.3d at 374 ("The rule of constitutional avoidance . . . forcefully counsels restraint in this case, where the issues are both novel and far-reaching and time is woefully short for thorough consideration."). It nevertheless engaged in a lengthy discussion of those issues. The majority criticized the district court for treating this matter "like a garden variety dispute over the necessity of discovery from a corporate representative designated as a trial witness." *Id.* at 369. It suggested that RFRA supersedes generally-applicable rules concerning civil procedure, such that a federal court must engage in a least restrictive means analysis before applying the Federal Rules of Civil Procedure or principles of federal common law to a litigant who asserts a religious objection. *See id.* at 371 ("As for the government's (*i.e.*, the court's or litigant's using the court) compelling need and least restrictive means, they are not satisfied merely because the Federal Rules ordinarily authorize broad discovery.").

The majority further stated that the district court erred in assuming that federal courts are competent to assess claims of privilege made by religious organizations. *See id.* at 372 ("[O]n what basis is the judiciary institutionally competent to discern which communications merely bear on the 'facts' and which communications interfere with a religious body's free exercise? The district court assumed such competence exists.").

Additionally, the majority stated that the district court erred in rejecting the First Amendment privileges asserted by TCCB. *See id.* at 372. "As for the free speech, free association, and petition claims under the First Amendment," the majority stated that "the district court failed to afford sufficient scope to rights that should protect the inner workings of TCCB when it engages in activity in the public square." *Id.* With respect to TCCB's claims under the Religion Clauses, the majority stated that "[b]oth free exercise and establishment clause problems seem inherent in the court's discovery order." *Id.* at 373. "That internal communications are to be revealed," the majority reasoned, "not only interferes with TCCB's decision-making processes on a matter of intense doctrinal concern but also exposes those processes to an opponent and will induce similar ongoing intrusions against religious bodies' self-government." *Id.* "Moreover, courts' involvement in attempting to parse the internal communications and discern which are 'facts' and which are 'religious' seems tantamount to judicially creating an ecclesiastical test in violation of the Establishment Clause." *Id.*

After concluding its discussion of the constitutional and RFRA issues, the majority rested its decision reversing the district court's order on Federal Rule of Civil Procedure 45(d), holding that the district court abused its discretion in concluding that Plaintiffs' subpoena did not impose an undue burden on TCCB. *See id.* at 375. In conducting the balancing of interests required by Rule 45(d), the majority held that the district court failed to give adequate weight to TCCB's constitutional interests in avoiding discovery. *See id.* at 375 ("This burden on TCCB's constitutional right to advocate in the public square cannot be ignored. . . ."); *id.* at 376 ("[R]ather than reject all of TCCB's privilege claims, the district court should have acknowledged their novelty and far-reaching implications. . . ."); *id.* ("The [district] court was too quick to reject TCCB's privilege claims.").

In the course of its discussion, the majority called attention to "two strange circumstances" that it said "suggest[ed] at least religious insensitivity." *Id.* at 370 n.8. The first was "that the plaintiffs chose to time their original subpoena, and the return date, to coincide with Holy Week," *id.*, and the second was "that the district court chose to issue its decision rejecting the motion to quash on a Sunday morning when TCCB's members and employees were almost surely in church," *id.* The majority also said that Plaintiffs' invocation of the sword and shield doctrine, which provides that a person who uses privileged information affirmatively waives the right to shield it from disclosure, *see, e.g.*, *Willy v. Admin. Review Bd.*, 423 F.3d 483,

497 (5th Cir. 2005), appeared to be an act of witness intimidation. *See Whole Woman's Health*, 896 F.3d at 375 ("TCCB has been challenged by the plaintiffs to either produce internal communication documents or withdraw its witness. This looks like an act of intimidation. The demand places on TCCB the 'Hobson's choice' of retreating from the public square or defending its position while creating a precedent (for the first time) that may open its internal deliberations to public scrutiny, or at least, ill-informed judicial scrutiny.").

