

November 16, 2015

Chair and Members  
Ohio House Community and Family Advancement Committee  
State of Ohio House of Representatives  
77 S. High Street  
Columbus, OH 43215

**Re: Testimony on H.B. No. 294, 131st General Assembly, Regular Session 2015-2016**

Ladies and Gentlemen:

The Charlotte Lozier Institute has been asked to provide testimony regarding H.B. No. 294 (“the Bill”), which would require the Ohio Department of Health (“Department”) to ensure that certain State funds and certain federal funds the State of Ohio (“State”) administers are not used to perform nontherapeutic abortions, promote nontherapeutic abortions, contract with any entity that performs or promotes nontherapeutic abortions, or that becomes or continues to be an affiliate of any entity that performs or promotes nontherapeutic abortions.

To evaluate the Bill I use the following five-part framework. (1) Is the Bill just? (2) Is the Bill permitted under binding sources of law? (3) Is the Bill good public policy? (4) Does the Bill comport with sound political principles? (5) Is the Bill politically plausible in a democratic-republican form of government?

**Whether the Bill Is Just.** Analysis of any proposed legislation should begin by asking whether it is just. As then-Senator Barack Obama once stated so eloquently, “[o]ur law is by definition a codification of morality,”<sup>1</sup> and one would not be hard pressed to find similar expressions of the moral nature of law by public officials and individuals occupying different points across the political-ideological spectrum. Indeed, the understanding that law is rooted in principles of justice that reflect the moral nature of the human being and our shared social life is a vital legacy of the American project. This project unifies citizens into a free and self-governing people even as they engage in protracted, often deeply-felt debates about the right answers on what can seem like difficult questions.

These understandings should inform consideration of the Bill. Whether or not the U.S. Supreme Court interprets the U.S. Constitution to require a legal right to terminate a pregnancy, intentionally taking an innocent human life is always unjust. Further, abortion can also involve substantial and lasting harm to the mother as well as to other individuals such as medical practitioners and family members who participate in or are affected by abortion. The Bill steers public funds away from organizations that perform or promote abortion. The Bill is just.

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<sup>1</sup> Senator Barack Obama, “Call to Renewal Keynote Address,” Call to Renewal Conference on Building a Covenant for a New America, June 28, 2006, *reprinted in* New York Times, “Obama’s 2006 Speech on Faith and Politics” (June 28, 2006), at [http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html?pagewanted=all&_r=0).

**Whether the Bill Is Permitted Under Binding Sources of Law.** After considering whether a measure is just the next step is to consider whether a measure is permitted under binding sources of law. As to a measure undertaken by the Ohio Legislature these sources would include the Ohio Constitution, the U.S. Constitution, and other sources of federal law including statutes and regulations. Here I do not consider issues arising under the Ohio Constitution.

The Alliance Defending Freedom (“ADF”) is a national public interest law firm that submitted testimony dated October 20, 2015 addressing the legality and constitutionality under federal law of a similar if not identical version of the bill in the Ohio Senate designated as S.B. No. 214.<sup>2</sup> In addressing S.B. No. 214 ADF explained that:

- “There is no conflict between [S.B. No. 214’s] provisions and federal law and regulations, and [S.B. No. 214] therefore raises no federal preemption issues.”<sup>3</sup>
- “States have authority to enact laws and policies that encourage childbirth over abortion, including withholding taxpayer subsidies for abortion.”<sup>4</sup>
- S.B. No. 214 does not “impermissibly condition government benefits on the forfeiture of constitutional rights such as the right of association.”<sup>5</sup>

Given the similarity between the House version of the Bill and various Senate versions of the bill, the analysis ADF conducted of a Senate version of the bill should also be helpful in evaluating the House version of the Bill.

