No. 18-50730

In the United States Court of Appeals
For the Fifth Circuit

WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., doing business as Brookside Women's Health 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 WOMEN'S HEALTH ALLIANCE; DR. BHAVIK KUMAR,

Plaintiffs-Appellees,

v.

CHARLES SMITH, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 1:16-CV-1300-DAE-AWA

BRIEF OF *AMICI CURIAE* CATHOLICS FOR CHOICE, CENTRAL CONFERENCE OF AMERICAN RABBIS, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, JUST TEXAS: FAITH VOICES FOR REPRODUCTIVE JUSTICE, MUSLIMS FOR PROGRESSIVE VALUES, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, RELIGIOUS INSTITUTE, UNION FOR REFORM JUDAISM, UNITARIAN UNIVERSALIST ASSOCIATION, AND WOMEN OF REFORM JUDAISM IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Central Conference of American Rabbis
General Synod of the United Church of Christ
Just Texas: Faith Voices for Reproductive Justice
Muslims for Progressive Values
Religious Coalition for Reproductive Choice
Religious Institute
Union for Reform Judaism
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Respectfully submitted,

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STATEMENT OF INTEREST

Amici curiae[1] are religious leaders from a broad range of traditions who acknowledge the diversity of views regarding when life begins, and accordingly support the right of women to decide, in accordance with their beliefs, how to dispose of fetal tissue following the loss or termination of a pregnancy.

SUMMARY OF ARGUMENT

The recently-enacted provisions of Chapter 697 of the Texas Health and Safety Code (§§ 697.001-.004, 697.007-.009), and the implementing regulations promulgated thereunder (25 Tex. Admin. Code §§ 138.1-.7) (collectively, the "Challenged Laws"), provide that after the loss or termination of *any* pregnancy, healthcare facilities must ensure that the embryonic or fetal tissue be treated in the same manner as human remains, *i.e.*, either cremated or buried. *See* TEX. HEALTH & SAFETY CODE § 697.004(b). The sole stated purpose of the Challenged Laws—which applies regardless of the woman's circumstances and preferences—is to "express the state's profound respect for the life of the unborn by providing for a

[1] Pursuant to FRAP 29(a)(2), *amici* file this brief with the consent of all parties. Additionally, undersigned counsel for *amici* certify that no party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money to fund the preparation or submission of this brief. No person, other than *amici*, their members, or their counsel contributed money to fund the preparation or submission of this brief.

dignified disposition of embryonic and fetal tissue remains." TEX. HEALTH & SAFETY CODE § 697.001.

Many religious traditions, however, do not share the State's apparent view that "life" begins at the moment of conception. These traditions do not require, or even countenance, the understanding that termination of a pregnancy is akin to a death, mandating funeral rites such as cremation and burial. Moreover, because not all religious traditions embrace a clear view on the precise moment when life begins, many traditions view elective termination of a pregnancy as a woman's moral prerogative.

The one-size-fits-all approach of the Challenged Laws fails to account for this diversity of views across and within religious traditions regarding when and how life begins; how, if at all, the termination of a pregnancy should be observed; and the moral implications of choosing to terminate a pregnancy. This forces the State's views about personhood onto all Texas women, needlessly adding to the emotional burdens of losing or terminating a pregnancy. *Amici* oppose this encroachment on religious freedom.

ARGUMENT

I. RELIGIOUS TRADITIONS DO NOT SHARE A UNIFORM VIEW OF WHEN LIFE BEGINS

Burial and cremation are rituals that draw from religious tradition, and respond to and commemorate the end of human life. By imposing these rituals on

the disposition of embryonic or fetal tissue, the Challenged Laws effectively require all Texas women to treat embryonic or fetal tissue as tantamount to a human life, and to treat the moment of conception as the beginning of life. In enacting the Challenged Laws, the State has thus ignored, and disrespected, the wide variety of religious perspectives on the profound question of when and how life begins.

