

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
WOMAN’S HEALTH ALLIANCE; DR. BHAVIK KUMAR,
Plaintiff-Appellees,

v.

CHARLES SMITH, EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN
SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas, Austin Division

**AMICUS BRIEF ON BEHALF OF ORGANIZATIONS DEDICATED TO
THE FIGHT FOR REPRODUCTIVE JUSTICE SUPPORTING
PLAINTIFF-APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS

No. 18-50730, *Whole Woman's Health et al. v. Charles Smith*

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

The Amici Curiae

The Afiya Center
Deeds Not Words

Neither the Afiya Center nor Deeds Not Words has a parent corporation. No publicly held corporation owns 10% or more of either company's stock.

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INTEREST OF AMICI CURIAE¹

Amici are two organizations, the Afiya Center and Deeds Not Words, dedicated to fighting for a woman’s right to control her body, sexuality, gender, work, and reproduction (“reproductive justice”), particularly on behalf of underserved or at-risk communities. This brief focuses on the devastating impact the challenged provisions of Chapter 697 of the Texas Health & Safety Code, codified at Tex. Health & Safety Code §§ 697.001 – 697.004, 697.007 – 697.009 (collectively, the “Challenged Laws”), will have on women, and particularly African-American women, in Texas.

As advocates for reproductive justice, *Amici* work closely with women of color in Texas to protect their human rights, including their right to self-determination and autonomy, and to accessible reproductive healthcare. These women are among the most likely to be affected by the Challenged Laws, which require disposing of a woman’s embryonic and fetal tissue from certain abortion and miscarriage management procedures as if they are human remains, regardless of the woman’s beliefs. The Challenged Laws undermine the ability of these women to make their own decisions about their bodies, propagating longstanding and detrimental

¹ *Amici* have authorized undersigned counsel to file this brief on their behalf in support of Plaintiffs-Appellees. Undersigned counsel authored this brief, and no other person or entity has funded its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

stereotypes, and act as a further barrier to reproductive care. *Amici* submit this brief in support of Plaintiff-Appellees to inform the Court about the numerous ways in which the Challenged Laws violate and frustrate the tenets of reproductive justice and harm the communities reproductive justice advocates work to protect.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Reproductive justice refers to the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women’s human rights. The term “reproductive justice” was coined during the 1994 Cairo International Conference on Population and Development, when a group of Black women activists outlined policy demands and a human rights-based framework to address the history of reproductive oppression in their communities. *See* Mary Ziegler, *Reproducing Rights: Reconsidering the Costs of Constitutional Discourse*, 28 *Yale J.L. & Feminism* 103, 141 (2016). The reproductive justice movement has since grown to include other marginalized groups, and uses community-focused strategies to combat oppression in all aspects of women’s lives.

Reproductive justice reflects the intersection of reproductive rights and social justice. It goes beyond the pro-choice/pro-life debate and has three primary principles: (1) the right not to have a child; (2) the right to have a child; and (3) the right to parent children in safe and healthy environments. At the heart of reproductive justice is the idea that “all fertile persons and persons who reproduce and become parents require a safe and dignified context for these most fundamental

human experiences.” Loretta Ross, *Reproductive Justice: An Introduction* 9 (2017). But achieving this goal depends on access to resources including “high-quality health care, housing and education, a living wage, a healthy environment, and a safety net for times when these resources fail.” *Id.* at 9-10. The movement thus goes beyond advocating for reproductive rights, and further seeks to empower marginalized women to change the structural power inequalities that prevent them from accessing the resources they need to exercise their rights.

Amici serve their communities by putting the principles of reproductive justice to work. They help underserved Black women in Texas with all aspects of their lives, including their physical, mental, social, and economic well-being. Specifically, *Amici* help underserved Black women get access to the resources they need to be self-sufficient and to make the decisions that are best for themselves, including decisions related to reproductive care.

