October 12, 2015

Chair and Members
Community and Family Advancement Committee
State of Ohio House of Representatives
77 S. High St.
13th Floor
Columbus, OH 43215

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

Ladies and Gentlemen:

Alliance Defending Freedom has been asked to provide a legal opinion regarding the legality and constitutionality under federal law of H.B. No. 294, which would require the Department of Health ("Department") to ensure that State funds and certain federal funds the State administers are not used to perform or promote abortions or to contract or allow affiliation with an entity that does so. In our opinion, H.B. 294 is both constitutional and consistent with applicable federal law.

H.B. 294 adds a new section to the Revised Code that prohibits the Department from allowing certain State and federal funds under enumerated programs to be used to perform or promote elective abortions (Sec. 3701.034(B)(1) and (2)); contract with "an entity that performs or promotes elective abortions" (by which the undersigned takes to mean abortions not qualified for reimbursement under the federal Hyde Amendment[i]) (Sec. 3701.034(B)(3)); or to be affiliated with an entity that does so. (Sec. 3701.034(B)(4)).

There is no conflict between the Bill's provisions and federal law and regulations, and the Bill therefore raises no federal preemption issues.[ii] State agencies engaged in federal partnerships such as those enumerated in H.B. 294 have authority to administer program grants and funding in a manner that reflects State policy, provided the implementation is congruent with federal mandates. Nothing in the statutes and implementing regulations for these programs prohibits state partners from directing grants to particular types of providers in furtherance of State policy to avoid subsidizing elective abortion. *Planned Parenthood of Indiana, Inc. v. Indiana Dept. of Health*, 699 F.3d 962, 985 (7th Cir. 2012) (upholding state restrictions on federal block grant for sexually-transmitted disease treatment pursuant to 42 U.S.C. § 247c(c)).[iii]

The Supreme Court has observed that state governments have "a legitimate and substantial interest in preserving and promoting fetal life."[iv] To further that end, States have authority to enact laws and policies that encourage childbirth over abortion,[v] including withholding taxpayer subsidies for abortion. As the Court has stated numerous times, "[T]he State need not commit *any* resources to facilitating abortions….",[vi] and "[A] woman's freedom of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[vii] Federal law reflects this policy choice through the Hyde Amendment, which prohibits funding for abortion except under certain extenuating circumstances.[viii] Like the Hyde Amendment upheld by the Supreme Court, this bill "places no obstacles absolute or otherwise in the pregnant woman's path to an abortion" because she "continues as before to be dependent on private sources for the service she desires."[ix]

Nor does the bill impermissibly condition government benefits on the forfeiture of constitutional rights such as the right of association.[x] The Supreme Court has never held that providers or physicians have a constitutional right to perform abortions—or any medical procedure for that matter—independent from the rights of the patient. In fact, the Court has even declined to determine whether a physician has a "constitutional right[] to practice medicine."[xi] To the contrary, it is clear that the State may regulate the ability of physicians to practice medicine, including performing abortions.[xii] Moreover, the Fifth Circuit Court of Appeals ruled in *Planned Parenthood v. Suehs*, 692 F.3d 343 (5th Cir. 2012), that Texas' prohibition on providers of elective abortion and entities associated with abortion providers receiving public funds under the state Medicaid waiver program did not violate their First Amendment right of association or right to equal protection. The Seventh Circuit Court of Appeals reached a similar conclusion in assessing Indiana's provision, similar to Section 4(b) of the proposed Act, reasoning that Indiana's differential treatment of providers of elective abortion was a permissible governmental preference. *Planned Parenthood of Ind., Inc. v. Comm'r, Ind. State Dept. of Health*, 699 F.3d 962 (7th Cir. 2012).

Thank you for the privilege of submitting this testimony on behalf of H.B. No. 294. Please do not hesitate to contact Alliance Defending Freedom if you have any questions about this matter or to request further information.

Sincerely yours,

Steven H. Aden /s/

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ALLIANCE DEFENDING FREEDOM

cc: Interested Parties

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

ENDNOTES

[i] It is the uniform view in the federal courts that State participation in the Medicaid program obligates State officials to implement public funding of Hyde-qualified abortions. *See, e.g., Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634 (6th Cir. 1996); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. den*., 516 U.S. 1011 (1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3rd Cir. 1995), *reh. en banc den., cert. den*., 516 U.S. 1093 (1995).

[ii] Implied preemption due to a conflict with federal law has been held to arise in only two circumstances: when state law stands as an obstacle to the execution of Congressional objectives, *see, e.g., International Paper v. Ouellette*, 479 U.S. 481, 491-92 (1987), and when it is physically impossible to comply with both state and federal requirements. *See, e.g., PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011). The Act's provisions present neither circumstance.

[iii] Case law holding that States are precluded from depriving elective abortion providers of Medicaid funding, *e.g., Planned Parenthood v. Commr., supra*, 699 F.3d 962; *Planned Parenthood of Arizona Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. den*., 134 S.Ct. 1283 (2014), are not applicable to the Bill's provisions because Medicaid funding is not affected and there is no equivalent provision to the "free choice of qualified provider" provision that was the source of the funding mandate in those cases.

[iv] *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).

[v] *Id*. at 146.

[vi] *Webster v. Reprod. Health Servs*., 492 U.S. 490, 511 (1989) (emphasis supplied), citing *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519, 521 (1977), and *Maher v. Roe*, 432 U.S. 464 (1977).

[vii] *Harris v. McRae*, 448 U.S. at 316.

[viii] *See* Omnibus Appropriations bill of 2009, Pub. L. No. 118, §§ 507-08, 123 Stat. 524, 802-03 (2009) (enacting H.R. 1105).

[ix] *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding prohibitions on the use of Medicaid to pay for non-therapeutic abortions).

[x] *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[xi] *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (plurality opinion) (citation and internal quotations omitted); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion).

[xii] *See Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the states[.]"); *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 685-86, 693 (7th Cir. 2002).