Fifth Circuit Update

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Arbitration

***Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Indus. Servs., L.L.C.*, 898 F.3d 629 (5th Cir. 2018)**

Plaintiff Lone Star sold its assets, customer lists, and customer contracts to a competitor, Defendant Sunbelt. The sales price included three future contingent payments, called "earnouts," which were dependent on the amount of revenue Sunbelt received from Lone Star's customer base. The sales contract provided a mechanism for Sunbelt to calculate revenue and for Lone Star to propose an adjustment. The arbitration provision of the parties' contract provided that an arbitrator would resolve any "dispute[s] over [Lone Star's] proposed adjustments to [the] Revenue Calculation." After a dispute arose and an arbitrator was appointed, the arbitrator agreed with Lone Star's upward adjustment to the revenue calculation but also reformed the contract, concluding the parties had made a mutual mistake when listing the revenue target for former Lone Star customers in the agreement. The district court vacated the portion of the arbitration award reforming the contract.

An arbitrator exceeded his powers in reforming a contract based on mutual mistake when the arbitration clause only empowered him to resolve a certain dispute.

The Fifth Circuit affirmed. The Court reasoned that the arbitration provision empowering the arbitrator was narrow as it authorized the arbitrator only to resolve the parties' dispute over Lone Star's proposed adjustments to the revenue calculation. Had the provision extended to any dispute "regarding" or "arising out of" the revenue calculation, the outcome might have been different. By straying beyond the contractual language, the arbitrator exceeded his power and thus, the order reforming the contract for mutual mistake was properly vacated.

***Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686 (5th Cir. 2018)**

Kimberly Huckaba filed suit in federal court against Ref-Chem, L.P., her former employer. Ref-Chem responded by filing a motion to dismiss and compel arbitration pursuant to an arbitration agreement that Ref-Chem alleged the parties had entered into. The agreement in question was signed by Huckaba, but not by Ref-Chem. Ref-Chem claimed Huckaba was bound by the agreement because she signed it and that it had voluntarily agreed to arbitrate pursuant to the agreement. Huckaba countered that she had signed with the expectation that Ref-Chem would also sign. The district court granted Ref-Chem's motion to compel and dismissed the case, but the Fifth Circuit reversed.

Applying Texas law, the Court observed that Texas requires execution and delivery of a contract with the intent that it be mutually binding on all parties. Whether a signature is required is based on the parties' intent, and a signature is not required as long as both parties give their consent and there is no evidence of intent to require both parties to sign to execute the contract. Turning to the language in the contract, the Court observed that the contract referred to both parties signing the agreement multiple times, including: (1) a clause stating the signing parties were giving up their right to sue; (2) a clause prohibiting modifications unless they were in a writing signed by both parties; and (3) a signature block for Ref-Chem. Additionally, in the first line of the the agreement it stated that it would include Ref-Chem's signature. Based on this evidence, the Court concluded the parties' intention was for Ref-Chem to sign the agreement. It reached this conclusion even though Ref-Chem's conduct, such as keeping the agreement in Huckaba's file and moving to compel arbitration when she

An arbitration agreement that is not signed by an employer is not binding on an employee even though the employee signed the agreement.

sued, provided some evidence that Ref-Chem had intended to be bound by the agreement. Thus, because Ref-Chem did not sign the agreement, neither party was bound by it.

Constitutional Law

***Collins v. Mnuchin*, 896 F.3d 640 (5th Cir.), *reh'g en banc granted*, 908 F.3d 151 (5th Cir. 2018)**

In 2008, the Housing and Economic Recovery Act ("HERA") was passed, creating a new independent federal entity—the Federal Housing Finance Agency ("FHFA"). The FHFA oversees the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). In 2012, the United States Treasury Department and the FHFA, as conservator to Fannie Mae and Freddie Mac, entered into an agreement whereby the Treasury provided billions of taxpayer dollars in capital to Fannie Mae and Freddie Mac and, in exchange, they were required to pay the Treasury quarterly dividends equal to their entire net worth. Aggrieved Shareholders of Fannie Mae and Freddie Mac bought suit against the Treasury and the FHFA (collectively, the "Agencies"). Specifically, shareholders brought a statutory claim for violation of HERA, alleging that the agencies exceeded their statutory authority under HERA by agreeing to the exchange. Shareholders also brought a constitutional claim, alleging that the FHFA was unconstitutionally structured in violation of the separation of powers doctrine because it was headed by a single director removable only for cause, did not depend on congressional appropriations, and evaded meaningful judicial review. The district court ruled in favor of the agencies, and the shareholders appealed.

