

No. 18-50484

**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. BHAVICK KHUMAR,
Plaintiffs-Appellees,

v.

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

v.

TEXAS CATHOLIC CONFERENCE,
Movant-Appellant.

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

BRIEF FOR DEFENDANT-APPELLEE CHARLES SMITH

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CERTIFICATE OF INTERESTED PERSONS

No. 18-50484

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. BHAVICK KHUMAR,
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Movant-Appellant.

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.

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STATEMENT REGARDING ORAL ARGUMENT

The constitutional issues raised in this appeal merit oral argument, should the Court's expedited schedule permit it.

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INTRODUCTION

Plaintiffs-Appellees are abortion providers who are challenging a Texas law that requires health care facilities to treat fetal remains with respect—through interment or scattering of ashes—rather than placing the treated remains or ashes in a landfill. Non-party the Texas Catholic Conference of Bishops (TCCB) has offered its assistance regarding the disposition of fetal remains at Catholic cemeteries to enable health care facilities to comply with this law. This offer of help, however, undermines Plaintiffs’ legal position that they will not be able to comply with Texas’s fetal-disposition laws. Consequently, Plaintiffs subjected the TCCB to overly broad discovery requests and demanded production of the TCCB’s protected internal communications—*unless their Executive Director agrees not to testify*. A clear message has been sent to Texas Catholics: facilitating compliance with Texas’s fetal-disposition law, or providing testimony in this lawsuit, will put your First Amendment freedom at stake.

Defendant-Appellee Charles Smith, Executive Commissioner of the Texas Health and Human Services Commission, seeks to put the conflict between the TCCB and Plaintiffs in context. Plaintiffs have affirmatively waived *any* argument that the costs of compliance make the law unconstitutional, and Plaintiffs have not brought a First Amendment claim. Thus, neither disposition costs nor religion are at issue in this lawsuit. Plaintiffs nevertheless argue that there is a lack of entities willing and able to provide fetal-tissue disposition in accordance with Texas law. The TCCB has publicly expressed the willingness and ability of Catholic cemeteries to inter fetal remains from Plaintiffs’ facilities. Rather than exploring with Catholic cemeteries

over the last year and a half, their ability to provide services, Plaintiffs have instead chosen to subject the TCCB to invasive discovery into its entirely irrelevant internal communications. Plaintiffs' conduct demonstrates that they are not interested in good-faith attempts at compliance, but only their legal challenge. Defendant also agrees with and supports the TCCB's First Amendment arguments and urges the Court to reverse the district court's order requiring the TCCB to produce its internal communications.

STATEMENT OF JURISDICTION

Federal subject-matter jurisdiction exists over the underlying lawsuit because Plaintiffs have raised constitutional challenges to Texas's laws. 28 U.S.C. § 1331; ROA.1655-78. As explained by the TCCB in its motion to stay, appellate jurisdiction exists under the collateral-order doctrine. TCCB Mot. to Stay at 4 n.1. Moreover, this Court can treat the TCCB's interlocutory appeal as a petition for writ of mandamus. *In re Grand Jury Subpoena*, 190 F.3d 375, 389 n.16 (5th Cir. 1999); *see also id.* ("It is well-established that the writ is appropriate in certain cases compelling discovery against a claim of privilege." (internal quotation marks and citation omitted)).

ISSUE PRESENTED

Whether the district court erred in ordering the TCCB, a religious organization, to produce its internal communications to Plaintiffs when Plaintiffs have not shown that those communications are relevant to any issue in this lawsuit, and when those communications are protected from disclosure by the First Amendment.

STATEMENT OF THE CASE

I. Texas Law Governing the Disposition of Fetal Remains.

In 2017, the Texas Legislature enacted Chapter 697 of the Texas Health and Safety Code to govern the disposition of embryonic and fetal tissue remains. Tex. S.B. 8, 85th Leg., R.S. (2017). The purpose of the law 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; *see also Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (a State “‘may express profound respect for the life of the unborn’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality op.)). Chapter 697 requires health care facilities to dispose of embryonic and fetal tissue remains in one of four ways: interment, cremation, incineration followed by interment, or steam disinfection followed by interment. Tex. Health & Safety Code § 697.004(a). The ashes of embryonic and fetal tissue remains may be scattered in accordance with the laws governing human remains but may not be placed in a landfill. *Id.* § 697.004(b).