The concurring opinion reiterated those points using even more forceful language. It stated that the "proceedings . . . chronicled in Judge Jones's comprehensive opinion . . . leave this Court to wonder why the district court saw the need to impose a 24-hour mandate on the Bishops on a Sunday (Father's Day, no less), if not in an effort to either evade appellate review—or to tax the Bishops and their counsel for seeking review." *Id.* at 376 (Ho, J., concurring). The concurring opinion further "wonder[ed] if this discovery is sought, *inter alia*, to retaliate against people of faith for not only believing in the sanctity of life—but also for wanting to do something about it." *Id.*

Both the majority and concurring opinions commented on the merits of the underlying case, concerning the constitutionality of the Challenged Laws. The majority opinion characterized those laws as "specifying *legitimate* methods for disposing of fetal remains," *id.* at 365 (emphasis added), requiring "humane (and 'human') treatment," *id.* at 371. The concurring opinion stated that "nothing in the text or original

understanding of the Constitution prevents a state from requiring the proper burial of fetal remains." *Id.* at 376 (Ho, J., concurring).

The dissenting opinion criticized the majority opinion in several respects. First, the dissent asserted that the majority invoked the doctrine of constitutional avoidance but did not actually adhere to it. *See id.* at 377 (Costa, J., dissenting) ("True avoidance of difficult First Amendment questions would be to not opine on them when they are not properly before the court."). The dissent argued that TCCB's constitutional claims could have been resolved on a narrow ground—that TCCB forfeited any right to immunity from judicial consideration of its discovery objections by voluntarily providing a sample of the documents over which it claimed a privilege for *in camera* review. *See id.* at 377, 378-79 ("The Conference's privilege claim does not present a substantial First Amendment concern for the reason mentioned at the outset: it did not argue in the trial court that the First Amendment barred *in camera* inspection of its records, so it cannot do so now.").

Second, the dissent argued that there were major flaws in the majority's jurisdictional holding. These include that it "assume[d] that the collateral order doctrine is the only route to stopping a production before it happens" even though "a mandamus petition, which is just as available to a third party as to a litigant, is the typical way to protect a privilege when its piercing will cause irreparable harm." *Id.* at 378. The dissent also criticized the majority for predicating the court of appeals' jurisdiction on the presence of a First

Amendment issue and then promptly holding that the court was precluded from reaching that issue. *See id.*

Third, the dissent argued that the majority's accusations of religious bias and witness intimidation were unfounded and inappropriate. *See id.* at 381-82; *id.* at 382 ("[T]here is no basis to view the discovery request (the scope of which the plaintiff and Conference worked to greatly narrow) and its timing as anything more than lawyers trying to fulfill their duty of zealous advocacy. The unusual behavior would be if a party did not seek documents from a witness it plans to cross examine at trial."); *id.* ("Among the exemplary group of trial judges who serve our circuit, the one handling this case stands out: with over three decades of service, he is now essentially working for free as a senior judge, and volunteering to travel thousands of miles outside the district of his appointment to help with the heavy docket in the Western District of Texas. Speculating that malice is behind his decisions seeking to expedite a high profile case with a rapidly approaching trial date is not the award he is due.").

Plaintiffs filed a petition for rehearing *en banc* on July 30, 2018. *See* Pet. for Reh'g En Banc (5th Cir. Doc. No. 00514577396). It was denied on August 16, 2018. *See* Ct. Order (5th Cir. Doc. No. 00514603516).

IV. Disposition of the Underlying Case.

Ms. Allmon testified at trial, which began on July 16, 2018, and concluded on July 20, 2018. Her testimony relied on and referred to internal TCCB

communications. *See, e.g.*, Fifth Cir. R. on Appeal (18-50730) ("ROA-2") at 4738 (direct examination) ("Q. . . . At your direction, did your staff compile numbers or data regarding capacity?/ A. Yes./ Q. And did they do that in the normal course of the business of the Texas Conference of Catholic Bishops?/ A. Yes./ Q. And did you as the executive director rely upon what your staff did in making a determination about the capacity of diocesan-controlled cemeteries?/ A. Yes.").

The district court entered final judgment for Plaintiffs on September 5, 2018, permanently enjoining enforcement of the Challenged Laws. *Whole Woman's Health*, 2018 WL 4225048 at *27. Defendant filed an appeal on September 5, 2018, ROA-2 at 3331-33, which remains pending at the court of appeals.

V. The District Judge.

This case was originally assigned to the Hon. Sam Sparks. Following the stay of proceedings in the district court, it was transferred to the Hon. David A. Ezra.