The Federal Housing Finance Agency was unconstitutionally structured because it was too insulated from executive branch control.

The Fifth Circuit affirmed in part and reversed in part. The Court affirmed dismissal of the statutory claim, holding it was barred by the section of HERA that bars courts from taking any action to restrain or affect the exercise of powers or functions of the FHFA as a conservator or receiver. However, the Court reversed the dismissal of the constitutional claim, holding the FHFA was unconstitutionally structured in violation of the separation of powers doctrine because it was insulated to the point where the executive branch could not control it or hold it accountable. The Court reached this conclusion after assessing the combined effect of: (1) the for-cause director removal restriction; (2) the single-director leadership structure; (3) the lack of a bipartisan leadership composition requirement; (4) the funding stream outside the normal appropriations process; and (5) the Federal Housing Finance Oversight Board's purely advisory oversight role. The appropriate remedy was to sever and strike the language of HERA providing that the executive branch could remove the FHFA's director only for cause (so that the executive branch can now remove the director at will), and to leave the remainder of HERA undisturbed.

***Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018)**

In 2011, the Texas legislature enacted a law that required voters to present government-issued identification in order to vote at the polls ("SB 14"). The law was challenged, and the district court held the law unconstitutional, and that it violated section 2 of the Voting Rights Act because of its discriminatory purpose and effect. After the an en banc Fifth Circuit held the law unconstitutional based on its disparate impact on minorities in 2016, the legislature worked with the challengers to fashion an interim remedy for the 2016 election whereby voters could cast a ballot upon swearing or affirming that they had a reasonable impediment and completing a Declaration of Reasonable Impediment ("DRI") that listed various impediments that might prevent a voter from having an ID.

The Texas voter ID law did not violate the Constitution or the Voting Rights Act.

In 2017, the legislature passed a new law codifying a substantial portion of the interim remedy crafted for the 2016 election ("SB

5”). Besides extending the time period for which expired ID’s will be accepted and adding new forms of acceptable ID, the most substantial difference between SB 5 and the interim remedy was to remove the category of “other” from the DRI where voters had the option to fill in any reason they wished, an option Texas claims was abused during the 2016 election. Despite these changes, the district court held that SB 5 was also unconstitutional and entered a permanent injunction against the law.

The Fifth Circuit began its analysis by holding that the passage of SB 5 did not moot the case. Turning then to the district court’s remedial order, the Court emphasized that federal courts are to defer to legislation designed to address voting rights violations unless the law is infected with a discriminatory purpose. The Court then admonished the district court for failing to show such deference and instead issuing an injunction that far exceeded the scope of violations found by the Court. It also found the district court committed numerous errors, including concluding that SB 5 was the tainted fruit of SB 14 despite the Court’s prior holding limiting the problems with SB 14 to a subset of indigent minority voters and presuming without proof that the invidious intent behind SB 14 carried over to SB 5 while also overlooking the improvements made to SB 5. The Court also faulted the district court for placing the burden of proof on the state to prove that SB 5 was not unconstitutional and for not considering less stringent relief.

Also significant was the fact that Plaintiffs never actually challenged SB 5. The Court observed that SB 5 largely replicated the interim terms to which the parties agreed. While Plaintiffs did criticize the removal of the “other” box and the requirement of submitting the DRI under penalty of perjury, the Court found these critiques to be speculative. While noting that its opinion did not prevent future challenges to SB 5, it held that for now it was an effective remedy to the deficiencies the Court previously found in SB 14. Therefore, the Court reversed the district court’s permanent injunction.

Judge Higginbotham wrote a concurring opinion. He stated that he would hold the case moot because the new law supplied the relief sought by Plaintiffs. He also criticized the district court's reliance on segregation cases and stated they had no role in the discrete state rules at issue in the case. Finally, he discussed the tension between disentangling partisan advantage from racial purpose when the minority voters are heavily invested in the party not in power and suggested that a confessed purpose of gaining a partisan advantage might violate the Equal Protection Clause.