In addition to the ADF testimony I also refer you to previous analysis authored by me and published by the Charlotte Lozier Institute that repeatedly quotes case law from the U.S. Supreme Court in explaining that:

- “[T]he government has a legitimate, substantial interest in preserving and promoting fetal life.”<sup>6</sup>
- “[T]he government is ‘permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.’”<sup>7</sup>

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<sup>2</sup> Steven H. Aden, Senior Counsel, Alliance Defending Freedom, Testimony on S.B. No. 214, 131st General Assembly, Regular Session 2015-2016 (stating that “Alliance Defending Freedom has been asked to provide a legal opinion regarding the legality and constitutionality under federal law of S.B. No. 214”) (testimony dated Oct. 20, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (internal endnote omitted).

<sup>5</sup> *Id.*

<sup>6</sup> Thomas M. Messner, The Women’s Health Protection Act of 2013: The Sweeping Impact of S. 1696, Charlotte Lozier Institute, Special Report, at 26 (July 2014) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 126 (2007)), <https://lozierinstitute.org/wp-content/uploads/2014/07/CLI-Special-Report-Blumenthal-Paper.pdf>.

<sup>7</sup> *Id.* at 26-27 (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 886 (1992) (plurality)).

- “[T]he government may ‘make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.’”<sup>8</sup>

A brief submitted to the U.S. Supreme Court on behalf of individuals and entities including the Charlotte Lozier Institute sums up the state of the law this way. “The abortion right, as declared by [the U.S. Supreme] Court, is freedom from government intrusion in the choice to have an abortion. The abortion right is not a right to support for abortion from the government.”<sup>9</sup>

I do not purport herein to consider every potential legal argument that opponents of the Bill might attempt to raise. However, one further argument that might come to your attention involves the provisions of the U.S. Constitution prohibiting the U.S. Congress and the States from passing bills of attainder. In the footnote associated with this sentence I refer you to analysis published by The Heritage Foundation concluding that proposed federal legislation that would defund the abortion organization Planned Parenthood is not a bill of attainder within the meaning of the U.S. Constitution.<sup>10</sup> A second Heritage publication, this one by Hans von Spakovsky, a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, concludes, even more pointedly, that the bill of attainder argument against the federal defunding legislation is “nonsense.”<sup>11</sup> To the extent that “[t]he substantive legal content” of the federal bill of attainder clauses as to the U.S. Congress and as to the States “are fundamentally the same,”<sup>12</sup> you might find these analyses helpful in your deliberations.

**Whether the Bill Is Good Public Policy.** Even as our society continues to debate the appropriate scope of and limits on the legal right to abortion created by the U.S. Supreme Court, the conclusion remains that the choice to intentionally take the life of an innocent human being is always unjust. Accordingly, public policies that steer public funds away from organizations that perform or promote abortions are good policy on their face.

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<sup>8</sup> *Id.* at 27 (quoting *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977))).

<sup>9</sup> Brief of Amici Curiae Women’s Public Policy Groups and a Coalition of Female State Legislative and Executive Branch Officials in Support of Nongovernment Parties 6 (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (citing cases that “support the view that the State need not commit any resources to performing abortions”), *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_ (2014), available at <http://www.becketfund.org/wp-content/uploads/2014/01/13-354-356-bsac-Womens-Policy-Groups-and-Coalition-of-Female-State-Legislative-and-Executive-Branch-Officials.pdf>).

<sup>10</sup> Nick Barden, “Lawmakers Are Saying They Can’t Defund Planned Parenthood. Here’s How to Respond to 8 of Their Claims,” *The Daily Signal*, The Heritage Foundation (Sept. 29, 2015), <http://dailysignal.com/2015/09/29/lawmakers-are-saying-they-cant-defund-planned-parenthood-heres-how-to-respond-to-8-of-their-claims/>.

<sup>11</sup> Hans von Spakovsky, “Cutting Off Funding to Planned Parenthood Doesn’t Violate the Constitution,” *The Daily Signal*, The Heritage Foundation (Oct. 5, 2015), <http://dailysignal.com/2015/10/05/cutting-off-funding-to-planned-parenthood-doesnt-violate-the-constitution/>.