As the Supreme Court has held, there is "wide divergence of thinking" about this question, with many traditions expressing "strong support for the view that life does not begin until live birth." *Roe v. Wade*, 410 U.S. 113, 160 (1973). Adding to the complexity of this issue is the fact that, under numerous religious traditions, "ensoulment," or the acquisition of personhood, is understood to occur at some point *between* conception and birth. The Evangelical Lutheran Church, for example, believes that "[e]mbryology provides insight into the complex mystery of God's creative activity" and that individual interpretation and evaluation of embryology leads to various understandings of when life begins.[2] The predominant Islamic belief, by contrast, is that a fetus acquires personhood 120 days from conception—though there are also minority views within Islam holding

[2] Evangelical Lutheran Church in America, *Social Statement on Abortion* at 1, 3 n.2, available at http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf.

that ensoulment occurs 40 days, 42 nights, or 45 nights after conception.[3] And in the Orthodox Jewish tradition, until 30 days of gestation, a fetus is considered "mere fluid" and is not accorded any status as a person.[4]

This variety of perspectives on the beginning of life and personhood has led to concomitant diversity in views on the moral implications of choosing to terminate a pregnancy. For example, while some in Episcopal and Anglican traditions would accord the same protection to a newly fertilized egg as to a born human being,[5] the Episcopal Church has taken the ultimate position that the choice of whether to terminate a pregnancy is a question of "individual conscience."[6] Unitarian Universalists similarly "do not agree on the precise moment in which life

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[3] Mark Cherry, *Religious Perspective on Bioethics* 196-97 (2004); Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Applications* 134-35, 140-41 (2009); Dariusch Atighetchi, *Islamic Bioethics: Problems and Perspectives* 94 (2006); ROA.4255-56, Padela Test. (ECF No. 245) at 115-16 (Dr. Padela testifying that there are different views within the Islamic community regarding when ensoulment occurs).

[4] Cherry, *supra* note 3, at 166-67; Susan Hollins, *Religions, Culture and Healthcare: Practice Handbook for Use in Healthcare Environments* 90 (2009); ROA.4298, Maienschein Test. (ECF No. 245) at 157 (Dr. Maienschein testifying that, under Jewish tradition, a fetus is considered to be akin to "water" during the early stages of development).

[5] Cherry, *supra* note 3, at 58-60 (noting that the Episcopal Church generally views the decision about abortion as a matter of individual conscience).

[6] Episcopal Church, *Standing Commission on Human Affairs and Health* at 153 (1988), available at https://www.episcopalarchives.org/e-archives/gc_reports/reports/1988/bb_1988-R016.pdf

begins" but are united in their affirmation for the well-being of women and others, and the principle that women "are moral agents who possess dignity, freedom of conscience, and the capacity to make decisions."[7] Unitarian Universalists also believe that "coercion, particularly over the most precious and intimate circumstances of our lives, is not only wrong, but breeds hatred and bitterness."[8]

The General Synod of the United Church of Christ likewise recognized in 1971 that "[t]he theological and scientific views on when human life begins are so numerous and varied that one particular view should not be forced on society through its legal system."[9] Further, the United Church of Christ's Statement on

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[7] Unitarian Universalist Association, *Unitarian Universalist Theology on Reproductive Justice* at 1-2, available at http://www.uua.org/sites/live-new.uua.org/files/documents/washingtonoffice/reproductivejustice/curriculum/1-2.pdf; *see also* Unitarian Universalist Association, *General Resolution on the Right to Choose* (1987), available at http://www.uua.org/action/statements/right-choose ("Unitarian Universalists believe that the inherent worth and dignity of every person, the right for individual *conscience*, and respect for human life are inalienable rights due every person; and that the personal right to choose in regard to contraception and abortion is an important aspect of these rights." (emphasis added)).

[8] Unitarian Universalist Association, *Unitarian Universalist Theology on Reproductive Justice* at 2, available at http://www.uua.org/sites/live-new.uua.org/files/documents/washingtonoffice/reproductivejustice/curriculum/1-2.pdf.

[9] General Synod of the United Church of Christ, *Freedom of Choice Concerning Abortion*, 17-GS-58 (1971), available at http://www.ctucc.org/files/tables/content/7726678/fields/files/327cad155b9c43dd8a95e03e4179fbe8/1971_freedom_of_choice.pdf.