Judge Graves wrote a dissenting opinion. While agreeing that the case was not moot, he stated SB 5 was merely an alter ego of the unconstitutional SB 14. He stated the district court correctly followed the en banc court's order to reexamine the evidence of discriminatory purpose and that it correctly disregarded evidence it was instructed not to consider by the Court. Absent a clearly erroneous finding of fact, the district court's conclusion should have been affirmed, and Judge Graves said there were no clearly erroneous findings of fact. Turing then to the district court's injunction, he stated that SB 5 changed very little from SB 14, and even if it lessened the discriminatory effects of the law, it did little to address the discriminatory reason for enacting the law in the first place. He stated Texas had the burden to prove SB 5 did not violate the Constitution, and the district court's thorough opinion did not error in concluding that it did not meet this burden. Thus, he would affirm the district court's invalidation of both SB 14 and SB 5.

Employment Law

***In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707 (5th Cir. 2018)**

In April 2017, two employees of In-N-Out Burger wore buttons advocating for a $15-per-hour minimum wage and the right to form a union at one of the company's fast food restaurants in Austin, Texas. Managers of the restaurant confronted the employees and eventually asked one employee to remove the button based on the company's strict dress code that forbade employees from wearing any pins or stickers while working. The employee complied but then filed unfair labor practice charges against In-N-Out. An administrative law judge held a hearing and ultimately found In-N-Out's "no-pins rule" violated the National Labor Relations Act. The National Labor Relations Board affirmed the ALJ's decision and ordered InN-Out to cease and desist from maintaining or enforcing its "no-pins rule" in a manner that prevented its employees from engaging in protected activity. In-N-Out sought review of the Board's decision from the Fifth Circuit, and the Board cross-applied for enforcement of its decision.

The Fifth Circuit began its analysis by discussing the deferential nature of its review, which required the Court to affirm the Board's decision so long as its legal conclusions had a reasonable basis in the law and its factual conclusions were supported by substantial evidence. The Court then observed that the National Labor Relations Act protects the right of employees to wear items relating to the terms and conditions of their employment and unionization. The only exception is when an employer can show that special circumstances outweigh the employees' interests in wearing such items. These special exceptions include when displaying protected items would: (1) jeopardize employee safety; (2) damage products; (3) aggravate employee dissension; and (4) interfere with the employer's established public image. Even when such a special circumstance exists, the employer's policy must also be narrowly tailored to fit that special circumstance.

Fast food restaurant violated federal labor law barring workers from wearing buttons supporting a higher minimum wage and stronger unions.

In-N-Out argued its strict dress code was necessary to maintain its public image, which sought to provide customers with a consistent experience in all stores, and to assure food safety. Rejecting these arguments, the Court held In-N-Out could not establish a special circumstance based on the longstanding nature of its uniform, its strict enforcement of its dress code, or the fact that customers were likely to see the pins.

It also stated the fact that In-N-Out required its employees to wear pins wishing customers a "Merry Christmas" and pins supporting In-N-Out's charitable foundation—both of which were larger than the pins at issue—undercut its arguments. Further, In-N-Out's arguments failed because it did not present any specific, non-speculative evidence to support its arguments. Finally, the Court found that In-N-Out's ban on pins was not narrowly tailored to address any concerns it might have for food safety. Thus, the Court upheld the Board's decision and granted its cross-application for enforcement.

Evidentiary Issues

***In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753 (5th Cir. 2018)**

The case involves multidistrict litigation against DePuy Orthopaedics, Incorporated ("DePuy") and Johnson & Johnson ("J&J"), DePuy's parent company, involving metal-on-metal hip implants sold and manufactured by DePuy. At trial, Plaintiffs claimed DePut defectively designed and marketed its hip implants and J&J was liable as a "nonmanufacturer seller," for aiding and abetting DePuy, and for negligent undertaking. After a trial prominently featuring expert witness testimony from both sides, the jury returned a $502 million verdict in favor of the Plaintiffs. Defendants brought motions for judgment as a matter of law ("JMOL") and a new trial, but all were denied except for the reduction in the verdict to $151 million pursuant to Texas's statutory cap on exemplary damages. Defendants appealed on numerous grounds.

