# 1851 CENTER FOR CONSTITUTIONAL LAW
# Interest Party Testimony on House Bill 496

December 1, 2022

Rep. Manchester, Chairman
Families, Aging, and Human Services Committee

Madam Chairman and Members of the Committee:

There is no "midwifery crisis" in Ohio today. However, despite the nice-sounding underlying intentions articulated by Rep. Keohler, due to a number of serious *but perhaps resolvable* oversights, HB 496 is likely to yield unintended and counterproductive results.

For the purposes of brevity, this testimony will focus solely on realities that (1) HB 496 is not necessary to legalize midwifery because it's perfectly lawful *now*; (2) rather than "legalizing" midwifery, HB 496 needlessly *felonizes* it; and (3) felonizing midwifery is both unconstitutional and horrific policy.

## I. HB 496 does not "legalize" midwifery because midwifery is already currently <u>lawful</u> in Ohio.

Many proponents of HB 496 have testified, essentially, "Because midwifery is good, HB 496 is good." This confusion may arise from the unnecessary length of the Bill and ensuing lack of familiarity with its actual text, or a *lack of familiarity with the current legal landscape in Ohio*:

1. However, midwifery is not *expressly* forbidden by any provision of the Revised Code. Meanwhile, it is not clear that midwifery fits within the scope of R.C. 4731.17 ("*Practice of nursing* as a registered nurse/practical nurse"), R.C. 3731.34 (unauthorized *practice of medicine*), or any other proscription.

2. As you know, creating any crime, including "the crime" of midwifery would require more specific language than that existing in any current Section of the Revised Code.[1]

[1] For instance, past attempts to prosecute midwives for the unlicensed practice of medicine have failed. See *Peckmann v. Thompson*, 745 F. Supp. 1388 (C.D. Ill. 1990)(holding that midwives could not be charged with unauthorized practice in the absence of a *specific* prohibition because "the common understanding of the practice of medicine generally does not encompass assisting the normal delivery of a healthy child," and "the condition of a pregnant woman without complications" is *not* a medical condition or ailment).

3. The General Assembly deliberately reversed all references in the Revised Code to the potential unlawfulness of midwifery by eliminating all reference to "the practice of midwifery" from R.C. 4731.341 sometime after 1983. That provision *had* stated that "*the practice of midwifery* by any person not at that time holding a valid and current certificate as provided by Chapter 4725 or 4731 of the Revised Code is hereby declared to be inimical to the public welfare and to constitute a public nuisance." Subsequent text referred to that practice as an "offense" and the practitioner as an "offender."

4. Finally, there is not a single recorded case within the state reflecting a successful prosecution against an Ohioan for "the practice of midwifery." Proponents who have suggested otherwise point to just a single case: a 2008 prosecution of a midwife. However, that midwife solely pled guilty to the drug crime of "possessing and dispensing controlled substances," i.e. pharmaceutical drugs (R.C. 2925.11). This charge, unrelated to births, could apply to any non-medical professional. But the appropriate solution to the risk of such prosecution is obviously not to felonize *all* midwifery, especially amongst *those who do not incorporate pharmaceuticals*.

Thus the *status quo* this Committee confronts *today* is that the employment of a midwife is, if a routine human birth is considered health care at all, a form of health care freedom in which midwives and parents are entitled to participate.

## II. Rather than "legalizing" midwifery in Ohio, this Bill felonizes it.

Rep. Koehler has described the purpose of HB 496 as "not to punish anyone for practicing midwifery in Ohio," but to "expand the practice of midwifery in Ohio," adding "we want midwifery to flourish."

However, HB 496 obliterates the comfortable *status quo* by, without explanation or justification, designating the practice of *all* midwifery, absent a license or exemption, as a felony.

Not a misdemeanor. Not a civil fine. But a *felony*. And this is the case even where the midwife causes no harm and all are satisfied with the services provided. Rather than punishing *harm*, HB 496 punishes those who fail to obtain a government permission slip to engage in an ancient practice that predates every government on earth – this is no different than felonizing farming, gardening, procreating, eating, or breathing.

There is perhaps no greater example of overcriminalization then to imprison those engaging in the type of births experienced by most humans to have walked on Earth.

An amendment to HB 496 attempt to address this through Proposed Section 4723.601, which states "Sections 4723.53 to 4723.60 of the Revised Code do not abridge, change, or limit in any way the right of a parent to deliver the parent's baby where, when, how, and with whom the parent chooses, regardless of the licensure requirements established in those sections." One natural reading of this text is that any midwife, licensed or not, could simply have parents sign a form stating that they choose for that midwife to participate in the delivery of their son or daughter, irrespective of whether that midwife maintains any license.

Simultaneously, however, Proposed R.C. 4723.54(B)(1) does not include the Section 4723.601 "exception" as an "exception" to the unauthorized practice of midwifery: instead, it states as follows: "Except as provided in division (B)(2) of this section, no individual shall knowingly practice as a certified professional

midwife unless the individual holds a current, valid license to practice as a certified professional midwife issued under section 4723.56 of the Revised Code."