Reproductive Health and Justice also affirmed that "there are many religious and theological perspectives on when life and personhood begin" and that "public policy must honor this rich religious diversity."[10]

In the same vein, the Presbyterian Church (U.S.A.) concedes that it "may not know exactly when human life begins" and recognizes the choice of whether to terminate a pregnancy as an "intensely personal" decision.[11] Accordingly, it holds that "human beings are moral agents" and "termination of a pregnancy is a matter of careful ethical decision of a patient . . . and therefore should not be restricted by law."[12] Additionally, liberal Jewish traditions respect the ability of a woman to reach her own decision regarding the termination of pregnancy, provided it is otherwise morally justified under Jewish law.[13]

Finally, the difficulty inherent in answering the question of "when life begins" is evident in the historical underpinnings of the Catholic tradition.

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[10] General Synod of the United Church of Christ, *Statement on Reproductive Health and Justice*, available at http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/455/reproductive-health-and-justice.pdf?1418423872.

[11] Presbyterian Church (U.S.A.), *Abortion Issues*, available at https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/.

[12] *Id.*

[13] Cherry, *supra* note 3, at 165-66.

Throughout the Catholic tradition, from its earliest times to today, scholars, theologians, and ordinary Catholics have had differing beliefs about when personhood begins. Though the institutional Catholic Church currently opposes abortion from the moment of conception, the Church experienced a long period of disagreement regarding the status of a fetus.[14] Medieval texts embraced the Aristotelian view that human "ensoulment" takes place 40 days after conception for males and 80 days after conception for females.[15] In the sixteenth century, the Catholic hierarchy's formal position changed at various points, oscillating between recognizing life as beginning upon conception or at the time of quickening, when the fetus first moved in a woman's womb.[16] This lack of consensus continues

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[14] Vatican Congregation for the Doctrine of the Faith, *Instruction on Respect For Human Life in its Origin and on the Dignity of Procreation*—Replies *to Certain Questions of the Day*, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html; Vatican Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion* at n.19 ("This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are as yet in disagreement."), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html

[15] Anne Stenvold, *A History of Pregnancy in Christianity: From Original Sin to Contemporary Abortion Debates* 45-46 (2015).

[16] *Id.* at 70 (noting that Catholic law recommended a quickening test to establish whether or not ensoulment had taken place); Frank K. Flinn, *Encyclopedia of Catholicism* 4 (2007).

today: notwithstanding the institutional position of the Catholic Church, a majority of Catholic voters view abortion as a moral choice[17] and Catholic women today have abortions at approximately the same rate as other women.[18]

Thus, the world's major religions are far from united on the question of when, if ever, an embryo or fetus *in utero* becomes endowed with the "sanctity of life," such that the termination of a pregnancy should be marked with end-of-life rituals. The exact question of when life begins has been the topic of much controversy and deliberation for centuries. The positions across the spectrum coalesce, however, on the importance of individual conscience and deliberation in grappling with the mysteries of life. The question of personhood implicates fundamental questions about individual moral judgment and faith. It is not a question that the State is equipped to answer for the millions of men and women of Texas of different faiths and creeds—many of which espouse beliefs that contradict the edict set forth in the Challenged Laws.

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[17] Belden Russonello Strategists, *2016 Survey of Catholic Likely Voters*, at 5 (October 2016), available at http://www.catholicsforchoice.org/wp-content/uploads/2016/10/2016-Catholic-Voter-Poll.pdf ("Sixty percent of Catholic likely voters overall say that "deciding to have an abortion can be a morally acceptable position.").

[18] Guttmacher Institute, *Characteristics of U.S. Abortion Patients in 2014 and Changes since 2008*, at 1, 6-7 (May 2016), available at https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf

II. THERE IS A DIVERSITY OF RELIGIOUS TRADITIONS REGARDING BURIAL RITES, FUNERALS, AND MOURNING

The Challenged Laws also encroach on religious freedom by requiring cremation or burial as the ultimate method of disposition, to the exclusion of any other choice. This disrespects the wide variety of religious and philosophical views regarding observance of the end of pregnancy, and robs women and their families of their ability to approach pregnancy loss in a manner consistent with their own faiths.