Judge Ezra was appointed to the United States District Court for the District of Hawaii by President Ronald Regan in 1988. *Senior District Judge David A. Ezra (Biographical Information)*, United States District Court for the Western District of Texas, https://www.txwd.uscourts.gov/court-staff/senior-u-s-district-judge-david-a-ezra/ (last visited Nov. 12, 2018). He served as Chief Judge of that District from 1999-2005. *Id.* He assumed senior status in 2012. *Id.* In 2013, he

was designated to the Western District of Texas, where he continues to serve. *Id.* Judge Ezra has an extensive history of community service, including as a member of the Judicial Conference of the United States. *Id.* He graduated first in his class from St. Mary's University School of Law in 1972, and he served as a commissioned officer in the U.S. Army from 1971 to 1977. *Id.*

After the court of appeals issued its decision, Judge Ezra met with counsel for the parties to the underlying litigation in his chambers. He informed counsel that he is a devout Roman Catholic, but he does not allow his personal religious beliefs to affect his responsibilities as a judge. ROA-2 at 3925-26. He gave counsel the opportunity to make a motion for his recusal, and all counsel declined. ROA-2 at 3924-25, 3929.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision to Exercise Jurisdiction Conflicts with This Court's Decision in *Mohawk*.

A. Review Mechanisms Other Than Collateral Order Appeal Suffice to Protect the Rights of Litigants Asserting First Amendment Privilege.

Section 1291 of the Judicial Code provides, in relevant part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a

direct review may be had in the Supreme Court."[6] 28 U.S.C. § 1291. This Court has held that the statute encompasses not only judgments that "terminate an action," but also a "small class" of collateral rulings that are appropriately deemed "final" even though they do not end the proceedings in the district court. *Mohawk*, 558 U.S. at 106 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)). "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)).

In *Mohawk*, this Court made clear that expansion of appellate jurisdiction through the collateral order doctrine is disfavored. It "reiterate[d] that the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)). Citing the Rules Enabling Act, 28 U.S.C. §§ 2071-77, the Court cautioned that "rulemaking" rather than

[6] Although the court of appeals did not address TCCB's argument that the district court's order denying its motion to quash was appealable under 28 U.S.C. § 1292 as an injunction, this Court has rejected similar arguments. *See United States v. Ryan*, 402 U.S. 530, 534 (1971) ("[W]e do not think that the District Court's order was rendered a temporary injunction appealable under 28 U.S.C. § 1292(a)(1) by its inclusion of a provision requiring respondent to seek permission from the Kenyan authorities to remove some of the documents from that country, and in the event that permission was denied to permit Government officials access to the documents in Kenya.").

"expansion by court decision" is the means preferred by Congress "for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113; *see also id.* at 115 ("The scope of federal appellate jurisdiction is a matter the Constitution expressly commits to Congress, and that Congress has addressed not only in 28 U.S.C. §§ 1291 and 1292, but also in the Rules Enabling Act amendments to which the Court refers." (citations omitted)) (Thomas, J., concurring in part and in the judgment).

Pretrial discovery orders are generally not reviewable under the collateral order doctrine. *See id.* at 108 (citing 15B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3914.23 (2d ed. 1992); *see also infra* at 25-26. *Mohawk* reaffirmed this well-settled rule and held that disclosure orders adverse to the attorney-client privilege do not warrant an exception to it. In particular, it held that, while such orders may satisfy the first two conditions of the collateral order doctrine—conclusiveness and separateness—they fail to satisfy the third—effective unreviewability. *Id.* at 109. The Court explained that: "In making this determination, we do not engage in an individualized jurisdictional inquiry. Rather, our focus is on the entire category to which a claim belongs." *Id.* at 107 (citations and internal quotation marks omitted). "As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under

§ 1291." *Id.* (internal quotation marks and alterations omitted).

The Court concluded that collateral order appeal is not necessary to ensure effective review of disclosure orders adverse to the attorney-client privilege because other review mechanisms are available to litigants. *See id.* at 109-11. Those most relevant here are: (1) petitioning for a writ of mandamus, *id.* at 111 ("[I]n extraordinary circumstances—*i.e.*, when a disclosure order amounts to a judicial usurpation of power or a clear abuse of discretion, or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus." (internal quotation marks and alterations omitted)); and (2) noncompliance, *id.* ("Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions."). The court of appeals failed to acknowledge these mechanisms or identify any reason why they would be unavailable to a litigant asserting a First Amendment privilege against disclosure.

