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.

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

REPLY BRIEF FOR PETITIONERS

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The Texas Catholic Conference of Bishops ("TCCB") devotes much of its brief in opposition to arguing the merits of its motion to quash Plaintiffs' document subpoena. But the issue before this Court is not whether the district court was correct in denying the motion; it is whether 28 U.S.C. § 1291 conferred jurisdiction on the court of appeals to review the district court's decision. The dispositive consideration is whether discovery orders rejecting claims of First Amendment privilege would be effectively unreviewable absent collateral order appeal. Well-settled precedent establishes that at least two other mechanisms provide litigants asserting a novel or important privilege against compelled document production with an effective opportunity for review: mandamus and noncompliance.[1] TCCB failed to identify a valid justification for the court of appeals' departure from this precedent.

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[1] Just last week, the Sixth Circuit rejected collateral order jurisdiction in a case concerning the assertion of a First Amendment privilege against discovery because of the availability of alternative mechanisms for review. *Ohio A. Phillip Randolph Inst. v. Larose*, No. 18-4258, slip op. at 7 (6th Cir. Jan. 18, 2019) (ECF No. 31-2) ("Application of the *Cohen* factors further convinces us that this case is not appropriate for collateral order review. Most significantly, there are alternative avenues through which the [non-party litigants] may remedy the alleged violation of their First Amendment privilege.").

I. TCCB's Arguments Concerning Mandamus and Noncompliance Are Unconvincing.

The critical flaw in the court of appeals' decision was its failure to acknowledge alternative mechanisms—besides collateral order appeal—for obtaining review of an order compelling the production of documents. Such mechanisms include mandamus and noncompliance. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009); Pet. at 23-24. TCCB failed to establish that these mechanisms would be insufficient to provide litigants asserting a First Amendment privilege with an effective means of obtaining review.

With respect to mandamus, TCCB argues that there is no basis for distinguishing between claims of First Amendment privilege against document production and claims of qualified immunity from suit. BIO at 28. But this Court has rejected "the lawyer's temptation to generalize" in this way. *Will v. Hallock*, 546 U.S. 345, 350 (2006). In *Will*, the Court rebuffed an analogy between sovereign immunity and the judgment bar of the Federal Tort Claims Act ("FTCA"), holding that decisions denying the latter are not eligible for collateral order review. *Id.* at 353-55. After stressing the need to keep the "small class of collaterally appealable orders . . . narrow and selective in its membership," *id.* at 350 (internal quotation marks omitted), the Court distinguished qualified immunity from the FTCA's judgment bar on several grounds, including that quick resolution of qualified immunity defenses creates important incentives for official conduct, *see id.* at 353 ("The nub of qualified immunity is

the need to induce officials to show reasonable initiative when the relevant law is not 'clearly established'; a quick resolution of a qualified immunity claim is essential." (citations omitted)).

In *Mohawk*, the Court observed that quick resolution of privilege claims is unlikely to have substantial impact on conduct outside of litigation. *See* 558 U.S. at 110 ("[I]n deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal."). The *Mohawk* Court further explained that "rulings adverse to the privilege," which tend to be highly fact-bound, "vary in their significance; some may be momentous, but others are more mundane." *Id.* at 112. These factors led the Court to conclude that "the limited benefits of applying 'the blunt, categorical instrument of § 1291 collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs." *Id.* (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994)).

Instead, the urgency of securing review of such orders is best considered on a case-by-case basis. The *Mohawk* Court emphasized that "litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal." *Id.* at 110. "[W]hen a disclosure order 'amounts to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice"—as TCCB claims is the case here—"a party may petition the court of appeals for a writ of

mandamus." *Id.* at 111. "Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions." *Id.* Indeed, noncompliance has been the customary way of obtaining immediate review of orders compelling disclosure for more than a century. *See Alexander v. United States*, 201 U.S. 117, 121-22 (1906). Requiring this extra step ensures that litigants will seek immediate review of discovery orders only when the interests at stake are sufficiently high, and the arguments against disclosure sufficiently meritorious, to risk the imposition of sanctions. *See United States v. Ryan*, 402 U.S. 530, 532-33 (1971) ("[W]e have consistently held that the necessity for expedition . . . justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.").[2]

Here, TCCB argues that noncompliance is not an appropriate means for litigants asserting a First Amendment privilege to obtain review of disclosure orders because it would prolong the litigation, leading to

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[2] Although TCCB contends that First Amendment privileges are rarely invoked, BIO at 26, a search of the federal caselaw suggests otherwise. In any event, assertion of First Amendment privilege would surely increase if litigants knew that including it among their discovery objections would enable them to circumvent the final judgment rule. *Cf. Mohawk*, 558 U.S. at 113 ("Were this Court to approve collateral order appeals in the attorney-client privilege context, many more litigants would likely choose that route.").

a "protracted legal process" that, in some cases, pits "church and state as adversaries." BIO at 28. But noncompliance requires no further action by a litigant asserting privilege. The burden would be on the party seeking disclosure to move for sanctions. The litigant resisting disclosure could then either waive its response or respond simply that it is availing itself of the procedure outlined in *Alexander*. Should the court issue sanctions against the litigant, the litigant could then proceed with an immediate appeal. Thus, this century-old procedural mechanism, intended to promote efficiency in the administration of justice, does not entail protracted legal proceedings.[3]