Religious traditions take disparate approaches to funeral rites and grief, but most religions do *not* mandate—and some even proscribe—the burial or cremation of fetal tissue after a miscarriage or abortion. For example, in the Islamic tradition, cremation is generally prohibited. ROA.4257-58, Padela Test. (ECF No. 245) at 116-17 (explaining that, under Islamic tradition, cremation would not constitute a dignified disposition of remains, because it evokes images of hell and punishment). Similarly, Jewish tradition requires that a person be buried with all body parts intact.[19] And Catholic cemeteries do not permit the scattering of ashes from

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[19] Hollins, *supra* note 4, at 93, 95 ("For some Jews it is crucial for a person to be buried with the body intact."); Kathryn E. Peterson, *Note: My Father's Eyes and My Mother's Heart: The Due Process Rights of the Next of Kin in Organ Donation*, 40 Val. U. L. Rev. 169, 187 (2005) (Islamic doctrine requires that a corpse be respected, dictating that a body not be subject to cremation . . . Similarly, traditional Jewish law prohibits mutilation of the dead and requires that a person be buried with all body parts intact.").

embryonic or fetal tissue on their property, because the "Catholic church does not view the scattering of ashes as a dignified form of disposition of remains[.]" ROA.4644, Stump Test. (ECF No. 247) at 31.

Across Protestant religions, responses to a terminated pregnancy are determined based on factual circumstances specific to each terminated pregnancy and the needs of the family. For example, in the Presbyterian tradition, when a stillbirth occurs, a minister discusses the parents' beliefs as to whether they considered the stillborn child to have been a person at death to determine the type of service that is appropriate.[20] For miscarriages, a healing service may be more appropriate, rather than the graveside service that is more common in the case of a stillbirth or infant death.[21] Burial of a fetus is also rare in the tradition of Unitarian Universalists.[22]

Of the religions that do have specific practices for addressing a terminated pregnancy, few provide for a formal burial or ceremony. Indeed, in the Orthodox Jewish tradition, tissue collection and burial, and a period of formal mourning, are

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[20] Perry Biddle, *A Funeral Manual* 21 (1994).

[21] *Id.*

[22] Margaret M. Andrews & Joyceen S. Boyle, *Transcultural Concepts in Nursing Care* 401 (2008).

traditional only if a fetus has reached at least 40 days' gestation.[23] In Reform Judaism, attitudes toward miscarriage and stillbirth vary; funerals are uncommon, but a rabbi may conduct a simple service, if the parents request this.[24] Similarly, in the Muslim faith, burial rites vary depending on whether there is a miscarriage or stillbirth. Burial of a fetus is rare, and prior to a gestational age of 130 days, fetal tissue may be treated like other discarded tissue.[25]

Thus, as with the question of when life begins, the question of whether and how to commemorate a lost pregnancy varies widely across religious traditions. Yet the Challenged Laws seek to suppress this variety of practices, by requiring that all women observe the termination or loss of any pregnancy with burial or cremation, regardless of religious background.

III. THE CHALLENGED LAWS WILL HARM WOMEN SPIRITUALLY AND EMOTIONALLY

A. The Challenged Laws Will Cause Women Emotional Harm by Forcing Them to Observe Religious and Personal Rituals Inconsistent with Their Beliefs

The State's usurpation of critical decisions surrounding pregnancy termination is likely to take a significant emotional toll on women. As the district

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[23] Hollins, *supra* note 4, at 90.

[24] *Id.*

[25] Andrews & Boyle, *supra* note 22, at 390; Hollins, *supra* note 4, at 73; Sachedina, *supra* note 3, at 135.

court record establishes, women who have either chosen to terminate a pregnancy, or experienced the loss of a wanted pregnancy, have found these experiences more upsetting when accompanied by a mandate to observe rituals associated with the death of a human being. For example, Blake Norton, who suffered a miscarriage, testified that she was "shocked and upset and confused" when she learned that she was required to bury her fetal tissue, and that the experience exacerbated her grief. ROA.4086-87, Norton Test. (ECF No. 244) at 172-73. Similarly, Dr. Karen Grace Swenson, an obstetrician gynecologist, testified that her healthcare practice ultimately terminated its relationship with a hospital that mandated burial of fetal tissue, "because of the distress that [its] patients experienced" due to the hospital's burial policy. ROA.4646, 4668-69, Swenson Test. (ECF No. 247) at 33, 55-56.

