IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

-vs-

Case No. A-16-CA-1300

CHARLES SMITH,
Defendant.

ORDER

Before the Court is non-party Texas Catholic Conference of Bishops (TCCB)'s Rule 4(a) Statement of Appeal (Dkt. # 165), objecting to Magistrate Judge Austin's order denying TCCB's motion to quash. Plaintiffs have filed a response in opposition (Dkt # 167) and Defendant has filed a response in support (Dkt. # 166). Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the motion, the responses, the entire file in this action—including the documents submitted for *in camera* review— the Court **DENIES** TCCB's Appeal (Dkt. # 165) for the reasons that follow.

BACKGROUND

I. Case Context

Plaintiffs are a variety of Texas medical providers who offer healthcare services to women. Dkt. # 93 ¶¶ 12–17. Plaintiffs challenge the constitutionality of rules and legislation restricting the disposal of fetal tissue under 42 U.S.C. § 1983 on behalf of themselves and their patients by bringing suit against Charles Smith, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity.

Previously in this case, United States District Judge Sam Sparks granted Plaintiffs' motion for preliminary injunction, prohibiting amendments to Title 25 of the Texas Administrative Code

§§ 1.132–1.136 (the Amendments) from taking effect. Dkt. # 49. Before the Amendments, healthcare providers could choose from seven methods to dispose of human tissue, regardless of whether the tissue resulted from "surgery, labor and delivery, autopsy, embalming, or a biopsy" or a "spontaneous or induced human abortion[.]" 25 TEX. ADMIN. CODE § 1.136(4)(A)(ii) (2015); 14 Tex. Reg. 1457, 1457–62 (adopted Mar. 14, 1989). The Amendments modified these rules, limiting disposal of fetal tissue to three methods regardless of gestational age: interment, incineration followed by interment, or steam disinfection followed by interment. " 41 Tex. Reg. 9709, 9738–39 (Dec. 9, 2016) (codified at 25 TEX. ADMIN. CODE § 1.136(a)(4)(A)(v)–(a)(4)(B)(I)). In enjoining the Amendments, Judge Sparks noted the evidence in the record suggested "there may be only one facility, . . . in the entire State of Texas both willing and currently able to handle the disposal of fetal tissue as required by the Amendments." Dkt. # 49 at 20.

Before enjoining the Amendments, Judge Sparks held a two-day evidentiary hearing on Plaintiffs' motion. Ms. Jennifer Carr Allmon, executive director of TCCB, submitted a declaration in opposition to the preliminary injunction motion and testified on behalf of the Defendant at the evidentiary hearing. Dkt. # 17-2; Dkt. # 69 at 79–124. TCCB is an association of Roman Catholic bishops and archbishops in Texas and it advocates for the social, moral, and institutional concerns of the Catholic Church. Dkt. # 150 at 2. TCCB is operated by a staff of approximately eight people who receive direction from the Texas bishops.

At the hearing, Ms. Allmon's testimony focused on TCCB's efforts in support of the Amendments' creation as well as the Catholic Church's offer, communicated by TCCB, to provide free common burial of fetal remains in Catholic cemeteries throughout Texas coincident with the Amendments' implementation. Dkt. # 69 at 79–124. While testifying, Ms. Allmon discussed the availability and willingness of Catholic cemeteries to bury fetal remains, the willingness of Catholic

cemeteries to enter into contracts with abortion providers, and whether religious services would be conducted with the burial of fetal remains. *Id.*

Defendant appealed the preliminary injunction to the Fifth Circuit Court of Appeals, and Judge Sparks stayed the case pending a decision from the appellate court. Dkt. # 56; Dkt. # 66. While appeal of the preliminary injunction was pending, Texas enacted Texas Senate Bill 8 (SB 8). *See* Act of June 6, 2017, 85th Leg., R.S., ch. 441, 2017 Tex, Sess. Law Serv. 1165 (West).[1] Among other things, SB 8 created a new chapter in the Texas Health and Safety Code, Chapter 697, which also modifies the Texas statutory scheme for disposal of fetal remains. *Id.* at § 13. Under Chapter 697, healthcare facilities must dispose of fetal remains by interment or cremation. *See id.* § 697.004(a).