A mandamus petition is certainly available to litigants asserting a First Amendment privilege. Indeed, other courts of appeals have assessed claims of First Amendment privilege via mandamus petition after declining to exercise jurisdiction under the collateral order doctrine. *See In re Motor Fuel*, 641 F.3d at 487 ("Given the circumstances of this case, we conclude that the disclosure satisfies the[] initial prerequisites [for mandamus review]."); *Perry*, 591 F.3d at 1156 ("[W]e rely on mandamus to hear this exceptionally important case. . . .").

Likewise, litigants seeking review of a disclosure order adverse to a claimed First Amendment privilege have the option of noncompliance. Had TCCB elected noncompliance here, the most likely sanction would have been an order limiting the scope of Ms. Allmon's trial testimony, which Defendant could have challenged in a post-judgment appeal.[7] Had the district court instead held TCCB in contempt, the contempt order would have been immediately appealable. *See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action."); *infra* at 25-26.

The court of appeals failed to consider the efficacy of mandamus and noncompliance as alternate pathways to appellate review of the district court's discovery order, and it ignored this Court's admonition to avoid unnecessarily expanding the universe of orders eligible for collateral order appeal. Because

---

[7] The court of appeals suggested that Ms. Allmon had a right to testify at trial—independent of Defendant's interest in the litigation—as part of TCCB's advocacy "in the public square." *Whole Woman's Health*, 896 F.3d at 368. This premise is incorrect. The procedural rules governing civil litigation provide certain mechanisms for nonparty stakeholders to participate in the proceedings, including intervention, *see* Fed. R. Civ. P. 24, and the filing of *amicus curiae* briefs, *see* Fed. R. App. P. 29. Nonparties have no general right, however, to participate in a given matter. An Article III case or controversy is not a public forum. *See, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 66 (1986) ("Article III requires more than a desire to vindicate value interests.").

mechanisms other than collateral order appeal suffice to protect the rights of litigants asserting First Amendment privilege, the court of appeals' decision is in direct conflict with *Mohawk*, and this Court should summarily reverse it.

B. TCCB's Nonparty Status Does Not Justify the Court of Appeals' Decision to Exercise Jurisdiction.

This Court has declined to recognize a nonparty exception to the rule that orders compelling discovery are not immediately appealable under the collateral order doctrine. *See Cobbledick v. United States*, 309 U.S. 323, 326 (1940) ("[T]he requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding."). In *Cobbledick*, the Court held that "[n]either a party nor a non-party witness" may immediately appeal a district court order denying a motion to quash a subpoena because such piecemeal review would frustrate the intent of Congress, which has generally limited the jurisdiction of the courts of appeals to final judgments. *Id.* at 326 ("This is so despite the fact that a witness who is a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause."). The Court held that an appeal may nevertheless be taken from an order holding a witness in contempt of an order compelling discovery. *Id.* at 327 ("Let the court go farther, and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly

impeding the progress of the case." (quoting *Alexander*, 201 U.S. at 121)).

Prior to the instant case, the court of appeals faithfully applied this Court's precedents to decline jurisdiction in nonparty appeals from orders compelling discovery. In *Honig v. E.I. du Pont de Nemours & Co., Inc.*, 404 F.2d 410, 410 (5th Cir. 1968), for example, the court of appeals considered "an appeal by a witness not a party to the principal lawsuit, from an order of the trial court requiring him to submit to further examination by deposition." It "conclude[d] that this appeal must be dismissed under the general rule that a discovery order incident to a pending action is not subject to appeal." *Id.*; *accord Texaco Inc. v. La. Land & Expl. Co.*, 995 F.2d 43, 44 (5th Cir. 1993) (holding that *Honig* "is the controlling precedent in this circuit" and that any conflicting panel decisions have no precedential value). Likewise, in *A-Mark Auction Galleries, Inc. v. American Numismatic Association*, 233 F.3d 895, 898-99 (5th Cir. 2000), the court of appeals dismissed a nonparty appeal from a discovery order compelling the production of documents. Even though the discovery order had been entered by the Northern District of Texas while the underlying action was pending in the District of Colorado, the court of appeals held that it was not effectively unreviewable absent an immediate appeal. *Id.* It explained that, at a minimum, the nonparty resisting discovery could refuse to comply with the discovery order, be cited for contempt, and then appeal the contempt citation. *Id.*