Women regularly report finding burial and cremation of embryonic or fetal tissue inconsistent with their personal and religious beliefs, and object to imposition of end-of-life practices in connection with termination or loss of a pregnancy. *See* ROA.4086-89, Norton Test. (ECF No. 244) at 172-75 (testifying that Seton Hospital's policy requiring burial of fetal tissue upset her, because it was "incongruent and incompatible with [her] personal values and beliefs"); ROA.4678-79, Swenson Test. (ECF No. 247) at 65-66 ("In my experience, I have [had] patients that did not want their fetal or embryonic tissue buried, and [requiring that] caused distress of varied religious and philosophical and spiritual

beliefs . . . [because] they felt that it was not . . . respectful to them."); ROA.4348, Davis Test. (ECF No. 245) at 207 (explaining that some of his patients objected to burial or cremation of fetal or embryonic tissue). Although some women elect to have their fetal or embryonic tissue buried or cremated, this is rare and mostly limited to situations where the pregnancy is more advanced. *See* ROA.3987, Hagstrom Miller Test. (ECF No. 244) at 73; ROA.4663, Swenson Test. (ECF No. 247) at 50.

Women may forgo burial or cremation of embryonic or fetal tissue for any number of reasons: because they, consistent with many religious traditions, do not view embryonic or fetal tissue as tantamount to a human being; because, relatedly, they do not view the end of the pregnancy as akin to a death; or because the pregnancy ends too early for burial or cremation to be an appropriate option for them. *See generally* ROA.4281-82, Peterson Test. (ECF No. 245) at 140-41; ROA.4086-89, Norton Test. (ECF No. 244) at 172-75; ROA.4672-73, Swenson Test. (ECF No. 277) at 59-60. As the Supreme Court has recognized, it is each woman's prerogative to form her views about these personal subjects without interference from the State. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (recognizing a constitutional "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and noting that "[b]eliefs about these matters could not form the attributes of

personhood were they formed under compulsion of the State."). Yet the Challenged Laws strip women of the moral and decision-making authority to act in a manner consistent with their beliefs, in favor of mechanical adherence to the State's monolithic view.

As the record demonstrates, forcing women to observe pregnancy loss or termination with practices that do not comport with their beliefs heightens their grief, devalues their beliefs, and stigmatizes them for their pregnancy loss. For example, Ms. Norton, who was "devastat[ed]" when she learned of her miscarriage, explained that her experience with Seton Hospital's policy mandating burial of fetal tissue "imposed . . . a previously unfelt level of shame and stigma" on her, because her "value system was incongruent with what the hospital was telling [her] needed to happen. And that felt very much like [she] was being . . . told this is the right way that it should be done, and if [she] wanted something different, then [she] was wrong or bad for wanting that." ROA.4087, 4090-91, Norton Test. (ECF No. 244) at 173, 176-77.

Several physicians and medical ethicists likewise reported that requiring patients to observe practices inconsistent with their beliefs exacerbates their grief surrounding pregnancy loss or termination, and harms them by sending a message that their existing value systems are wrong. For example, Dr. Aasim Padela—the State's expert witness—testified that, based on his personal and clinical

experience, he found it troubling when patients were not given an option to dispose of embryonic and fetal tissue in a manner consistent with their beliefs, and that it was preferable to provide patients with "options that align with their held values[.]" *See* ROA.4229-30, 4263, 4275-76, Padela Test. (ECF No. 245) at 88-89, 122, 134-35. Similarly, Dr. Thomas Cunningham explained that many women experience dissonance between mandated funeral-type practices for fetal and embryonic tissue and their personal beliefs, and that this asymmetry conveys a message to women that they are "morally wrong" and causes feelings of grief and "moral distress." *See* ROA.4416, 4444-45, Cunningham Test. (ECF No. 246) at 17, 46-47.[26]

The imposition of a needless emotional burden on women is particularly egregious in view of the State's putative justification for the Challenged Laws, *i.e.*, the promotion of "respect for the life of the unborn" and provision of "a dignified disposition of embryonic and fetal tissue remains." *See* TEX. HEALTH & SAFETY CODE § 697.001. The Challenged Laws purportedly honor dignity of the unborn at

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[26] The State's suggestion that the harm to women can be cured by keeping them in the dark regarding the disposition of their embryonic and fetal tissue only aggravates these concerns. As an initial matter, women may become aware of the Challenged Laws through media accounts and word-of-mouth irrespective of the State's policy. And in other contexts Texas law requires a patient's informed consent before utilizing non-standard methods of tissue disposition. *See, e.g.*, TEX. HEALTH & SAFETY CODE § 173.006 (requiring informed consent in order to donate fetal tissue).