On December 6, 2017, the Fifth Circuit dismissed the appeal of the preliminary injunction in light of Defendant's unopposed motion to voluntarily dismiss, Dkt. # 80, and Judge Sparks transferred this case to the undersigned. The undersigned lifted the stay, and Plaintiffs filed an amended complaint challenging the constitutionality of SB 8's disposal scheme as well as a second preliminary injunction motion.

On January 29, 2018, this Court issued a second preliminary injunction, preventing the provisions of Chapter 697 restricting the disposition of fetal remains from taking effect. Dkt. # 110. Significant here, the Court concluded the evidence in the record indicated Chapter 697 imposes an undue burden on abortion access because its burdens appear to outweigh its benefits. *Id.* The Court considered burdens such as logistical challenges, the limited number of vendors available to dispose

[1] The Court cites this act hereafter as SB 8.

of fetal remains as mandated by Chapter 697, and the potential imposition on personal beliefs.[2] *Id.* The extent of these burdens remains a crucial issue for trial.

In the same order, the Court also referred the case to Magistrate Judge Andrew W. Austin for the purpose of setting an expedited scheduling order and discovery schedule and resolving all nondispositive discovery matters. *Id.* On February 7, 2018, the Magistrate Judge entered a scheduling order in this case. Dkt. # 115. Particularly relevant here, the parties were ordered to complete all discovery by June 15, 2018, and trial was set for July 16, 2018. *Id.*

II. Motion to Quash

On March 1, 2018, Defendant identified Ms. Allmon as a trial witness. On March 20, 2018, Plaintiffs served a subpoena for documents on the TCCB, and TCCB filed a motion to quash the subpoena on April 2, 2018. One day later, the Magistrate Judge denied the motion to quash without prejudice for failing to contain a certificate of conference as required by Local Rule CV-7(i) and for failing to follow the scheduling order.[3]

Plaintiffs and TCCB were unable to reach a full agreement on the subpoena. However, the parties agreed to limit the scope of the subpoena to documents including the following eight search terms: SB8, "SB 8", Fetal, Fetus, Embryonic, Embryo, Abortion, Aborted, Miscarriage, unborn, and "burial ministry". Dkt. # 156-6. Furthermore, Plaintiffs represent that they are requesting TCCB only produce emails sent to or received by Ms. Allmon where: (1) the emails or attachments to those emails include any of the agreed upon search terms, (2) the emails were sent or received on or after January 1, 2016; and (3) the emails or attachments relate to the burial, cremation, or disposition of

[2] The parties have stipulated that neither party will argue the challenged laws are unconstitutional due to any monetary costs of compliance. Dkt. # 119.

[3] The scheduling order entered in the case requires any discovery disputes be submitted for an informal conference prior to the filing of any motion. Dkt. # 115.

fetal or embryonic tissue. Dkt. # 167. TCCB produced the emails sent or received by Ms. Allmon sent to or received from an external email address. In total, TCCB produced 91 external emails to or from Ms. Allmon dating between November 29, 2016 and January 29, 2018. TCCB refuses to produce the corresponding 298 internal emails.

On June 11, 2018, TCCB filed a second motion to quash. On June 13, 2018, the Magistrate Judge held a hearing on the pending motion and subsequently issued an order denying TCCB's motion to quash.[4] TCCB filed a motion objecting to and appealing from the Magistrate Judge's Order. Plaintiffs responded in opposition and Defendant responded in support.

LEGAL STANDARD

TCCB appeals from the Magistrate Judge's order denying TCCB's motion to quash, which is a non-dispositive discovery motion. *See Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995) (considering pre-trial discovery motions to be non-dispositive). Accordingly, the Court must review the Magistrate Judge's order under the "clearly erroneous or contrary to law" standard of review. *See* 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a); Local Rules App. C, Rule 4(a); *see also Castillo*, 70 F.3d at 385.

The first standard stated in § 636(b)(A)—"clearly erroneous"—applies to review of a magistrate judge's factual findings. *Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014). A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948). This standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because

[4] Based TCCB's representations it would appeal denial of its motion to quash to the undersigned, the Court issued an expedited briefing schedule for any party seeking appeal of the Magistrate Judge's decision in keeping with the expedited schedule in place in this case and the upcoming trial. Dkt. # 158.

it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *see also, e.g.*, *Brinkley v. Comm'r*, 808 F.3d 657, 664–65 (5th Cir. 2015) (explicating the same standard).

