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to the Senate Committee on Health, Human Services and Medicaid

Opposing Senate Bill 155

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I am writing to oppose Senate Bill 155. I am the Associate Dean for Research and Faculty Development 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. 155 requires physicians to provide misleading information to patients seeking medication abortion by telling them that "[i]t may be possible to reverse" the effects of the abortion-inducing drug mifepristone. It also requires them to provide patients with written materials to this effect and to refer patients to information on the Ohio Department of Health website. Unfortunately, there is no valid medical basis for believing that a medication abortion procedure can be reversed or halted after it has begun. *Am. Med. Ass'n ("AMA") v. Stenehjem*, No. 1:19-CV-125, 2019 WL 4280584 (D.N.D. Sept. 10, 2019).

This law is unconstitutional. As the U.S. District Court for the District of North Dakota concluded, in a case brought by the American Medical Association and other plaintiffs challenging a very similar law, this compelled speech mandate violates doctors' First Amendment rights to freedom of speech.[1] S.B. 155 also imposes an undue burden on women's

[1] *AMA*, 2019 WL 4280584, at *13. This case is the only challenge to a medication abortion "reversal" law decided so far; although Arizona passed such a law in 2015, it quickly repealed the law after it was challenged in court.

abortion rights under *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). This bill is, in short, unconstitutional under any conceivable legal standard.

The U.S. District Court for the District of North Dakota found that the challengers of North Dakota's medication abortion "reversal" law had a substantial likelihood of succeeding on their claim that the law compelled physician speech in violation of the First Amendment. Under the U.S. Supreme Court's recent decision in *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), laws regulating speech in a medical context are subject to heightened scrutiny unless they true informed consent requirements, *id.* at 2373-74. Given that there is no credible medical evidence to support the possibility of medication abortion "reversal" and that it would, in fact, be unethical for doctors to suggest this option to their patients, *see* Am. Coll. of Obstetricians & Gynecol., *Facts Are Important* ("Claims regarding abortion "reversal" treatment are not based on science and do not meet clinical standards…. So-called abortion "reversal" procedures are unproven and unethical."), the information mandated by S.B. 155 must instead be considered compelled ideological speech, *see AMA*, 2019 WL 4280584, at *12 (finding that North Dakota's similar medication abortion reversal law constituted an ideological speech mandate). Such compelled ideological speech mandates are rarely, if ever, constitutional. Certainly, here, there is no state interest sufficiently compelling to justify forcing doctors to inform their patients about an untested and experimental procedure. As noted below, this mandate neither advances an interest in women's health nor does it protect potential life.

Even under the less demanding standard applied to physician speech mandates in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), S.B. 155 is unconstitutional. *Casey* dealt with a state requirement that physicians provide information before an abortion that was objectively true and not misleading, such as the nature of the procedure, the risks associated with abortion and with childbirth, and the probable gestational age of the fetus. *Id.* at 881. In that case, the Court held that such information could be required, as long as it was relevant, truthful, and not misleading. Since the information mandated by S.B. 155 is scientifically unproven, it is at least misleading, and more likely blatantly false. *AMA*, 2019 WL 4280584, at *11. As the federal court in North Dakota noted, the American College of Obstetricians and Gynecologists considers the only studies supporting the so-called "reversal" protocol to constitute "junk science," and experts

have noted that the protocol is "experimental and unsupported by scientific evidence." *Id.* Forcing doctors to give this information to women in a medical setting incorrectly and misleadingly suggests that it is a medically supported intervention that a doctor may ethically recommend to the patient. *Id.*

Second, S.B. 155 imposes an "undue burden" on women's abortion rights. Under the U.S. Supreme Court's landmark decision in *Whole Woman's Health v. Hellerstedt*, 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. The supposed "reversal" regimen is untested and unproven. As the federal court in North Dakota found, "the 'abortion reversal' protocol is devoid of scientific support, misleading, and untrue." *Am. Med. Ass'n*, 2019 WL 4280584, at *11. There is "no real, serious debate within the medical profession" about this. *Id.* at *12; *see also* Am. Coll. of Obstetricians & Gynecol., *Facts Are Important*. Nor does S.B. 155 promote the state's interest in potential life, since there is no evidence that the abortion "reversal" regimen actually works. Moreover, it stands to reason that women would be *more* likely, not *less* likely, to proceed with a medication abortion if they are told in every case that the procedure may be reversible. This would undermine rather than promote any purported state interest in potential life.

In the total absence of any medical or other benefit, even a minimal burden on abortion access is enough to render the law unconstitutional. Here, the burden is more than minimal, as it requires patients to be informed about an experimental and untested abortion "reversal" procedure. If women seek out this procedure, they may suffer risks to their health. Moreover, by imposing an unethical speech mandate on doctors, S.B. 155 interferes with the doctor-patient relationship and undermines the trust that is essential to that relationship.

Finally, S.B. 155 is not saved from unconstitutionality by the fact that the doctor "may choose to be disassociated from the materials and may choose to comment or not comment on the materials." First, it is not clear that this language applies to the speech mandate imposed by section 2919.125(A). Even if it does, however, it does not change the fact that the law forces

doctors to speak a false, ideological message to their patients, in violation of the First Amendment and the undue burden standard.

For all of these reasons, among others, S.B. 155 is clearly unconstitutional under existing precedent. I therefore oppose this legislation.