First, DePuy appealed the denial of its JMOL motion. It sought JMOL on the design defect claims for three reasons: (1) the metal-on-plastic product Plaintiffs relied upon was a different product, not an alternative design; (2) the design-defect claim was preempted by Food and Drug Administration regulations; and (3) liability was foreclosed by the Restatement of Torts. The Fifth Circuit rejected each of these claims.

Regarding the alternative design argument, the Court held the difference between DePuy's product and the one proposed by Plaintiffs was merely a matter of degree—not function—and that the degree of difference did not impair the hip implant's overall utility enough to constitute a different product. The Court also found the FDA regulations did not preempt the lawsuit. As to the Restatement argument, the Court rejected the argument because Texas courts had not applied the rule in question to medical implants.

DePuy also appealed the denial of its JMOL motion on Plaintiffs' marketing defect claims for three reasons: (1) the warnings in place were adequate; (2) Plaintiffs failed to properly designate a warning expert; and (3) Plaintiffs failed to prove causation. Rejecting the first argument, the Court held DePuy's warning lacked the specificity required by Texas law. As to the second argument, the Court held Plaintiffs had presented sufficient expert testimony. Addressing causation, the Court stated causation for marketing defects requires Plaintiffs to prove a doctor read or encountered the adequate warning and that he would have altered his treatment because of the adequate warning. While most of the Plaintiffs did produce such evidence, two of them did not, so the Court granted the JMOL motion as to them.

Defendants were entitled to a new trial when the district court erroneously admitted highly inflammatory evidence and Plaintiffs' counsel misled the jury into believing that key experts were testifying without compensation.

Turning next to J&J's appeal, the Court considered J&J's arguments regarding personal jurisdiction, the aiding and abetting claim, the nonmanufacturer seller claim, and the negligent undertaking claim. The Court first found J&J was amenable to suit in Texas under a stream of commerce theory because J&J played a significant role in placing its products into Texas's stream of commerce with the expectation that they would be purchased there. The Court also affirmed the nonmanufacturer seller and negligent undertaking claims. However, the Court threw out the aiding and abetting claim because no such claim exists in Texas.

Finally, the Court held Defendants were entitled to a new trial based on numerous egregious and prejudicial evidentiary errors. Its ruling was based in part on the inclusion of character evidence that J&J subsidiaries paid bribes to the Saddam Hussein regime. The Court found that Plaintiffs' attorney improperly invited the jury to infer guilt based on these prior bad acts and that his repeated references to Hussein were highly prejudicial. The Court also found that the attorney impermissibly introduced hearsay evidence of racial discrimination. It stated such evidence was introduced only to prove that racism infected DePuy's workplace, which made the evidence impermissible hearsay. Finally, the Court considered a Federal Rule of Civil Procedure 60(b)(3) motion on the grounds that the attorney concealed the payments of his two key experts. The Court concluded the attorney had impermissibly concealed these payments. Compounding this lack of candor was the attorney's repeated references during the trial that his experts—unlike Defendants' experts—were not paid to testify. The Court stated the attorney had created a false choice between his experts and the "bought" testimony of Defendants' experts. Because these deceptions prevented Defendants from fairly defending themselves, a new trial was needed. Thus, the Court ordered that a new trial take place.

Intellectual Property

Viacom Int'l v. IJR Capital Investments, L.L.C., 891 F.3d 178 (5th Cir. 2018)

In 2014, the owner of IJR Capital Investments, LLC ("IJR") decided to open seafood restaurants in California and Texas called "The Krusty Krab." After failing to discover any actual restaurants with names similar to the Krusty Krab, IJR filed a trademark application and developed a business plan for its restaurants. In November 2015, Viacom International, Inc. ("Viacom"), the owner of the SpongeBob SquarePants animated television series, sent a cease-and-desist letter to IJR claiming its use of the Krusty Krab name infringed upon its trademark of The Krusty Krab, a fictional restaurant with a prominent role in the SpongeBob television show. IJR refused Viacom's demands, so Viacom filed suit in 2016. The district court ultimately granted summary judgment to Viacom on its common law trademark infringement and unfair competition claims. IJR appealed to the Fifth Circuit.

The Court began its analysis of Viacom's trademark infringement claim by examining an issue of first impression: whether specific elements of a television show receive trademark protection. Concluding that they can, the Court looked to holdings from other circuits protecting elements prominently featured in other fictional franchises, such as the General Lee car from The Dukes of Hazzard and The Daily Planet from Superman. The Court held the Krusty Krab was a central element of SpongeBob because it appears in over 80% of episodes and featured extensively in SpongeBob films and merchandise.