The second standard—"contrary to law"—pertains to review of the magistrate judge's legal conclusions. *Moore*, 755 F.3d at 806. As commonly construed, this standard authorizes plenary and thus de novo review, *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993), although "[f]rivolous, conclusive or general objections need not be considered by the district court," *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

In sum, the clearly erroneous or contrary to law standard of review is a "highly deferential standard" and requires the court "to affirm the decision of the magistrate judge unless 'on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.'" *Baylor Health Care Sys. v. Equitable Plan Servs., Inc.*, 955 F. Supp. 2d 678, 689 (N.D. Tex. 2013) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

DISCUSSION

TCCB argues this Court should grant its appeal and quash Plaintiffs' subpoena because (1) TCCB's internal communications are privileged under the First Amendment; (2) enforcement of the subpoena would violate the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4; and (3) enforcing the subpoena violates Rule 45 of the Federal Rules of Civil Procedure. Dkt. # 165.

As a threshold matter, for the first time on appeal, TCCB argues requiring production of its internal communications violates RFRA. *See* Dkt. # 120; Dkt. # 150, Dkt. # 157.[5] Consequently, the

[5] The Court also reviewed the audio recording of the hearing on the motion to quash. After the Magistrate Judge indicated he found TCCB's relevance argument unpersuasive, TCCB characterized its remaining arguments as deriving from the First Amendment concerning religion and association.

TCCB's RFRA argument is waived. *See McGregory v. City of Jackson, Miss.*, 335 F. App'x 446, 449 (5th Cir. 2009) ("Arguments not made below are generally waived and cannot be raised for the first time on appeal."); *Cantu v. TitleMax, Inc.*, No. 5:14-CV-628 RP, 2015 WL 5944258, at *5 (W.D. Tex. Oct. 9, 2015) (holding party's failure to assert work product protection in proceedings before the magistrate judge waived ability to assert work product protection in appeal to district court); *Silva v. City & Cty. of Honolulu*, No. CV 11-00561 LEK-RLP, 2012 WL 12891431, at *4 (D. Haw. Dec. 31, 2012) (holding argument raised for the first time on appeal to district court comes too late). Under the clearly erroneous or contrary to law standard of review, the Court will not consider new objections to the subpoena not raised before the Magistrate Judge. The Court reviews TCCB's remaining arguments below.

I. First Amendment Privilege[6]

TCCB contends requiring production of its internal communications would infringe on its First Amendment rights, those guaranteed by the Free Exercise Clause and the Establishment Clause as well as under the freedom of association. In objecting to Plaintiff's subpoena as an infringement on First Amendment rights, TCCB asserts a First Amendment privilege. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009) (citing *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), *cert. granted and vacated as moot*, 458 U.S. 1118 (1982)).

The Magistrate Judge rejected TCCB's First Amendment privilege claim. The Magistrate Judge relied on *Ambassador College v. Goetzke*, 675 F.2d 662 (5th Cir. 1982) in concluding this case

[6] The Court notes the Fifth Circuit has observed, "in cases raising First Amendment issues . . . an appellate court has an 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.'" *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 491 (5th Cir. 2013)(quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). Thus, the Court has conducted a review of the entire record in this case to appropriately place the discovery dispute in context.

presented "no danger of the government seeking to monitor or regulate a religious group" and thus there were no free exercise violations here. Dkt. # 161 at 3.[7] In evaluating TCCB's associational rights argument, the Magistrate Judge applied *Perry v. Schwarzenegger*. He determined TCCB failed to make a *prima facie* showing production would chill the associational rights of TCCB members and any chilling effect was outweighed by Plaintiffs' interest. *Id.* at 3–5. The Magistrate Judge expressly based his conclusions on "the narrow scope of the requested documents," which address a central factual issue: "what burial services are available, and will remain available, to abortion providers in Texas." *Id.* at 3, 5.