To assist with the disposition of fetal tissue, the Legislature also authorized the creation of a Burial or Cremation Assistance Registry in which funeral homes and cemeteries may register with the State in order to make health care facilities aware that they are willing to assist in providing free common burials or low-cost private burials for fetal remains. *Id.* § 697.005. A funeral home or cemetery is not, however, required to sign up with the registry in order to provide such services. The registry is made available to any physician or health care facility that requests it. *Id.* The

Texas Health and Human Services Commission has promulgated rules for the purpose of carrying out these statutes. 25 Tex. Admin. Code §§ 138.1-8.

II. Plaintiffs' Lawsuit and Waiver of Financial Claim

Plaintiffs, abortion providers that generally dispose of fetal tissue through incineration followed by placement in a landfill, originally filed suit in 2016 when the Texas Department of State Health Services adopted rules that prohibited disposing of fetal tissue in a landfill or sewer. ROA.30-48. Those rules were preliminarily enjoined, and appeal was taken to this Court. ROA.1430-53, 1464-66. During the appeal, however, the Texas Legislature enacted Chapter 697, displacing the rules at issue. Tex. S.B. 8, 85th Leg., R.S. (2017).¹ The appeal was dismissed, and the case returned to district court where Plaintiffs amended their complaint to challenge Chapter 697 and its accompanying rules. ROA.1624-25, 1655-78.

Plaintiffs assert four constitutional claims: due process (undue burden), vagueness, equal protection, and commerce clause. ROA.1675-76. The main thrust of Plaintiffs' lawsuit is that Texas's fetal-disposition law interferes with the personal autonomy of women by mandating that health care facilities treat fetal tissue with respect. ROA.1669-71, 1699-1707. But Plaintiffs also asserted in their amended complaint that Chapter 697 might create an undue burden because it could increase costs or because there might not be sufficient entities available to assist Plaintiffs in disposing of fetal remains in compliance with the law. ROA.1672-75, 1708-09. Plaintiffs

¹ The challenged DSHS rules have since been repealed. 43 Tex. Reg. 3242 (2018).

obtained a preliminary injunction of the disposition provisions of Chapter 697 based, in part, on their claims regarding costs and potential unavailability of disposition vendors. ROA.1907-21.

Less than two months later, Plaintiffs dramatically altered course, affirmatively waiving any argument that the financial costs of complying with Chapter 697 were a burden that rendered the laws unconstitutional. ROA.1942. In exchange for this stipulation, which was signed by the district court, Defendant agreed that he would not seek discovery of Plaintiffs' financial records. ROA.1942-43. There is, therefore, no claim or argument in this case that the financial cost of complying with Chapter 697 makes it unconstitutional.

III. The TCCB's Involvement.

At the preliminary injunction hearing in January 2017 concerning the now-repealed DSHS rules, Defendant offered the testimony of Jennifer Carr Allmon, the Executive Director of the TCCB. ROA.2712-57. As explained by Mrs. Allmon, the TCCB, representing all Texas Catholic bishops, decided to make cemeteries throughout Texas available for interment of fetal tissue at no cost to health care providers (other than transportation costs). ROA.2716-17. Defendant then listed Mrs. Allmon as an individual with knowledge relevant to the lawsuit in his initial disclosures, and as a potential witness when the parties filed initial witness lists in April 2018. ROA.1996, 2144.

As a result, Plaintiffs served the TCCB with a third-party subpoena seeking a wide range of information, covering decades, much of it untethered to the allegations

in this lawsuit. ROA.2088-96. Defendant has not been privy to the discussions between counsel for Plaintiffs and the TCCB regarding the scope of the subpoena, but as explained in various district court filings, the documents at issue are now narrowed to internal documents involving Mrs. Allmon that were made after January 1, 2016 and contain certain search terms. ROA.2067.