The Court also held the Krusty Krab mark was distinctive because it has acquired distinctiveness through secondary meaning. To support its conclusion, the Court highlighted the prominence of the fictional restaurant in the SpongeBob show along with the millions Viacom had earned on licensed products displaying the Krusty Krab mark. Further, the Court pointed to the numerous ads featuring the Krusty Krab and Viacom's use of the Krusty Krab mark on the SpongeBob website and mobile app. Because of its prominent presence on the show and its use in the sale of products, the Court found that consumers would associate the Krusty Krab with Viacom, the creator of SpongeBob.

Company's plan to open seafood restaurant under the name "The Krusty Krab" infringed upon Viacom's common law trademark.

Turning next to whether Viacom successfully proved IJR's use of the Krusty Krab name would create a likelihood of confusion, the Court examined the seven so called "digits of confusion." While finding the district court erred in holding that every digit weighed in favor of Viacom, the Court nonetheless concluded Viacom established as a matter of law that there was a likelihood of confusion. Specifically, the Court found that Viacom's mark was strong based on its distinctiveness, that the two marks were identical, and that the products and services were similar because both involved a restaurant. The Court also found there was a danger of affiliation with Viacom in part based on the possibility that Viacom could open a Krusty Krab restaurant, as its subsidiary did with the Bubba Gump Shrimp Co., which was based on the Forrest Gump movie. As to the identity of purchasers, the Court stated that while there was likely some overlap, the record was inconclusive on this factor, so it did not favor Viacom. Likewise, it found advertising media did not favor Viacom because it did not advertise, and the factor of the defendant's intent was neutral because it was unclear whether IJR sought to capitalize on Viacom's reputation. Finally, for actual confusion, the court relied on a consumer survey showing that 30% of respondents would associate a Krusty Krab restaurant with Viacom to support the existence of actual confusion. Thus, the Court concluded a likelihood of confusion existed and affirmed the district court.

Jurisdiction/Procedure

Nester v. Textron, Inc., 888 F.3d 151 (5th Cir. 2018)

Plaintiff suffered permanent injuries when she was harmed by an unmanned utility vehicle. At trial, she prevailed against the vehicle's manufacturer on a design defect claim. The broad-form jury question on "safer alternative design," an element of a design defect claim, tracked the language from the Texas Pattern Jury Charge ("PJC").

Defendant appealed on four grounds. First, Defendant contended the definition of "safer alternative design" in the jury instructions was not expansive enough because it did not include a certain undisputed correct statement of the law.

Second, Defendant contended that two of the four alternative designs proposed by Plaintiff were factually unsupported and should not be commingled into a single broad-form question. Third, Defendant contended the district court incorrectly admitted two key pieces of evidence. Finally, Defendant contended the district court should have bifurcated liability and punitive damages into separate phases of trial. The Fifth Circuit affirmed.

First, the Court held the district court did not abuse its discretion in submitting the "safer alternative design" question from the PJC without Defendant's additional requested instruction. This decision hinged on whether the requested instruction was substantially covered in the charge as a whole, and the Court found it was. The Court explained that for twenty years, Texas courts have been using the "safer alternative design" PJC without Defendant's requested language, and the Court has not once held that reliance on a Texas PJC was an abuse of discretion. The Court further explained that a "commonly administered PJC is often a sensible place to draw the line" on how much law to include in the jury charge.

There is no presumption of harm if a broad-form jury question commingles factually valid and factually invalid theories.

Second, the Court rejected Defendant's argument that it should presume harm from the submission of a broad-form question when Plaintiff commingled *factually* valid and invalid theories. Instead, the Court held that it will presume harm only when a charge commingles *legally* valid and invalid theories. Because Defendant conceded there was sufficient evidence to support two of the four designs, the Fifth Circuit would "trust the jury to have sorted the factually supported from the unsupported."

Third, the Court held that the district court did not abuse its discretion in admitting as relevant a video depicting a similar accident because the video was probative of the existence of a defect. Also, the district court did not abuse its discretion in admitting as relevant a letter from Defendant's officer recommending an alternative design, when the letter contradicted Defendant's argument.