A. Free Exercise and Establishment Clauses

TCCB argues the Free Exercise and Establishment Clauses together shield a church's internal affairs and thus TCCB's internal communications should be protected from discovery. TCCB argues the Magistrate Judge erred by impermissibly evaluating whether the internal communications, specifically those provided for *in camera* review, had a religious focus. Dkt. # 165 at 5–7 (citing Dkt. # 161 at 5 n.2). TCCB asserts mere adjudication of whether the internal communications were religious or not poses problems for religious autonomy and entanglement of church and state. *Id.*

TCCB correctly asserts "[t]he Supreme Court has recognized the right of religious organizations to control their own affairs." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) (citing *Watson v. Jones*, 80 U.S. 679, 727 (1872)). That right "includes the freedom to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine and the right of religious organizations to select their own leaders." *Id.* (internal citations and quotations omitted). As a result, courts have recognized religious organizations' right

[7] The TCCB did not differentiate its free exercise and establishment arguments and instead blended the two arguments in both its motion to quash and the hearing before the Magistrate Judge.

to choose their clergy, control employment related to religious mission, and direct matters of church governance and religious doctrine. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 495–501 (1979).

However, the right to control internal affairs has not been construed to shield all of a church's internal documents from discovery. *See Goetzke*, 675 F.2d at 664–65 (finding, in the context of an alleged fraud, "the church must respond to discovery requests, as any other similarly situated litigant would be required"); *United States v. Holmes*, 614 F.2d 985 (5th Cir. 1980) (holding church was required to permit government to access information on the church's tax exempt status).

Here, context plays a key role in whether the Free Exercise and Establishment Clauses are implicated. TCCB is communicating and coordinating the Catholic Church's offer to serve as a viable vendor for burying fetal remains in compliance with the Amendments and Chapter 697. *See* Dkt. # 17-2; Dkt. # 69 at 79–124. The government is not requesting documents and does not seek to monitor or evaluate TCCB's religious activities. Instead, private entities providing healthcare services to seek to gather facts on the Catholic Church's burial services offer—namely how, when, where, and for how long burial services will be provided. The fact TCCB is a religious organization does not immunize its internal communications regarding those services from discovery.

There has been no showing Plaintiffs' discovery request infringes on TCCB's right to control its own affairs or interferes with matters of church government, faith, or doctrine. Plaintiffs do not seek to unmask the deliberative process by which TCCB arrived at the decision to support SB 8 or TCCB's strategy for showing that support. The danger of government interference with doctrinal decisions or church management, against which the Free Exercise and Establishment Clauses guard, is not present here. *Cf. McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972) ("[L]egislation

that regulates church administration, the operation of the churches [or] the appointment of clergy . . . prohibits the free exercise of religion." (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 107 (1952))); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (remarking that the ministerial exception is a structural protection that "categorically prohibits federal and state governments from becoming involved in religious leadership disputes"). Thus, production of TCCB's internal communications, tailored to the fact issue to be addressed at trial, does not trigger the Free Exercise and Establishment Clauses or a privilege asserted thereunder.

The Magistrate Judge's *in camera* review of the sample of TCCB's internal communications strengthened his conclusion the communications should be produced because they included "routine discussions of the burial services at issue here." Dkt. # 161 at 5 n.2. The Magistrate did not engage in forbidden line-drawing regarding religious beliefs or second-guess church doctrine. *Cf. Cannata*, 700 F.3d at 174 (reiterating that requiring a church to justify termination of its minister would cause "a civil factfinder to sit[] in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission"); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008) (noting interpreting the phrase "religious convocations or services" threatened to "embroil the government in line-drawing and second-guessing about which it has neither competence or legitimacy"). The Magistrate Judge merely remarked on the general focus of the emails between Ms. Allmon and other TCCB staff: burial services for fetal remains.

Accordingly, the Court overrules TCCB's objections concerning the Free Exercise and Establishment Clauses.

B. Associational Rights

TCCB claims the Magistrate Judge erred in finding TCCB failed to make a *prima facie* showing of a chilling effect on the exercise of associational rights by narrowly defining "chill." Dkt. # 165 at 10–11. According to TCCB, within the context of associational rights, the chilling analysis must also take into account impact on members' right to speak freely within the association. *Id.* And, TCCB contends, requiring production of TCCB's internal communications would chill conversations between the Catholic bishops concerning sensitive matters of church doctrine. *Id.*

The First Amendment protects a limited right to associate with others for the common advancement of beliefs and ideas concerning political, economic, religious or cultural matters. *See Perry*, 591 F.3d at 1159 ("The right to associate for expressive purposes is not, however, absolute." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))); *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958) ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ."). "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Perry*, 591 F.3d at 1159 (quoting *Roberts*, 468 U.S. at 623).