The Challenged Laws frustrate the ability of *Amici* to serve their communities and directly contravene the tenets of reproductive justice. They do so by denying women the basic human right to make decisions about their bodies, supplanting women’s beliefs with the State’s with respect to human life, controlling how women handle abortions and miscarriages, and ultimately, preventing underserved Black women from being able to access high-quality reproductive care without shame or guilt. Because the Challenged Laws impose significant burdens on Black women they should not stand.

ARGUMENT

The Challenged Laws require that “embryonic and fetal tissue remains” (“EFTR”) resulting from certain abortion or miscarriage management procedures be disposed of as if they are human remains, namely, through internment or scattering of the ashes. Tex. Health & Safety Code 697.004(a)-(b); 25 Tex. Admin. Code § 138.5(a), (c). The stated purpose of these laws “is to express the state’s profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains.” Tex. Health & Safety Code § 697.001. Yet in supposedly protecting the dignity of the EFTR, the Challenged Laws strip away the dignity of the women undergoing these procedures, by violating their “right to define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850, 853 (1992).

The Challenged Laws are unduly burdensome for all women, but are particularly problematic for the community *Amici* serves, underserved Black women. These women already face significant barriers to self-determination, empowerment, and reproductive care. *See generally* Dorothy Roberts, *Killing the Black Body: Race Reproduction and the Meaning of Liberty* (1997); Jael Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* (2004). The Challenged Laws only serve to exacerbate these problems. For example, the Challenged Laws seek to supplant Black women’s views about abortion and miscarriage with that of the State’s, violating their rights to self-determination and autonomy, and keeping Black

women in an oppressed state. They also perpetuate notions of shame and guilt surrounding abortions and miscarriages, which in turn manipulates Black women's actions with respect to reproduction. Finally, the available methods for disposition of ETFR under the Challenged Laws infringe on a Black woman's right to religious and cultural autonomy by forcing her to relinquish control over her body and decisions.

The real-world effect of the Challenged Laws will thus be to only exacerbate the problems Black women currently face, and create more obstacles for these women when seeking to exercise their right to an abortion and to miscarriage treatment.² For all of these reasons, the Challenged Laws should not stand.

I. The Challenged Laws force the State's beliefs onto Black women who may hold contrary beliefs about the disposition of fetal tissue

Every woman has a right to her own beliefs. The Challenged Laws, however, seek to force the State's beliefs onto women who may not share the same beliefs. Specifically, by requiring that ETFR be disposed of in the same manner as human

² A number of courts, including the Supreme Court, have recognized that the real-world consequences of abortion restrictions must be considered in the undue burden analysis. *See, e.g., Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (mem.) (O'Connor, J., joined by Souter, J., concurring) (noting that *Casey* evaluated the real-world effects of the challenged statute by asking whether the statute imposed a substantial obstacle to a large fraction of the women who would be affected by the law); *Whole Woman's Health v. Lakey*, 769 F.3d 285, 308 n.3 (5th Cir.) (Higginson, J., concurring in part and dissenting in part), *vacated in part*, 135 S. Ct. 399 (2014); *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 711 (3d Cir. 1991) (noting that "[t]he Supreme Court has thus been attuned to the real-world consequences" of abortion restrictions when evaluating whether an undue burden exists), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

remains, the State is associating abortions and miscarriages with death. But Black women seeking abortions or who miscarry may view these events differently, and a law forcing a view on these women is improper.

Take, for example, a Black woman who, as a result of her religion, culture, philosophy, and/or personal experiences, believes that human life does not begin until a fetus is viable outside of a womb. To her, the resulting ETFR from an abortion or miscarriage is not akin to a human—it is simply a byproduct of a medical procedure, like a removed appendix after an appendectomy. Accordingly, to her, ETFR requires no special disposal mechanism. And yet, if she seeks a surgical abortion or has a miscarriage, the Challenged Laws would require her ETFR be disposed of as if they are human remains. By virtue of dictating how her ETFR is disposed, the State is stripping her of her right to live her life consistent with her own beliefs.