This Court has permitted immediate nonparty appeals from orders compelling discovery "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Ryan*, 402 U.S. at 533. The paradigmatic example is *Perlman v. United States*, 247 U.S. 7 (1918). There, the target of a grand jury subpoena—Mr. Perlman—sought to appeal an order directing the clerk of the district court to produce to the grand jury certain documents that were part of a sealed district court record. *Id.* at 8-10. The Court held that the order was final and appealable. *Id.* at 13. It later described the rationale for this ruling as follows:

> Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim.

Cobbledick, 309 U.S. at 328-29; *accord Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) ("[U]nder the so-called *Perlman* doctrine, a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." (citations omitted)); *Ryan*, 402 U.S. at 533 ("To have

denied review would have left Perlman powerless to avert the mischief of the order for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." (citations and internal quotation marks omitted)).

This case is distinguishable from *Perlman* because the documents that TCCB claims are privileged are not in the possession of a disinterested third-party; rather, they are in the possession of TCCB itself. Thus, TCCB "is free to refuse compliance and . . . in such event [it] may obtain full review of [its] claims before undertaking any burden of compliance with the subpoena." *Ryan*, 402 U.S. at 533-34 ("*Perlman*, therefore, has no application in the situation before us.").

The facts of this case do not warrant a departure from this Court's well-settled precedent concerning the appealability of orders compelling nonparty discovery. The court of appeals' unauthorized exercise of jurisdiction should therefore be summarily reversed.

II. The Court of Appeals' Decision Embodies Errors and Departures from the Norms of Judicial Conduct That Warrant Exercise of This Court's Supervisory Power.

Alternatively, the Court should exercise its supervisory power to vacate the court of appeals' decision and remand the matter for reconsideration because the decision contains both legal errors and flagrant departures from the norms of judicial conduct.

The legal errors are troubling. First, the court of appeals' decision is in direct conflict with its own controlling precedent on the jurisdictional issue. *See supra* at 26 (citing *A-Mark Auction Galleries*, 233 F.3d at 898-99; *Honig*, 404 F.2d at 410). Its precedential value is thus uncertain, and it will sow confusion among litigants, district courts, and future appellate panels in the Fifth Circuit. *See Texaco*, 995 F.2d at 44 ("In the event of conflicting panel opinions from this court, the earlier one controls, as one panel of this court may not overrule another.").

Second, the court of appeals misconstrued a key fact in *In re Motor Fuel*, attempting to distinguish the Tenth Circuit's conflicting decision on the erroneous ground that it did not concern the rights of a nonparty. *Compare Whole Woman's Health*, 896 F.3d at 368 ("[N]either *Perry* nor *In re Motor Fuel Sales Practices* involved discovery against a third party."), *with In re Motor Fuel*, 641 F.3d at 476 ("The appellants, who include . . . non-party, retail motor fuel trade associations . . . seek reversal of the district court's discovery order directing them to disclose information that they claim is privileged under the First Amendment."). As a result, the court of appeals inadvertently created a circuit split on an important jurisdictional issue.

Third, the court of appeals exceeded its authority in applying the highly deferential abuse-of-discretion standard to the district court's application of Rule 45(d). The court of appeals held that the district court improperly balanced the litigants' respective interests by, among other things, failing to give sufficient weight

to the "burden on TCCB's constitutional right to advocate in the public square," *Whole Woman's Health*, 896 F.3d at 375, by which it meant the courtroom, *see id.* at 368.[8] But the court of appeals had already acknowledged that the scope of this alleged right was *not* established by precedent, and it declined to reach the issue itself. *See id.* at 374 ("We need not and do not finally resolve whether the order enforcing discovery of the internal emails violated TCCB's constitutional rights. . . ."). In essence, the court of appeals held that the district court abused its discretion by failing to give sufficient weight to a claimed right that has never been recognized by the courts, and that the court of appeals itself declined to recognize. It also accepted all of TCCB's factual contentions as true, disregarding the district court's contrary conclusions. *See, e.g.*, *id.* at 375-76 (holding that it could not ignore "the burdens TCCB has shown were created by this intrusive discovery request: relations with other parties in the faith impaired, internal modes of discussion upended, and participation by some Catholic cemeteries deterred").