The TCCB filed a motion to quash, ROA.2065-79, and the magistrate judge held a hearing on June 13. Mrs. Allmon was deposed that same day following the hearing. Also on June 13, the same day of the magistrate judge's hearing, but before the magistrate judge issued his ruling, the district court entered an expedited briefing schedule for any potential appeal—giving the appealing party until noon on June 14 to appeal and the responding party until 11:59 p.m. on June 14 to respond. ROA.2277. When the magistrate judge issued his order denying the TCCB's motion to quash, ROA.2280-85, the parties then followed the expedited schedule, finishing briefing on June 14. ROA.2295-2346. Defendant filed a response supporting the TCCB. ROA.2324-31.

The district court, at noon on Sunday, June 17, issued an order denying the TCCB's appeal and gave the TCCB 24 hours to produce the documents to Plaintiffs. ROA.2347-63. The TCCB appealed to this Court and sought an emergency stay. ROA.2364-66; TCCB Mot. to Stay, *Whole Woman's Health v. Smith*, No. 18-50484 (5th Cir., filed June 18, 2018). The district court then gave the TCCB an additional 72 hours to produce the documents in order to allow this Court time to resolve the appeal. ROA.2394. This Court issued a stay of the district court's order and set an

abbreviated briefing schedule allowing all interested parties to file briefs by June 25. Order, *Whole Woman’s Health v. Smith*, No. 18-50484 (5th Cir., filed June 18, 2018).

SUMMARY OF THE ARGUMENT

Defendant seeks to keep this lawsuit focused on what is truly at issue—the constitutionality of Texas’s fetal-tissue disposition law—and to keep Plaintiffs from harassing organizations that offer to assist in the burial of fetal remains. Plaintiffs’ stated reasons for seeking the TCCB’s internal communications have no bearing on the constitutional questions in this case and certainly do not warrant intruding on the TCCB’s First Amendment rights.

The only issue in this case on which the TCCB has evidence is the extent of its offer to provide its cemeteries and assistance in burying fetal remains, which bears on the availability of entities willing to dispose of fetal remains in accordance with Texas law. That offer could have been (and should have been) explored by Plaintiffs long ago and, under no circumstances, requires prying into the internal communications of the TCCB. Plaintiffs never engaged in good-faith discussions with the TCCB about whether it could assist Plaintiffs in complying with the law. Plaintiffs instead chose to attack those that would undermine their legal arguments. The Court should reverse the district court’s decision and thwart Plaintiffs’ unwarranted and improper harassment.

STANDARD OF REVIEW

Discovery orders are reviewed for an abuse of discretion. *Grogan v. Kumar*, 873 F.3d 273, 280 (5th Cir. 2017). Should the Court choose to treat this as a petition for

writ of mandamus, the TCCB must show a clear abuse of discretion and a lack of adequate alternative means to obtain the relief it seeks. *Mallard v. U. S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989).

A R G U M E N T

I. Plaintiffs Do Not Seek Relevant Information.

The bulk of Plaintiffs’ lawsuit focuses on their claim that Texas’s fetal-disposition law violates the personal autonomy of their abortion patients by requiring that the post-abortion fetal remains be handled with some respect. The TCCB has no information relevant to that argument. The TCCB’s relevance is to Plaintiffs’ additional argument regarding whether compliance with Texas law is possible due to the availability of entities willing to provide disposition services in accordance with Texas law. To make such a claim, Plaintiffs must demonstrate that there are insufficient means in Texas to inter, cremate, incinerate, or steam disinfect fetal tissue, such that Plaintiffs could no longer operate their clinics, burdening, at a minimum, a large fraction of women seeking abortions in Texas. *See Gonzales*, 550 U.S. at 167 (plaintiff bringing facial challenge bears “heavy burden” of showing, at a minimum, an undue burden in a large fraction of cases).

What is not at issue are the costs of such compliance or why the Catholic bishops of Texas chose to offer their assistance, which would almost certainly encroach upon fundamental First Amendment rights. Plaintiffs have all related external communications on these issues. They do not need to delve into the internal communications of the TCCB. *See Fed. R. Civ. P. 26(b)(1)* (stating that discovery must be “relevant

to any party's claim or defense and proportional to the needs of the case"). As a result, Plaintiffs' discovery demands can be seen only as attempts to harass and intimidate those who would stand in the way of their constitutional challenge to laws requiring the respectful treatment of fetal tissue.