A party asserting First Amendment privilege based on associational rights must make a *prima facie* showing of an objectively reasonable probability of a chilling effect on their associational rights if the discovery is permitted. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, No. A-15-CV-134-RP, 2016 WL 5922315, at *6 (W.D. Tex. Oct. 11, 2016) (citing *Perry*, 591 F.3d at 1160–61); *see also In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 488 (10th Cir. 2011) ("[T]he weight of existing authority instructs that the party claiming a First Amendment privilege in an objection to a discovery request bears the burden to make a prima facie showing of

the privilege's applicability."). This means the party must show enforcement of the discovery requests "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Perry*, 591 F.3d at 1160; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010) ("[W]e have explained that those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" (alteration in original) (citations omitted)).

If the party claiming the privilege can make the necessary *prima facie* showing, the burden shifts to the party seeking the discovery to demonstrate "an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *Id.* at 1161 (quoting *NAACP*, 357 U.S. at 463 (alternations in original)); *In re Motor Fuel*, 641 F.3d at 488. In evaluating whether the interest in disclosure justifies the deterrent effect, courts conduct a balancing test considering factors such as the importance of the litigation, the centrality of the information sought to issues in the case, less intrusive means of obtaining information, and the substantiality of the First Amendment interests at stake. *Perry*, 591 F.3d at 1161 (surveying cases for factors). In order for disclosure to be ordered, the party seeking the information must show it is "highly relevant" to the litigation, the request is "carefully tailored to avoid unnecessary interference with protected activities," and the information is "otherwise unavailable." *Id.*

As the Ninth Circuit has noted, "[i]mplicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Id.* at 1162. Based on this conclusion, there are at least two ways compelled

disclosure of internal campaign communications can deter protected activities: (1) by chilling participation and (2) by muting the internal exchange of ideas. *Id.* at 1163. As the Magistrate Judge determined, there is no indication the first danger exists here. TCCB's members are unlikely to experience threats, harassment, or reprisal. There is no evidence TCCB members will withdraw their membership or reduce their exercise of petition rights on any issue if production is ordered.

However, the second danger may be present. There is some evidence in the record—a conclusory statement by Ms. Allmon—TCCB members have already reduced their use of electronic communications out of fear their communications could later be shared. Dkt. # 165-1 at ¶ 9. Although lacking in detail, such a statement raises a reasonable inference that disclosure of TCCB's internal communications would inhibit internal conversations essential to the private exchange of ideas, a cornerstone of the freedom of association and expression. But a chilling effect that dampens internal communications is not as serious as cases where group members have been subjected to violence, economic reprisals, and police or private harassment. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 97 (1982) ("Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals . . . ."); *NAACP*, 357 U.S. at 462 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."). Such a difference "speaks to the strength of the First Amendment interests asserted, not their existence." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 176 (D.C. Cir. 2003). Thus, TCCB has made a *prima facie* showing of arguable chilling effect on its associational rights if the disclosure is permitted.

Although this Court's conclusion differs from the Magistrate Judge's, such a difference is nonprejudicial here. Even though the Magistrate Judge concluded TCCB failed to make a *prima facie* showing of a chilling effect, he nevertheless balanced Plaintiffs' interest in the disclosures with any deterrent effect on TCCB. *See* Dkt. # 161 at 5.

Conducting its own balancing test, the Court agrees with the Magistrate Judge's analysis: any chilling effect felt by TCCB through the release of its 298 emails is outweighed by Plaintiffs' interest in obtaining them. This case raises the questions concerning the constitutionality of laws restricting the disposal of fetal remains, not the least of which is whether the restrictions are an undue burden on abortion access. Through negotiation with the TCCB, Plaintiffs have narrowed their disclosure request to emails about the specifics of the burial services the Catholic Church has offered to provide, as communicated and coordinated by the TCCB. This evidence concerns a key factual issue to addressed as trial—the availability and nature of burial services for abortion providers in Texas. Moreover, Plaintiffs highlight how TCCB has held itself out as coordinating the availability of and procedure for burial services, and thus TCCB's internal communications include facts about the burial services not available elsewhere. Dkt. # 167 at 5–6. Plaintiffs do not request all of TCCB's internal communications concerning fetal remains or discussion of beliefs concerning the termination of pregnancy but have endeavored to limit inquiry to the offer to provide burial services. As a result, Plaintiffs present a strong interest in obtaining the internal emails.