II. The Cases Relied on by TCCB Are Inapposite Because They Do Not Concern Orders Compelling Discovery.

TCCB conflates the importance of the First Amendment interests underlying its assertion of privilege with the inability to obtain effective review absent

[3] TCCB also contends that "what Petitioners sought below was not a contempt order for failure to disclose, but rather disqualification of the Bishops as a witness." BIO at 29. This argument, which focuses on the particular facts of this case, is not relevant to whether the entire category of discovery orders rejecting claims of First Amendment privilege should be eligible for collateral order appeal. Moreover, it demonstrates that noncompliance by TCCB may have obviated any need for immediate review. Had the district court excluded testimony by Ms. Allmon about matters related to the disputed documents, there would have been no harm to TCCB's asserted interests in non-disclosure, and any harm to Defendant's interests could have been remedied on appeal from the final judgment. *See Mohawk*, 558 U.S. at 109.

collateral order appeal. Under the collateral order doctrine, these conditions are independent and each is "stringent." *Will*, 546 U.S. at 349; *accord Digital Equip.*, 511 U.S. at 881 ("Even, finally, if the term 'importance' were to be exorcised from the [collateral order doctrine] analysis altogether, Digital's rights would remain 'adequately vindicable' or 'effectively reviewable' on final judgment to an extent that other immunities, like the right to be free from a second trial on a criminal charge, are not."). Plaintiffs do not dispute that the First Amendment rights at issue—both those arising from the First Amendment's implicit right to freedom of association and those arising from the Religion Clauses—are vitally important. Instead, the dispute centers on whether, in the context of an order compelling the production of documents, those rights can be adequately protected by appellate mechanisms other than collateral order appeal. As already explained, this Court's precedents establish that they can. *See supra* at 1-5. The cases relied on by TCCB are inapposite because they do not concern orders compelling the production of documents.

The federal circuit court cases that TCCB cites for the proposition that "several circuits have . . . permitted [collateral order] appeals of claims that protect 'important First Amendment interests' from the discovery process," BIO at 27 (internal quotation marks omitted), all concern appeals from orders denying motions to dismiss pursuant to state anti-Strategic Litigation Against Public Participation ("anti-SLAPP") statutes. *Los Lobos Renewable Power, LLC v. Americulture*, 885

F.3d 659, 661 (10th Cir. 2018); *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1356 (11th Cir. 2014); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 143 (2d Cir. 2013); *Godin v. Schencks*, 629 F.3d 79, 82 (1st Cir. 2010). In each case, the court of appeals did not base its decision to exercise collateral order jurisdiction solely on its assessment of the importance of the rights at issue; it also determined that the order concerning those rights would be effectively unreviewable absent a collateral order appeal. *See Los Lobos*, 885 F.3d at 666 ("[W]ere we to wait for this case to conclude in the court below by ordinary process, the statute's sole aim would already be lost."); *Royalty Network*, 756 F.3d at 1357; *Liberty Synergistics*, 718 F.3d at 147; *Godin*, 629 F.3d at 85.

Similarly, none of the cases from this Court that TCCB cites for the proposition that "[q]ualifying collateral orders include . . . those that implicate compelling interests of a constitutional dimension" concern orders compelling the production of documents. BIO at 16. Instead, all of those cases concern orders that would in fact be unreviewable absent collateral order appeal. *See Sell v. United States*, 539 U.S. 166, 176-77 (2003) (appeal from a pretrial order requiring a criminal defendant to be involuntarily medicated) ("By the time of trial Sell will have undergone forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted."); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (appeal from an order denying a motion to dismiss an indictment based on the Speech or Debate Clause) ("[T]he Speech or Debate Clause was

designed to protect Congressmen not only from the consequences of litigation's results but also from the burden of defending themselves." (internal quotation marks omitted)); *Abney v. United States*, 431 U.S. 651, 660-61 (1977) (appeal from an order denying a motion to dismiss an indictment on double-jeopardy grounds) ("[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense."). This Court has never held that all district court orders concerning constitutional rights are eligible for collateral order appeal. To the contrary, it has rejected collateral order jurisdiction in cases concerning constitutional rights when the conditions for such jurisdiction—stringently construed—were not met. *See, e.g.*, *Flanagan v. United States*, 465 U.S. 259, 266 (1984) (holding that pretrial disqualification of defense counsel in a criminal prosecution is not eligible for collateral order appeal, even though it implicates Fifth and Sixth Amendment rights) ("[A] constitutional objection to counsel's disqualification is in no danger of becoming moot upon conviction and sentence.").

