

MEMORANDUM
May 25, 2016

To: Democratic Members of the Select Investigative Panel
From: Select Investigative Panel Democratic Staff
Re: Status Report

This memo serves as a status update on the Select Investigative Panel, created by House Republicans after three House Committees had already investigated the inflammatory video allegations of anti-abortion extremists and found no wrongdoing. Democrats voted overwhelmingly against creation of the Panel and have asked several times for Speaker Ryan to disband it.

From the outset, this investigation has not been an objective, fact-based inquiry for the truth, but a political weapon to punish women, their doctors, and researchers. Its entire pretext – the fraudulent videos created by anti-abortion extremist David Daleiden and his associates – has been thoroughly discredited. Yet instead of relying on actual documents or facts provided to the Panel over the past several months, Republicans continue to rely on Daleiden and other anti-abortion extremists while creating misleading “exhibits” for use at public hearings and suppressing facts that disprove their inflammatory allegations.

Despite the Chair’s false public claims of widespread non-compliance, thousands of pages of documents have been submitted to the Panel by universities, clinics, and companies. These materials indicate that costs related to fetal tissue donation remain consistent with the Government Accountability Office’s reporting from sixteen years ago and provide no evidence of the unlawful sale of fetal tissue. Republicans are engaged in a dangerous campaign that is wasting taxpayer dollars and putting life-saving research and health care at risk.

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I. NOT A FAIR OR FACT-BASED INVESTIGATION

a. Select Panel Republicans are engaged in a McCarthyesque demand to “name names.”

Over the course of this investigation, Chair Blackburn has issued sweeping demands to universities, academic research institutions, and clinics. She has sought years of invoices, banking records, and other materials. She has also demanded the names of researchers, students, laboratory or clinic personnel, and doctors involved in fetal tissue research or reproductive health care over the past six years.

These entities have worked diligently to respond to the Chair’s demands. They have turned over thousands of pages of documents and answered key questions about their fetal tissue donation programs. The only thing that they have been reluctant to provide is the names of individuals who work in their labs and clinics. As they have explained, identifying anyone in connection with this investigation puts them in danger. These entities, and Democrats on the Panel, have asked Chair Blackburn to explain why amassing a sweeping database of names is necessary and how the names that she seeks are pertinent to her investigation.

Chair Blackburn has repeatedly refused to explain why she needs a database of names. During the Panel’s first hearing, she had the following exchange with Representative Jerrold Nadler:

Rep. Nadler: “Madam Chair, will you explain how the names of individual medical or graduate students, researchers, health care providers, and clinic personnel are pertinent to this investigation?”

Chair Blackburn: “No, sir, I am not going to do that.”¹

Congress’s broad authority to seek information is not unlimited. Members have an obligation to explain what they are investigating and how the information that they seek furthers an authorized investigation. “To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.”²

While steadfastly refusing to explain how her demand for names is pertinent to any legitimate investigative aim, Chair Blackburn has stated publicly that the Panel will “act responsibly with each and every name.”³ Yet just two days before the Panel’s first deposition, Republicans reneged on their public and private promises to protect individual privacy and security. After initially ensuring the Panel’s first deponent that they would put procedures in place to protect her and others that she might be asked to identify, they then confirmed that:

¹ *Bioethics and Fetal Tissue: Hearing Before the Select Investigative Panel of the Comm. on Energy and Commerce*, 114th Cong. (Mar. 2, 2016).

² *Watkins v. United States*, 354 U.S. 178, 215 (1957) (setting aside criminal conviction for contempt of Congress for refusal to “name names” when subpoenaed to appear before the Subcommittee of the House Committee on Un-American Activities).

³ Kelsey Harkness, *Here’s Why Republicans Are Demanding Names in Fetal Tissue Probe*, THE DAILY SIGNAL (Apr. 6, 2016).

“We will not assure that [the deponent’s] name or any of the other names used in the deposition will remain private.”⁴

This refusal stands in stark contrast to the assurance on the Republicans’ website, which promises whistleblowers that “any personal information that you provide us will be kept in strict confidence.”⁵ Apparently Republicans will protect individuals who provide information that might support the Republicans’ preferred partisan narratives, but deny this same protection to individuals who perform life-saving research and health care.