---

[8] The court of appeals also held that the district court gave too much weight to Plaintiffs' interest in obtaining the disputed documents because, in its view, they would be cumulative of other discovery, in particular Ms. Allmon's deposition testimony. *See Whole Woman's Health*, 896 F.3d at 375 ("Her recent deposition is 125 pages long. Further document discovery of any kind would, without further explanation, be cumulative."). The court of appeals overlooked that the purpose of Plaintiffs' subpoena was to obtain impeachment material—documents that would contradict or undermine the basis of the witness' testimony.

The court of appeals' departures from the norms of judicial conduct are even more troubling. First, both the majority opinion and the concurrence commented on the merits of Plaintiffs' underlying constitutional claims, even though they were not relevant to the issues before the panel and the case had not yet gone to trial. The majority opinion described the statute Plaintiffs were challenging as "a law specifying legitimate methods for disposing of fetal remains." *See id.* at 365. But whether the disposition methods mandated by the statute are legitimate—and other methods illegitimate—is a contested issue. The concurrence went further. After describing abortion as a "moral tragedy," it asserted that "nothing in the text or original understanding of the Constitution prevents a state from requiring the proper burial of fetal remains." *Id.* at 376. Plainly, the concurring judge made up his mind about the constitutionality of the Challenged Laws before the parties had the opportunity to present their evidence and arguments at trial.

Second, the court of appeals opined at length about constitutional issues that did not form the basis of its decision. Despite invoking the doctrine of constitutional avoidance, the court of appeals engaged in an extensive discussion of the First Amendment issues raised by TCCB, charging the district court with error in its handling of them. *See supra* at 13-14, 17. If allowed to stand, the court of appeals' decision will create confusion in the district courts about the extent to which they are bound by its constitutional musings.

Third, the court of appeals made unfounded allegations of religious bias and witness intimidation against the district judge and Plaintiffs' counsel. *See supra* at 15-16, 18. The court of appeals cited the timing of Plaintiffs' subpoena as evidence of "at least religious insensitivity." *Id.* at 370 n.8. But Plaintiffs served the subpoena at their earliest opportunity following Defendant's service of his amended initial disclosures, which is typical in litigation, and they accommodated each of TCCB's requests for an extension of time to comply. *See supra* at 5-6. Likewise, the court of appeals found evidence of bias in the timing of the district court's order affirming the magistrate judge's decision because it was issued on a Sunday, which is the Sabbath Day for Roman Catholics. *See Whole Woman's Health*, 896 F.3d at 370 n.8. But the court of appeals issued its own opinions on a Sunday, and it issued the order announcing its decision on a Friday morning, just hours before the start of the Jewish Sabbath.[9] *See supra* at 10. By its own logic, the court of appeals' actions manifested religious bias, but that is plainly not the case. All involved were acting in good faith to deal with stringent time constraints.

Additionally, the court of appeals found evidence of witness intimidation in Plaintiffs' invocation of the sword-and-shield doctrine, a common principle of equity. *See Whole Woman's Health*, 896 F.3d at 375; *see also* 8 Charles Alan Wright & Arthur R. Miller, *Federal*

[9] Plaintiffs' legal team includes individuals from varied religious backgrounds, including both Roman Catholic and Jewish lawyers.

Practice and Procedure § 2016.6 (3d ed. 2002) ("[M]ost cases . . . hold[ ] that discovery is permissible of privileged matter to the extent it is contemplated that the privilege will be waived at trial."); *Willy*, 423 F.3d at 497 ("[W]hen a party entitled to claim . . . privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege."). But the court of appeals provided no explanation for why the doctrine amounted to witness intimidation in this case but not the myriad other cases in which it has been invoked.

The court of appeals' allegations of bias reflect a faulty assumption that the principal lawsuit pits people of faith against nonbelievers. *See Whole Woman's Health*, 896 F.3d at 376 (Ho, J., concurring) ("They leave this Court to wonder if this discovery is sought . . . to retaliate against people of faith. . . ."). To the contrary, there are people of faith on both sides of the dispute. Indeed, the lawsuit seeks to protect the religious liberty of women who have abortions or miscarriages from encroachment by the State. Undoubtedly, Plaintiffs have a different view of the constitutional issues at stake than TCCB, but not all disagreements reflect animus. Plaintiffs' counsel endeavored to treat TCCB with courtesy and respect throughout the proceedings, including by conferring in good faith to narrow the scope of the subpoena and accommodating each of TCCB's requests for an extension of time. And the district judge subjected all of the litigants to tight deadlines in an effort to expedite the proceedings given the prior entry of a preliminary injunction. *See* ROA-2 at

3921 ("And I'll tell you why I gave the deadlines that I did. . . . We have an injunction in place here.").

