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to the House Health Committee
Opposing Senate Bill 28

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I am writing to oppose Senate Bill 28. I am the Associate Dean for Academic Affairs and Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law. As a scholar and litigator in the field of constitutional law, with a particular focus on reproductive rights, I write to share with the Committee my constitutional analysis of the bill currently under consideration. I am submitting this testimony on my own behalf and not on behalf of Case Western Reserve University.

S.B. 28 requires abortion clinics to dispose of tissue from each fetus, embryo, and even each zygote (i.e. a fertilized egg before it implants in the uterus) and blastoctye (i.e., the embryonic cells from approximately 5 days post-fertilization to approximately 10-12 days post-fertilization) by means of individual cremation or burial, and to assume the cost of that disposition. It is my opinion that this law is unconstitutional for several reasons.

First, according to basic principles of due process, every law must, at the very least, be supported by a "rational basis," meaning that it must be rationally related to a legitimate government purpose. Yet, as two other federal courts have already concluded, no legitimate purpose supports legislation requiring fetal tissue to be treated in the same manner as the remains of a deceased human person. "[T]he Supreme Court and the circuit courts applying Supreme Court precedent have unequivocally held that for purposes of the Fourteenth Amendment, a fetus is not a 'person.'" *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r, Indiana State Dep't of Health ("PPINK")*, 265 F. Supp. 3d 859, 870 (S.D. Ind. 2017); *see also Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 230 (W.D. Tex. 2017). Therefore, the state has no legitimate interest in treating a fetus or embryo as such. Nor can the legislature claim to advance an interest in potential life where, as here, there is no potential life in existence that the law is regulating.

PPINK, 265 F. Supp. 3d at 871-72.

Second, this law will unduly burden access to abortion. Under the U.S. Supreme Court's landmark decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), a court deciding the constitutionality of an abortion restriction must consider whether the benefits conferred by the law outweigh the burdens it imposes. Here, the law confers no health or safety benefits. It does not advance the state's interest in potential life, as it concerns only situations in which there is no potential life. And the interest in treating fetal tissue with the same respect and dignity as the bodies of deceased human persons has already been found not to constitute a legitimate end for the state to advance. Yet, the burden on access to abortion may be quite significant. By requiring individual burial or cremation of each fetus, embryo, zygote, and blastocyte, and requiring the clinic to pay the cost of the chosen disposition, the legislation ensures that an extreme financial burden will be imposed on abortion providers—and most likely a prohibitive one for many providers. This constitutes a significant burden that cannot be outweighed by any interest the state may assert here, such as a purported interest in the dignity of fetuses.

Finally, this law raises serious constitutional concerns due to the vagueness of its directives. A law—particularly one that, like S.B. 28, carries criminal penalties—is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Ass'n of Cleveland Fire Fighters*, 502 F.3d 545, 551 (6th Cir. 2007) (quoting *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1925)). In other words, a law violates due process if it individuals cannot know how they are expected to conform their conduct to it. S.B. 28 is vague in several respects. For example, the law requires separate disposition for each zygote, blastocyte, embryo, or fetus. However, in very early pregnancy terminations, it may be impossible to know how many embryos are present—even with medical testing. This requirement thus sets up a requirement that is impossible to comply with in some cases. For similar reasons, it will be impossible to comply with S.B. 28's mandate that the physician complete a separate report "for the abortion of each zygote, blastocyte, embryo, or fetus." S.B. 28 thus violates constitutional guarantees of due process for this third, independent reason.

For all of these reasons, among others, S.B. 28 is clearly unconstitutional under existing precedent. I therefore oppose this legislation.