Finally, the Court held that the Texas statute requiring bifurcation of the liability and punitive damages phases did not apply in federal court. Bifurcation in federal court is a case-specific determination made in the sole discretion of the trial judge, and that discretion was not abused.

Nogess v. Poydras Ctr., L.L.C., 728 F. App'x 303 (5th Cir. 2018)

After defense counsel removed this case to federal court and made related misrepresentations, a magistrate judge imposed Rule 11 sanctions on the attorney and the district court affirmed. On defense counsel's motion to certify the sanctions order for an interlocutory appeal, the district court entered a final judgment on sanctions under Federal Rule of Civil Procedure 54(b). Defense counsel appealed.

The Fifth Circuit sua sponte determined that it lacked appellate jurisdiction. First, the Court explained that Rule 54(b) authorizes a final judgment "as to one or more, but fewer than all, claims." The term "claims" means the plaintiff's causes of action, and does not encompass sanctions. Second, even though the district court stated that it "granted" counsel's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b), it entered a final judgment under Rule 54(b) instead. The district court did not certify in accordance with 28 U.S.C. § 1292(b) that the issue was "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Therefore, the Fifth Circuit could not review the sanctions judgment by treating it as an interlocutory order. Third, an appeal was not allowable under the collateral order doctrine, because

A district court may not authorize an immediate appeal of a sanctions order by entering a final judgment on sanctions under Rule 54(b).

the sanctions would be reviewable in an appeal from a final judgment on the merits of the case. Fourth, the Court declined to address an open question regarding whether an appeal may be considered where the sanctioned attorneys have withdrawn, as here the sanctioned attorneys remained counsel of record at the time the appeal was filed.

***Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018)**

The Texas Department of State Health Services proposed regulations that would prohibit disposing of fetal remains in a landfill or sewer. Several health care providers licensed to perform abortions sued the Department challenging the regulations. The executive director of the Texas Conference of Catholic Bishops testified at the preliminary injunction hearing in favor of the Department and was scheduled to appear as a trial witness. The executive director testified about the Bishops' moral views and willingness to absorb some costs associated with burying fetal remains. Then Plaintiffs subpoenaed the Bishops for all documents concerning fetal remains and abortions, among others. The Bishops moved to quash the subpoena, contending it violated the First Amendment, the Religious Freedom Restoration Act, and the unduly burdensome rule of Federal Rule of Civil Procedure 45(d). The district court denied the motion to quash, and the Bishops appealed.

Preliminarily, the Fifth Circuit held it had appellate jurisdiction over the interlocutory third-party discovery order and then reversed on the merits.

As to the jurisdictional issue, the Court found the standards of the collateral order doctrine were met, which permits appeals of interlocutory decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment. The Court reasoned that the order was conclusive as to the Bishops, the order resolved important and very novel issues, and any new trial

Appellate jurisdiction existed over an interlocutory third-party discovery order under the collateral order doctrine.

ordered on later appeal would not directly benefit a third-party witness. The Court further explained that courts have limited ability to assess the strength of religious groups' claims about their deliberations for purposes of monitoring discovery, and that Fifth Circuit precedent holds that interlocutory court orders bearing on First Amendment rights are subject to appeal pursuant to the collateral order doctrine.

As to the merits, the Court strongly criticized the district court's rejection of the Bishop's First Amendment claim. The Court also said the district court erred in finding that the Bishop's waived their Religious Freedom Restoration Act claim. Nonetheless, the Court did not rule based on these issues because the dearth of guiding case law and exigent time frame to make a decision counseled in favor of the doctrine of constitutional avoidance. Instead, the Court turned to Rule 45(d), which provides that a court must quash a subpoena to avoid subjecting the person to undue burden. Under that rule, the Court held that the district court abused its discretion in denying the Bishop's motion to quash because the district court discounted the Bishop's burdens of production and failed to require more than a minimal rationale for discovery of their internal communications.

The dissent would hold differently on both the jurisdictional issue and the merits. The dissent recognized that appellate jurisdiction would have been a close question if the discovery dispute was limited to a First Amendment claim. However, because the majority opinion ultimately reverses based on violation of the Federal Rules of Civil Procedure and not the First Amendment, the dissent would have found no appellate jurisdiction. The dissent also noted that a mandamus petition, rather than an interlocutory appeal, is the typical way to protect against the discovery of privileged documents.