Finally, none of the cases that TCCB cites for the proposition that "[a]ppellate courts have regularly found that they have jurisdiction over" orders "reject[ing] defenses under the Religion Clauses in a way that has exposed churches to unnecessary intrusion into their internal affairs" concern orders compelling the production of documents. BIO at 21. The Seventh Circuit's decision in *McCarthy v. Fuller*, 714 F.3d 971,

976 (7th Cir. 2013), permitted a collateral order appeal from an order holding that a federal jury had to decide whether the defendant was a member of a Roman Catholic religious order, even though the Holy See had ruled that she was not. Whether this decision reflects a correct application of the collateral order doctrine is debatable, *see id.* at 976 ("It is true that the error . . . in deciding that whether Fuller is a member of a religious order is a proper question to put to a jury, allowing the jury to disregard the ruling by the Holy See, can in principle be corrected on appeal from a final judgment."), but given the peculiar facts of the case, which can only be described as *sui generis*, it is not relevant to the Fifth Circuit's decision to exercise collateral order jurisdiction over a discovery order. The remaining cases relied on by TCCB are state or non-Article III District of Columbia court cases concerning application of the ministerial exception to liability for wrongful termination. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608-09 (Ky. 2014); *Harris v. Matthews*, 643 S.E.2d 566, 568-69 (N.C. 2007); *United Methodist Church v. White*, 571 A.2d 790, 791-93 (D.C. 1990).[4] These cases shed no light on the proper exercise of federal appellate jurisdiction.

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[4] *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011), is no longer good law. *See Trinity Christian Sch. v. Comm'n on Human Rights & Opportunities*, 189 A.3d 79, 82 n.4, 84 (Conn. 2018).

III. TCCB Mischaracterizes the Nature of the Litigants' Discovery Dispute.

TCCB mischaracterizes several important aspects of the discovery dispute between the litigants. Although the merits of the discovery dispute are not currently before the Court, Plaintiffs feel obligated to correct the record.

First, Plaintiffs agreed to four limiting conditions on their subpoena, narrowing their requests to documents that (1) were sent to or from Ms. Allmon, (2) during a thirty-month period, (3) 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. TCCB omitted the last condition, *see* BIO at 11, which makes clear that Plaintiffs only sought documents concerning the subject of Ms. Allmon's trial testimony.

Second, TCCB erroneously asserts that it produced "internal communications to lower-level Conference staff." BIO at 12. To the contrary, TCCB asserted a blanket privilege over all of Ms. Allmon's internal communications, regardless of the participants or subject-matter. At the hearing on TCCB's motion to quash, TCCB's counsel said that those communications fell into three categories, all of which TCCB had declined to produce:

> There's Jennifer Allmon communicating with the bishops and the bishops responding to Jennifer Allmon. . . . I'd call those the bishop communications. And then, there are staff

> internal communications, and that is basically Jennifer Allmon with two other individuals that work on her staff where they talk about how they're going to implement the bishops' directives, and I call those the internal staff communications. . . . The last one is internal, what I'd call, voting members but not bishops, and there's only a few of those documents.

ROA-1.2969-70. Additionally, Ms. Allmon submitted a sworn affidavit that described her document review process and identified the documents that TCCB withheld from production:

> I personally reviewed each of those 6000 pages. In doing so, and in accordance with the understanding between counsel for TCCB and counsel for Whole Women's Health, I culled through the documents and eliminated those that were not at all related to this litigation . . . I then separated the remaining documents between external documents and internal records. . . . The internal records consist of 130 internal Bishop email communications, 22 TCCB voting member email communications, 146 TCCB staff email communications and 19 documents.

ROA-1.2083.[5] Contrary to TCCB's statements to this Court, BIO at 11-12, nearly half of the documents that

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[5] TCCB subsequently sought to claw back some of the documents that it had produced—including draft press releases and op-ed articles—asserting that those documents were also privileged. *See* ROA-2.2760-69.

it refused to produce are relevant communications between Ms. Allmon and subordinate staff members. If it had produced those documents, the need for judicial intervention in this matter likely could have been avoided.

Third, TCCB mischaracterizes this case as a dispute between "ideological" and "political opponents." BIO at 1. Plaintiffs harbor no animus toward Roman Catholics generally or the Texas Bishops in particular. Some of the Plaintiffs, their counsel, and their patients are themselves practicing Roman Catholics. Although Plaintiffs disagree with TCCB on some issues, they agree with TCCB on others. Plaintiffs' subpoena to TCCB was not a fishing expedition designed to gather opposition research on a political opponent, as TCCB suggests. Rather, it was a narrowly-tailored discovery request designed to obtain relevant, prior statements from a witness that the State planned to call at trial. Whatever the merits of TCCB's privilege claims—and they are sharply disputed—there is simply no support for the contention, which TCCB continues to assert, that Plaintiffs or the district judge acted in bad faith.[6]

[6] TCCB selectively quotes from the district judge's statement at the start of the trial in the principal case that he would "absolutely ignore" portions of the court of appeals' decision. BIO at 31. The judge said that he would ignore the parts of the decision "which seemed to rule on the merits of this case." ROA-2.3941. He had earlier told counsel in chambers: "I'm not disappointed that I was reversed. That happens. . . . But I was disappointed in the tone of the opinion, which made it appear as if I was biased. . . ." ROA-2.3920.

CONCLUSION

The Court should grant the relief requested in the Petition.

Respectfully submitted,

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