the expense of the dignity of the women whose religious and personal freedom they curtail. If the State truly wished to honor life and dignity, it would permit women to either mark the loss or termination of pregnancy, or choose not to do so, in a manner consistent with their personal and/or religious beliefs. Instead, the Challenged Laws exclude women from the decision governing disposition of their embryonic and fetal tissue, and use their tissue—without their consent—to make a religious statement that life begins at the moment of conception, and to stigmatize women for their pregnancy loss. It is therefore clear that honoring life and dignity is a secondary concern.

Imposition of such a gratuitous emotional burden on women experiencing pregnancy loss is not only cruel in and of itself, but may also expose women to physical danger by deterring them from seeking appropriate medical care. In the district court, Texas health-care providers and women subjected to similar fetal tissue burial mandates reported that, rather than submit to the requirements of the Challenged Laws—which apply only to fetal or embryonic tissue extracted by health-care providers—some women will delay or avoid seeking necessary medical care. *See* ROA.4669-70, Swenson Test. (ECF No. 247) at 56-57 (testimony of Dr. Karen Swenson, explaining, based on her experience, that some patients delay or avoid seeking medical care if the medical center's policy for disposing of fetal remains is inconsistent with their religious beliefs); ROA.4092, 4104, Norton Test.

(ECF. No. 244) at 178, 190 (testifying that after her experience with Seton Hospital's fetal burial policy, she "can not go back to Seton again, [and] will do whatever [she] can to not have any further procedures down there"); ROA.4132-33, Kumar Test. (ECF No. 244) at 218-19. The fact that the Challenged Laws force women to choose between observing their religious beliefs and seeking needed medical care is, again, inimical to the protection of life and dignity.

Amici, as practitioners of diverse religious traditions, are troubled by the introduction of unnecessary emotional turmoil into what is a personal and sometimes difficult occasion; subordinates the life and dignity of women to that of extracted embryonic tissue; and discourages women from seeking appropriate medical care. Although, as noted above, *amici* subscribe to disparate views on the complex question of when personhood begins, all believe in the fundamental moral principle that people should be treated with compassion and humanity. *Amici* therefore oppose the State's cruel and inhumane efforts to force unwanted religious practices on women following the loss or termination of a pregnancy.

B. The Registry and The Texas Catholic Conference of Bishops' Proposed "Solution" Exacerbate this Problem

In an apparent effort to assuage concerns about the burdens the Challenged Laws impose on Texas health care providers, the Texas Catholic Conference of Bishops made a statement about collecting health-care providers' fetal remains and interring them at Catholic cemeteries. The Challenged Laws also direct the Texas

Department of State Health Services (the "Department") to establish a registry of "funeral homes and cemeteries willing to provide free common burial or low-cost private burial", as well as "private nonprofit organizations" willing to "provide financial assistance for the costs associated with burial or cremation of the embryonic and fetal tissue remains of an unborn child[.]" *See* TEX. HEALTH & SAFETY CODE § 697.005(1). Neither the Catholic Conference's proposal nor the Registry provide viable disposition options.

The Catholic Conference's proposed "solution" to the Challenged Laws' logistical problems not only exacerbates the imposition of religious practices on women, but denies all women the ability to follow their conscience following the loss or termination of pregnancy. Many Catholic women believe individual conscience should be the final arbiter for decisions about pregnancy.[27] These women, as well as women who practice a faith other than Catholicism or no faith at all, are likely to be offended and upset by the suggestion that embryonic and fetal remains be indiscriminately buried in Catholic cemeteries and subject to unbidden religious rituals. For people of other or no faith, this is particularly true because, as explained *supra* at 9-11, the idea of burying embryonic or fetal tissue in any cemetery is at odds with many religious belief systems and the views that

[27] *See* Belden Russonello Strategists, *supra* note 17, at 8.

individuals across many religions hold about embryonic and fetal tissue. A *de facto* state policy forcing women to not only treat fetal tissue as tantamount to a human, but also proposing to resolve the burdens of that law by having the tissue be buried according to *a particular religion's burial practices* —regardless of their own faith—is a gross intrusion on women's religious freedom, and is likely to amplify the emotional burdens imposed by the Challenged Laws.