A. Plaintiffs affirmatively waived any arguments regarding costs.

After obtaining a preliminary injunction based, in part, on claims about costs, Plaintiffs have since waived any argument that the costs of complying with Chapter 697 are an undue burden that renders the law unconstitutional. ROA.1942. At the discovery hearing before the magistrate court, Plaintiffs appeared to vacillate on that stipulation, but have since reconfirmed their understanding that financial costs are not at issue. ROA.2330-31. Consequently, financial implications cannot be cited as a justification for the discovery.

While Plaintiffs have refrained from directly arguing that the TCCB communications are relevant to their cost argument, it is implicit in much of what they claim. For example, Plaintiffs argued at the discovery hearing that they want to know why only ten cemeteries have currently signed up with the Burial Assistance registry. ROA.2984-85. But signing up with the registry is not a precondition to providing no-cost or low-cost burial or cremation services—or services in line with regular rate structures. To the extent Plaintiffs are suggesting that they might have to pay for interment services at cemeteries not on the registry, they have waived any claim that such payment renders the law unconstitutional.

B. Plaintiffs have not brought a First Amendment claim.

Plaintiffs also suggest that they need the TCCB's internal communications to know whether any religious service will be used in any burial of fetal tissue in a Catholic cemetery. ROA.2985. But Plaintiffs have not brought a First Amendment claim. ROA.1675-76. Consequently, the religious nature of any burial (or lack of a religious ceremony) is not a relevant issue in this lawsuit. Regardless, Plaintiffs have not demonstrated that they cannot obtain this information through means other than intruding on the First Amendment rights of the TCCB. Indeed, Plaintiffs were able to question Mrs. Allmon on this point at the preliminary-injunction hearing in 2017. ROA.2745-46; *see also* ROA.2718-19. Further, Plaintiffs admit that they sent subpoenas to every cemetery and funeral home that Defendant identified in its disclosures. ROA.2337-38. It would have been a simple matter to ask them what they anticipated their practices would be.

C. The TCCB's motives are not relevant.

Perhaps most concerning is Plaintiffs' claim that they needed the TCCB's internal communications to show the TCCB's involvement in "drafting the very law at issue," asserting that the TCCB was "the driving force behind the law." ROA.2170. Plaintiffs then appeared to step back from that position at the hearing, claiming that "[t]he subpoena isn't based on [Mrs. Allmon's] legislative advocacy." ROA.2986. But regardless of what position Plaintiffs take now, whether the TCCB supported Chapter 697 has no bearing on its constitutionality—yet that is precisely the type of information Plaintiffs seek through their discovery.

Plaintiffs' suggestion that the TCCB's support for this law makes its internal communications fair game in litigation about that law is troubling. There is no proper reason to seek the internal discussions of a religious group about whether to support a piece of legislation when those discussions have no impact on the constitutionality of the legislation itself. Instead, it will only curb those discussions in the future. ROA.2129, 2375.

Defendant will not add to the TCCB's briefing on the First Amendment other than to comment that pressing an inquiry into a religious institution's internal theological and related communications cannot be perceived as anything but improper meddling. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553, 559-60 (5th Cir. 1972); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002). A church is entitled to participate in society without losing its sacrosanct First Amendment protections. *See Surinach v. Pesquera De Busquets*, 604 F.2d 73, 78 (1st Cir. 1979) (protecting against disclosure of a church school's information in order not to infringe upon its ability to make decisions about religious education); *see generally*, Tex. Const. art. I, §§ 5 & 6.

As the TCCB argued, the deliberations and religious doctrine of Texas's Catholic bishops are strongly protected by the First Amendment. And whatever the motivations of the TCCB are concerning Texas's fetal remains law, the TCCB is not the Texas Legislature. Thus, the TCCB's actions regarding the passage of the fetal remains law are wholly immaterial. *See Barnes v. Tumlinson*, 597 F. App'x 798, 799 (5th Cir. 2015) (per curiam) ("Discovery is not a license for the plaintiff to 'go fishing[.]'").