The mere fact that the State is supplanting Black women's views with its own is a violation of the basic principles of reproductive justice. But the impact goes even further. The Challenged Laws demean Black women by suggesting that they are either incapable of forming their own opinions about abortion and miscarriages, or that the State knows better than they do. This patronizing attitude has historically been a source of oppression among Black women, and is precisely the type of mindset that the reproductive justice movement seeks to eliminate.

II. The Challenged Laws shame and stigmatize Black women who seek abortions or who miscarry

The Challenged Laws further perpetuate notions of shame and guilt surrounding abortions and miscarriages, and in turn, influence women's decisions regarding reproduction. This is a continuation of the historic oppression women have experienced due to sexism. More significantly, this is a continuation of the historic oppression Black women and other women of color have experienced as a result of white supremacy and economic exploitation. Black women's bodies have long been seen as commodities to be used for others' benefit, and the Challenged Laws perpetuate these notions by manipulating women into making decisions about their bodies to suit the beliefs of others.

For example, requiring ETFR to be disposed of in the same manner as human remains manipulates Black women into believing that they have caused, intentionally or unintentionally, the death of a human being. This mindset perpetuates and magnifies the shame and stigma surrounding abortions and miscarriages. It further circumscribes a woman's ability to make decisions that she believes are right for her—either by discouraging women from exercising their right to obtain an abortion, or by discouraging women who miscarry from trying to conceive again.

Indeed, many low-income Black women who seek abortion do so because they cannot afford to care for and support a child. *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *Perspectives*

Sexual & Reproductive Health 110, 114-15, 115 tbl. 5 (2005) (indicating that 75% of Black women cited inability to afford a child as a reason for seeking abortion). The loss of the opportunity of a child takes an emotional toll on them to begin with, and the Challenged Laws compound this issue by suggesting to women—who may believe otherwise—that they are bringing about the death of a human. To avoid the increased stigmatization and shame surrounding the procedure, some women may elect to forgo having an abortion altogether. But the fact that the Challenged Laws discourage women from making the decisions that they believe are best for them is a violation of the foundational principles of reproductive justice. The very definition of reproductive justice states that women have the right to not have children, the right to have children, and the right to parent them in safe and healthy environments. By discouraging women from having abortions, the Challenged Laws violate the first principle; and by encouraging women to have children that they may not be able to financially support, the Challenged Laws violate the third principle.

The Challenged Laws further impact a Black woman's decision to conceive, infringing on the second principle of reproductive justice—a women's right to have children. Black women who are forced to have abortions for medical reasons or who miscarry may be less likely to try to have children again because of the Challenged Laws. Many Black women cope with these events by viewing the aborted or miscarried fetus as something that had not yet developed, something that was not yet living. But the Challenged Laws would require burying or cremating the ETRF,

signifying to women that they lost something more than an opportunity; they lost a human child. This takes an extreme emotional toll on women, deepening the grief (and at times guilt) that women feel in the aftermath of such events. This is particularly concerning for women who have miscarriages, given that women who have one miscarriage are likely to have multiple miscarriages. *See* Sohinee Bhattacharya & Siladitya Bhattacharya, *Effect of Miscarriage on Future Pregnancies*, 5 *Women's Health* 5, 6 (2009). The Challenged Laws are likely to magnify the grief, shame, and stigma these women face in subsequent attempts at pregnancy.

III. The Challenged Laws force Black women to “choose” between compliance and their religious and cultural norms

Not only do the Challenged Laws force the State's beliefs onto women, but the application of the Challenged Laws violate women's rights to religious and cultural autonomy and present practical hurdles to underserved Black women.