For these same reasons, the State's proposed Registry further compounds the problems posed by the Challenged Laws. Notably, the Registry lists only twelve cemeteries as possible substitute medical waste vendors. Each is a Catholic cemetery. *See* ROA.5175, Pls.' Ex. 10 (ECF No. 250-2) at 113. The district court record reflects that many of these cemeteries plan to mark the burial sites with Catholic religious symbols, and perform religious services over them. *See* ROA.4628-29, Stump Test. (ECF No. 247) at 15-16 (Deacon Stump, a representative from the Catholic Diocese of Dallas—which controls three of the cemeteries on the Registry, explaining that fetal and embryonic tissue would be buried in a casket, a religious service would be held over the grave site, and graveside markers would likely be placed at the grave site); ROA.4512-13, 4542-43, Shields Test. (ECF No. 246) at 113-14, 143-44 (James Shields, director of Our Lady of the Rosary Cemetery and Prayer Gardens, testifying that the cemetery planned to bury fetal and embryonic tissue in a large vault in the Holy Family

Garden behind a statue of the Holy Family, with a memorialization "like little ones are welcomed by Jesus and by Our Lady"). Of the remaining organizations listed on the Registry, three are funeral homes, which do not provide disposition services, and one is a non-profit organization, which is affiliated with the Catholic Church. All of the organizations capable of providing disposition services are, therefore, linked to a single religious sect—the Catholic Church.

As the district court recognized, the State's "reliance on Catholic affiliated cemeteries to bury the embryonic and fetal tissue remains is problematic because it raises the specter of Establishment and Freedom of Religion Clause concerns." ROA.3309-10 n.21. Indeed, "[i]t is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) (citations omitted). Where "citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Challenged Laws compel expressive conduct in "adherence to an ideological point of view." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).[28] By depriving women of the moral autonomy to form and act in a

[28] The Challenged Laws are "not an informed consent requirement" or regulation of professional conduct that merely "incidentally" burdens speech. *See Nat'l Inst.*

manner consistent with their beliefs, the Challenged Laws strip women of their dignity and force them to adhere to practices that would violate their conscience. *Amici* oppose the imposition of such an unwarranted and unnecessary emotional burden on Texan women.

IV. THE CHALLENGED LAWS REPRESENT AN INAPPROPRIATE INTRUSION BY THE STATE INTO WOMEN'S RELIGIOUS PRACTICE

As set forth above, the Challenged Laws enshrine as law the religious viewpoint that embryonic and fetal tissue deserves to be disposed of like a human being, and accordingly should be cremated or buried. In so doing, the Challenged Laws disregard the diversity of religious viewpoints regarding the genesis of personhood, divest women of their capacity to make personal decisions surrounding the loss or termination of pregnancy, and create cruel and unnecessary emotional burdens. This threatens the freedom of all religious communities.

Amici, as religious leaders, cherish the freedom that the U.S. Constitution guarantees to all persons to practice their religions free of state intrusion. "When the government puts its *imprimatur* on a particular religion, it conveys a message

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of Family Life v. Becerra, 138 S. Ct. 2361, 2373 (2018). The sole purpose of the Challenged Laws is to compel ideological expression. ROA.3121, Defendant's Amended Proposed Findings of Fact and Conclusions of Law No. 12 (ECF No. 241) at 4 ("[t]he purpose of Chapter 697 is '*to express* the state's profound respect for the life of the unborn'" (emphasis added) (quoting Tex. Health & Safety Code § 697.001)).

of exclusion to all those who do not adhere to the favored beliefs." *Lee*, 505 U.S. at 606 (Blackmun, *J.*, concurring). *Amici* appreciate that persons of different faiths, or within the same faith, may disagree on the point at which personhood takes shape, and they respect the right of all individuals to form, and act in accordance with, their own beliefs on these issues. Conversely, they oppose any effort to imbue any particular belief on these matters with the force of law, as the Challenged Laws do. They urge the Court not to countenance this intrusion on Texas religious communities' freedom to develop and practice their own beliefs.

CONCLUSION

For the reasons set forth above, *amici* support Appellees in urging the Court to affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. 32(a)(6) and Fifth Circuit Rule 32.1 because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2019, I electronically filed a true and correct copy of this brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

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