Thus, HB 496 forces midwives to guess as to whether they're engaging in a felony when serving Ohio parents' preferences. This creation of ambiguous felonies is another reason the Bill is cannot become law.

### III. Felonizing midwifery violates the Ohio Constitution.

Because midwifery is currently lawful, prohibiting its sale transgresses the Ohio Health Care Freedom Amendment, enacted by a supermajority of Ohio voters as Issue 3 in 2011, as Section 21 of Article I (Ohio's Bill of Rights): Division (B) of the Amendment forbids any state rule that prohibits the sale of health care; Division (C) of the Amendment forbids any state rule that imposes a penalty for the sale of health care.

Consequently, so long as the practice of midwifery were considered "health care," (and this Bill does so) Proposed R.C. 4723.54(A)(1) and (2) violate both the will of Ohio voters and the sacred guarantees of Ohio's Bill of Rights.

### IV. Felonizing birthing assistance, except when approved by the Ohio Board of Nursing makes exceptionally poor public policy.

As drafted, HB 496 is counterproductive to Ohio midwives, parents, or children:

1. Delegating licensing, rulemaking, and disciplinary authority to a board perennially-hostile to the practice of midwifery endangers its continued existence. Yet HB 496 lends power over midwives to their *direct competitors* that have, for decades, repeatedly expressed the desire to *end* midwifery by non-nurses: Since 1998, the Ohio Board of Nursing has argued that "the practice of midwifery by persons other than certified nurse-midwives should be prohibited," while deriding valuation of "freedom of choice" and "home births" as secondary to "public safety." See *Ohio Board of Nursing Position Statement: Direct Entry Midwife Study Council Report, January 1998.*

2. Despite the Board of Nursing's hostility, HB 496 empowers it with exceptionally-broad authority to establish rules and standards for the licensing and regulation midwives.[2] the Board is granted the power to impose training costs and paperwork requirements to gain a license on the front-end, coupled with scope of practice limits, and disciplinary proceedings on the back-end that drive up the cost of midwifery to a point where *it will be solely within reach of the wealthiest Ohioans* (unless government intervenes yet again to subsidize - - and further control - - such services). The Board of Nursing is further given, rather than a mandate to issue the license, *subjective discretion* as to "whether the applicant meets the requirements for a license." See Proposed R.C. 4723.55(C).[3]

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[2] See Proposed R.C. 4723.55(A), for example, permitting the Board of Nursing to subjectively determine "the information the board considers necessary" to sufficiently "apply" to practice midwifery.

[3] History teaches what happens when the General Assembly confers power to a medical board to snuff out smaller and more specialized practitioners. Not long after the GA conferred similar power to the State Medical Board to "prescribe rules for the regulation of massage therapy," the Board enacted draconian admittance and scope of practice rules that put many massage therapists out of business, and unduly boxed in many others (the regulations required a "six-hundred-clock-hour course of study" and forbade a message therapist from administering "certain forms of medical treatment"). Massage therapists challenged these regulations in Court, but were required (as is still the case) to run their appeal through the politically-slanted Franklin County Court of Appeals, which reflexively concludes with no analysis that "when considering

3. HB 496 ensures that midwives on the Board of Nursing will be outnumbered 13 to 2.

This regulatory calamity will reduce the supply of midwives and dramatically increase cost of home births.

**V. In conclusion, there are many superior means of effectuating this Bill's professed goals.**

HB 496 felonizes lawful conduct that has been expanding and flourishing *without government* intervention – particularly in the wake of out-of-control hospital costs and pandemic regulations rendering hospital births impractical if not impossible. The General Assembly should defend rather than assault this ancient practice, and could easily alter HB 496 to do so.

***First,*** HB 496 could be easily narrowed to simply and solely create a pathway for licensure of those few midwives wishing to dispense pharmaceuticals – Proposed R.C. 4723.551(A) already does so for "Certified Midwives".

***Second,*** HB 496 could be narrowed to simply include accountability functions such as mandatory informed consent and requiring reporting of adverse events to supplement voluntary contractual arrangements between parents and midwives and common law liability when midwives actually cause harm.

***Third,*** if the sponsors of the bill are serious about protecting parental rights to control who assist with the birth of their children, then the language inserted in Proposed Section 4723.601 ("the right of a parent to deliver . . . with whom the parent chooses") should be made an affirmative defense to the proposed crime of the "unlicensed practice of midwifery, so that there is no confusion whatsoever.

Ultimately, House Bill 496 may be a noble effort. However, its textual shortcomings render it counterproductive. Fortunately, those shortcomings can be easily fixed.

Should you have any questions, please feel free to contact me by email at *MThompson@OhioConstitution.org*.

Respectfully submitted,

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the reasonableness of an administrative rule, deference is given to the agency's expertise," and that challengers must overcome insurmountable "presumptions" and "burdens of proof" that favor the regulatory board. *Midwestern College of Massotherapy v. Ohio Medical Board*, 102 Ohio App.3d 17 (1995).