First, the real-world effect of the Challenged Laws will be to undermine Black women's rights to religious autonomy. The primary disposition method relied on by the State involves an offer made by the Catholic Church to assist healthcare providers with burial ETFR. *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 631 (W.D. Tex. 2018). But the women the Challenged Laws will affect, including Black women in the communities *Amici* serves, come from diverse religious and cultural backgrounds. Forcing these women to have their ETFR interred with a religious

institution that they may not belong to is an affront to their right to live their lives according to their own religious beliefs.

Second, the Challenged Laws ignore the role that “death” plays in the Black community and supplants Black women’s cultural norms with the State’s chosen norms. The death of a human being is a community experience and multi-step process in the Black culture. It is not simply placing bones in a box or scattering ashes. Beyond emotional strength, it involves time, planning, and resources. Indeed, a typical Black funeral service involves at least contacting a funeral home, selecting a preacher; planning a service that would include naming the ancestors of the deceased, as well as whom the deceased is survived by, singing religious songs, reciting scriptures, and a eulogy; renting a car to transport the family members of the deceased; and writing an obituary. Particularly for women who have multiple abortions or miscarriages, this is no small endeavor. A Black woman considering an abortion or who miscarries would thus have to grapple with a moral conundrum under the Challenged Laws: either go through the entire funeral process for something she does not believe ever existed as a human, or allow the State to classify her ETFR as a “death” without respecting her cultural norms.

Indeed, the community-based perspective of death in the Black communities highlights other problems with the Challenged Laws, such as their infringement on women’s rights to privacy. A Black woman seeking an abortion or who has a miscarriage may not want to share that with her family, friends, and community. But,

if she is to dispose of her ETFR as human remains, that is what following her cultural norms would require. The Challenged Laws also create practical hurdles for underserved Black women. Many of these women cannot afford the incidental costs associated with planning and attending a funeral for their ETFR, including taking time off of work and paying for child care (who, in the Black community, typically do not attend funeral services).

Moreover, the very tenor of Black funeral services is incompatible with the Challenged Laws. Black services frequently focus on celebrating life, as opposed to mourning loss. How is a woman supposed to gather her family, friends, and community to celebrate the life of something she believes never had a life to begin with? This is particularly difficult for women who already have other children, because the funeral service would suggest to the children that they lost a sibling they never knew—a traumatic and devastating event. Her only other option under the Challenged Laws is to forgo all of her cultural norms and allow the State to commandeer her ETFR and treat it according to the State’s beliefs. Forcing Black women to make this “choice” is incompatible with the principles of self-determination that underlie reproductive justice.

IV. The Challenged Laws restrict access to reproductive care for underserved Black women

The end result of the burdens the Challenged Laws place on underserved Black women is the same: an additional barrier to reproductive care. These women

already struggle to receive the same type and quality of care as women of different races and different means. *See generally* Office of Human Rights and Int'l Affairs, Nat'l Assn of Social Workers, Reproductive Health Disparities for Women of Color (2004), <https://www.socialworkers.org/LinkClick.aspx?fileticket=tkhvhsbExqY%3D&portalid=0> (noting that “[m]inority women are also less likely to have access to reproductive health care” and that “women of color are less likely to receive adequate reproductive health care”). By forcing contrary beliefs on these women, shaming them for their decisions, deepening their grief, stripping them of their religious autonomy, and neglecting their social and cultural norms, the Challenged Laws will discourage women from seeking the reproductive care they want or need. Particularly given that Black women have historically been denied the same access to reproductive care as others, the Challenged Laws exacerbate the injustice these communities already face, and threaten to stymie any growth in self-determination and empowerment that these women have achieved so far.

CONCLUSION

For all of these reasons, as well as those set forth in the Brief of Plaintiffs-Appellees, the Challenged Laws should be struck down.

Dated: January 10, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3005 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond font size 14.

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CERTIFICATE OF SERVICE AND FILING

I certify that I electronically filed the foregoing document using the Court's CM/ECF filing system on January 10, 2019. Counsel was served via CM/ECF on January 10, 2019.

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