It is a sad reality that religious bias does sometimes infect the adjudicative process. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719, 1729 (2018). But not every act of zealous advocacy—nor adverse ruling—in a proceeding involving religious actors is a manifestation of bias. Assuming that anyone who does not share the Bishops' view that abortion is a "moral tragedy," *Whole Woman's Health*, 896 F.3d at 376 (Ho, J., concurring), is necessarily hostile to religion comes awfully close to imposing the kind of ecclesiastical test that the court of appeals decries, *see id*. at 373. It also has the tenor of crying wolf. Finding indicia of bias in routine behavior threatens to desensitize the judicial system to genuine acts of discrimination.

Further, the court of appeals' precedential opinion threatens to impose significant reputational harms on those accused of bias. Absent concrete evidence of religious bias and witness intimidation, it was wrong for the court of appeals to make accusations about such serious forms of misconduct. Those allegations, in and of themselves, are sufficient to warrant this Court's intervention. When combined with the court of appeals' other errors and departures from judicial norms—which include ignoring and misconstruing precedent to justify an anomalous exercise of jurisdiction, and commenting on constitutional issues not properly before the court, including the merits of Plaintiffs' claims in

the principal lawsuit—they call into question the fundamental fairness of the proceedings. Accordingly, the Court should exercise its supervisory power to vacate the court of appeals' decision, remand the case, and instruct the court of appeals both to reconsider its decision in light of precedent and tailor its discussion to the issues properly before it.

III. This Matter Is Not Moot.

A case becomes moot if the parties no longer have a legally cognizable interest in the outcome. *See Chafin v. Chafin*, 568 U.S. 165, 174 (2013). But "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 172.

This matter is not moot because Plaintiffs continue to have an interest in obtaining the disputed documents from TCCB. Although the district court has entered a final judgment for Plaintiffs in the principal lawsuit, Defendant has filed an appeal. *See supra* at 19. The court of appeals may reverse the district court's judgment on a ground to which the documents are relevant, or it may remand the case for further proceedings. Accordingly, until all appeals in this case have been exhausted, Plaintiffs' dispute with TCCB is not moot.

Alternatively, should the Court conclude that the matter is moot, Plaintiffs request that the Court vacate the court of appeals' decision and remand with a direction to dismiss TCCB's motion to quash as moot. *See*

Azar v. Garza, ___ U.S. ___, 138 S. Ct. 1790, 1793 (2018) (vacating the court of appeals' decision and remanding the case with instructions for the court of appeals to direct the district court to dismiss the relevant claim as moot); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."). That course of action would prevent the court of appeals' unreviewable decision "from spawning any legal consequences," and mitigate the reputational harms flowing from its unfounded allegations of misconduct. *Munsingwear*, 340 U.S. at 41.

CONCLUSION

The Court should grant this petition and summarily reverse the court of appeals' decision concerning appellate jurisdiction. Alternatively, the Court should grant the petition, vacate the court of appeals' decision, and remand the case with instructions that the court of appeals reconsider its decision in light of precedent and tailor its discussion to the issues properly before it.

If the Court concludes that this matter is moot, it should vacate the court of appeals' decision and remand with instructions to dismiss TCCB's motion to quash as moot.

Respectfully submitted,

MOLLY DUANE
AUTUMN KATZ
CAROLINE SACERDOTE
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038

PATRICK J. O'CONNELL
LAW OFFICES OF PATRICK J. O'CONNELL PLLC
2525 Wallingwood Drive, Bldg. 14
Austin, TX 78746

STEPHANIE TOTI
Counsel of Record
DAVID BROWN
LAWYERING PROJECT
25 Broadway, 9th Floor
New York, NY 10004
(646) 490-1083
stoti@lawyeringproject.org

J. ALEXANDER LAWRENCE
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

November 12, 2018