II. Plaintiffs' Discovery Demands Are Harassing.

Plaintiffs' conduct demonstrates that their motive is not to discover information regarding the availability of Catholic cemeteries as one option to dispose of fetal remains. That information is public and does not require a subpoena to demonstrate. Instead, Plaintiffs' demands are designed to harass those that would stand in the way of their lawsuit. The Court should not countenance such conduct.

A. Plaintiffs issued an obviously overly broad subpoena.

Plaintiffs' subpoena to the TCCB reveals no reasonable attempt to limit its scope. Its demand for any documents "concerning" abortion and miscarriage for the entirety of the TCCB's existence (back to 1965) is untethered to the allegations in this lawsuit. ROA.2096. Similarly, any e-mails between the TCCB and various agencies and employees of the Texas government is not limited to any claims in this litigation. ROA.2096. Even as an opening gambit, such discovery against a third party is plainly prohibited by Federal Rule of Civil Procedure 45(d)—and sanctionable. Fed. R. Civ. P. 45(d)(1) (stating that the "attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena").

The subpoena has been narrowed after months of negotiation, review, and production, at significant cost to the TCCB. ROA.2067, 2081-85. Yet Plaintiffs still seek internal TCCB emails touching on the disposition of fetal remains. As explained by the TCCB, such emails implicate the bishops' deliberations about the doctrinal considerations concerning providing fetal-disposition services—including in the context of abortion—and the reasons in favor of, or against, such a ministry. ROA.2083-84,

2373-75. Their reasoning is not, and cannot be, at issue under the First Amendment considerations explained by the TCCB. Nor is it relevant to the constitutional questions presented in this case. And given Plaintiffs' failure to explain why the TCCB's internal communications are relevant to whether Texas's fetal-disposition laws are constitutional, *see supra* pp. 8-11, the only possible reason for continuing to press for these documents is to harass those that would seek to assist health care facilities with the respectful disposition of fetal remains.²

B. Plaintiffs seek to suppress evidence harmful to their case.

Plaintiffs' conduct also reflects a disturbing attempt to suppress contrary evidence. This is, perhaps, best demonstrated by Plaintiffs' offer to withdraw their document subpoena if Mrs. Allmon agrees not to testify. ROA.2985-86. Plaintiffs' offer to withdraw their subpoena, shows that they are interested only in suppressing Mrs. Allmon's testimony and not procuring evidence of the truth regarding the availability of locations to inter fetal remains.

Further, Plaintiffs have been aware since Mrs. Allmon testified at the preliminary injunction hearing in January 2017 of the TCCB's offer to provide assistance with fetal-tissue disposition. ROA.2716-17. Plaintiffs have, therefore, had one and a half years to contact the TCCB to determine whether and how the TCCB could assist Plaintiffs in disposing of fetal remains in accordance with Texas law. Had they done so, Plaintiffs would have firsthand knowledge whether the TCCB's offer would

² Indeed, Plaintiffs admit they sent the same (overbroad) subpoena to every funeral home and cemetery identified by Defendant. ROA.2337-38.

meet their needs and enable them to comply with Texas law. Plaintiffs instead chose to subject the TCCB to wide-ranging discovery requests in an effort to publicize internal deliberations that are protected by the First Amendment. The Court should not permit Plaintiffs to use the tools of government to try to intimidate the TCCB and strip it of its First Amendment rights because of its offer to assist with the disposition of fetal tissue.

* * *

Plaintiffs offer no reason for this Court to order the TCCB to give up its First Amendment rights and produce its internal communications. The evidence sought is not relevant to the issues in this case and, unless overturned by this Court, the district court's order will serve only to deter other organizations from supporting legislation to which Plaintiffs are opposed. The district court's order should be reversed.

CONCLUSION

The Court should reverse the district court's order on the TCCB's motion to quash.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On June 25, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Darren McCarty
DARREN MCCARTY

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3501 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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