On the other hand, TCCB presented a relatively weak interest in shielding the emails. There is no indication TCCB's members will withdraw their membership or be deterred from advocating for their position on abortion or the treatment of fetal remains. Instead, TCCB only argues it will experience a limited invasion of privacy and a reduction in its electronic communications.

Balancing the interest and the harm, the Court finds Plaintiffs's interest in disclosure substantially outweighs the deterrent effect on TCCB's exercise of the right of association. Plaintiffs have shown their request is highly relevant to the litigation, carefully tailored to avoid unnecessary interference with protected activities, and the information sought is otherwise unavailable. Therefore, there Court overrules TCCB's objection relating to TCCB's associational rights.

In sum, the Court finds the Magistrate Judge's conclusion that TCCB failed to prove a First Amendment privilege shielding its 298 internal emails from disclosure was not clearly erroneous or contrary to law.

II. Rule 45

TCCB further argues Plaintiffs' subpoena should be quashed under Rule 45 of the Federal Rules of Civil Procedure. The Magistrate Judge concluded the narrowed discovery request, limited to the issue on which Ms. Allmon will testify, sought documents that "are plainly relevant and discoverable." Dkt. # 161 at 2. TCCB argues the Magistrate Judge erred in denying the motion to quash because the subpoena requires the disclosure of privileged information and would subject TCCB to an undue burden. Dkt. # 165 at 16–20.

Rule 45 requires a court to quash a subpoena if it requires disclosure of privileged or other protected matter or subjects a person to an undue burden. FED. R. CIV. P. 45(d)(3)(A). The party resisting discovery bears the burden of proof to substantiate its privilege claim or demonstrate compliance with the subpoena would be unreasonable and oppressive. *See In re Equal Emp't Opportunity Comm'n*, 207 F. App'x 426, 431 (5th Cir. 2006); *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004).

First, TCCB's privilege argument repeats TCCB's assertion of First Amendment privilege. The Court already addressed this argument above. TCCB has not shown the subpoena, as narrowed, requires information protected by First Amendment privilege or any other privilege.

Second, TCCB has not shown producing the remaining 298 emails it identified as responsive to Plaintiffs' discovery request is an undue burden. To determine whether the subpoena presents an undue burden, a court considers the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. *Wiwa*, 392 F.3d at 818. As the Magistrate Judge concluded and this Court discussed above, the internal emails are relevant to a key factual issue in this case and Plaintiffs' have carefully narrowed their request to that fact issue. Furthermore, the Court finds production of the 298 emails does not impose a significant burden on the TCCB. TCCB has failed to prove complying with the narrowed subpoena would be unreasonable or oppressive.

Accordingly, the Court overrules TCCB's objections made under Rule 45. The Magistrate Judge's finding that the narrowed subpoena requests relevant and discoverable documents was not clearly erroneous or contrary to law.

CONCLUSION

Upon its own review, the Court finds the Magistrate Judge's order was not clearly erroneous or contrary to law. The Court is not left with a definite and firm conviction that a mistake has been committed. For the foregoing reasons, the Court **DENIES** Texas Catholic Conference of Bishops's Rule 4(a) Statement of Appeal (Dkt. # 165). The Court **FURTHER ORDERS** the Texas Conference of Catholic Bishops to produce, within TWENTY-FOUR (24) HOURS of the entry of this order, emails sent to or received by Ms. Allmon, where: (1) the emails or attachments to those emails

include any of the agreed upon search terms, (2) the emails were sent or received on or after January 1, 2016; and (3) the emails or attachments relate to the burial, cremation, or disposition of fetal or embryonic tissue.

IT IS SO ORDERED.

DATE: Austin, Texas, June 17, 2018.

DAVID ALAN EZRA
SENIOR UNITED STATES DISTRICT JUDGE