<sup>12</sup> David F. Forte, *State Bill of Attainder and State Ex Post Facto*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* (Edwin Meese III et al. eds.) (stating that “[t]he substantive legal content of the Bill of Attainder and the Ex Post Facto Clauses in Sections 9 and 10 of Article I are fundamentally the same”) (online version last visited Nov. 16, 2015), available at <http://www.heritage.org/constitution/#/articles/1/essays/71/state-bill-of-attainder-and-state-ex-post-facto>.

Some opponents might nevertheless argue that measures such as the Bill will reduce access to certain health care services inasmuch as some organizations that perform or promote abortion services also provide legitimate health care services. The Charlotte Lozier Institute has exposed the problems with this argument in multiple publications discussing the prominent abortion organization Planned Parenthood.

- One Lozier publication finds, for example, that federally funded health centers have “about 20 times more locations than Planned Parenthood,” “serve tens of millions more patients than Planned Parenthood,” and “offer substantially more health services than Planned Parenthood.”<sup>13</sup>
- According to another publication, this one jointly created by the Lozier Institute and Alliance Defending Freedom, in Ohio specifically “[t]here are 10 health care clinics for every Planned Parenthood.”<sup>14</sup>
- Yet another Lozier publication, this one authored by Lozier Institute President Chuck Donovan, articulates the even more fundamental point that Planned Parenthood can “suspend and withdraw from” abortion activities.<sup>15</sup>

In short, the public need not fund organizations that perform or promote abortion to fund access to good health care. Steering public funds away from the performance or promotion of abortion services is good public policy.

**Whether the Bill Comports with Sound Political Principles.** A measure advancing good policy in the specifics must still be evaluated under more-general principles guiding the role of government in a free society and the wisdom of imposing any particular regulation affecting free institutions and individuals. When evaluating the Bill in this stage of the analysis, the primary consideration is whether the government sets an unwise precedent by using public resources to shape private conduct on a matter of deeply entrenched moral dispute. This consideration weighs heavily on all people of good will who understand that the coercive power of government can be trained just as quickly on one set of practices as another.

There can be no doubt, whatever one’s point of view, that government has assumed a deep, intrusive, entrenched role in modern social life. The extent and depth of this role should remain the source of important debate.

In the meantime, based on current conditions, public officials must act as wisely as possible. In some cases the right approach is to allow for a broad range of morally informed action by private individuals and institutions. In other cases the right approach is to establish policies based on common moral values and the demands of justice as to the weakest and most vulnerable among us.

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<sup>13</sup> Genevieve Plaster and Rebecca Gonzales, “Access to Care: A Mission for Community Health Centers,” Charlotte Lozier Institute (Oct. 27, 2015), <https://lozierinstitute.org/access-to-care-a-mission-for-community-health-centers/>.

<sup>14</sup> Alliance Defending Freedom and Charlotte Lozier Institute, “Women Have Real Choices” (last visited Nov. 16, 2015), *available at* <https://lozierinstitute.org/wp-content/uploads/2015/08/Ohio-State-Map.jpg>.

<sup>15</sup> Chuck Donovan, “Planned Parenthood and the Public Purse,” Charlotte Lozier Institute (Sept. 29, 2015), <https://lozierinstitute.org/planned-parenthood-and-the-public-purse/>.

Abortion involves intentionally ending the life of an innocent, profoundly vulnerable human being and can also involve substantial and lasting harm to the mother as well as to other individuals such as medical practitioners and family members who participate in or are affected by abortion. Abortion is an issue on which public officials and private citizens can be and should be clear-eyed without ignoring or downplaying any of the difficult and often heart-wrenching circumstances that sometimes surround the practice.

Stewarding public funds away from the performance and promotion of abortion is a wise, just, and prudent exercise of government discretion.

**Whether the Bill is Politically Plausible in a Democratic-Republican Form of Government.** Having satisfied oneself that a measure is just, in compliance with binding sources of law, good public policy, and in accordance with sound political principles, the final question any proponent must ask under the five-part framework I propose is whether the measure is also politically plausible in a democratic-republican form of government. This is a practical question that understands politics as the art of achieving what good is possible and, as such and as to the Bill, it is a question that Members of the Ohio Legislature are uniquely positioned to consider for themselves.

Sincerely yours,

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