Since abortion became legal in this country, doctors and patients have been murdered, clinics have been vandalized, and ongoing threats have put doctors and their families in fear for their safety. One of the individuals targeted by the Chair in this investigation already received graphic death threats after being identified in Daleiden’s false videos.⁶ The gunman who killed three people, injured nine others, and terrorized patients and providers at a Planned Parenthood clinic last November echoed nearly identical words as those used by Chair Blackburn and others in connection with this investigation.⁷ Federal Judge William H. Orrick blocked further release of the fraudulent videos in light of the increased harassment, including death threats, against individuals identified in those videos.⁸

Congress should not target individuals or organizations as possible subjects of investigation without a legitimate basis for doing so. None exists here. The demand that people appear, knowing that they may be named publicly and asked to name others, is reminiscent of Senator Joe McCarthy, whose bullying behavior ultimately resulted in censure by the Senate but not before he damaged many American’s lives and careers. As Representative Jerrold Nadler noted at the Panel’s second hearing: “this committee is worse than the McCarthy investigation because McCarthy endangered people’s jobs. This committee is knowingly endangering people’s lives. . . .”⁹

⁴ Letter from Jessica Hertz and Mary Ellen Callahan, Jenner & Block, to Hon. Marsha Blackburn, Chair, Select Investigative Panel of the Committee on Energy and Commerce (Apr. 25, 2016).

⁵ THE ENERGY AND COMMERCE COMMITTEE, SELECT INVESTIGATIVE PANEL, <https://energycommerce.house.gov/select-investigative-panel> (last visited May 24, 2016).

⁶ Jessica Glenza, *Man charged for online violent threats against company over Planned Parenthood fetal tissue*, THE GUARDIAN (Dec. 17, 2015); U.S. Dept. of Justice, *Washington Man Pleads Guilty to Sending Death Threats* (Apr. 19, 2016).

⁷ Richard Fausset, *Suspect in Colorado Planned Parenthood Rampage Declares ‘I’m Guilty’ in Court*, NY TIMES (Dec. 9, 2016).

⁸ Nat’l Abortion Fed’n v. Ctr. for Med. Progress, No. 15-cv-03522-WHO, 2016 U.S. Dist. LEXIS14485 at *69-70 (N.D. Cal. Feb. 5, 2016) (granting motion for preliminary injunction).

⁹ *Pricing of Fetal Tissue: Hearing Before the Select Investigative Panel of the Comm. on Energy and Commerce*, 114th Cong. (Apr. 20, 2016).

b. Select Panel Republicans are manufacturing “exhibits” and suppressing facts that contradict their inflammatory allegations.

Even knowing that Daleiden’s video allegations have proved false, Panel Republicans continue to invoke the videos to justify their investigation and use information that appears to come directly from Daleiden or other anti-abortion extremists. Panel Democrats sent Chair Blackburn a letter on April 7, 2016, raising this concern and seeking access to the “documentation” that at least one anti-abortion group publicly claims to have sent to the Panel.¹⁰ The Chair failed to respond and her staff refused to provide these materials. Republicans subsequently used documents withheld from Democrats to question witnesses in public hearings and during depositions.

Republicans have also manufactured misleading “exhibits” for use at public hearings. Two days before the Panel’s April 20, 2016 hearing, Republicans distributed their packet of “exhibits” to hearing witnesses, Democratic Members of the Panel, and the press. Republican staff told Democrats that many of the documents had come from StemExpress, a tissue procurement business identified in the Daleiden videos and targeted by the Chair in her investigation. However, when asked by Democrats, Republicans refused to transmit the packet to StemExpress for verification and comment. Because Republicans refused, Democrats sent the documents to StemExpress for comment and copied Republicans on that transmittal.

In a letter submitted the next day – and before the public hearing – StemExpress notified the Panel that some of the documents could not be authenticated and appeared to have come “directly from Mr. Daleiden and/or his associates.”¹¹ The company also advised the Panel that several of the “exhibits” created by majority staff were misleading, inaccurate or lacking evidentiary support. As the company explained:

“Several of the proposed exhibits appear to force the Majority’s views into the record in a way that we have never seen in any government investigation in the House, Senate, or across dozens of federal and state jurisdictions around the United States.”¹²

The company asked the Republicans to consider “rescinding or revising its exhibits to avoid reliance on questionable documents that could easily be vetted with StemExpress personnel, several of whom have been offered up for depositions or issued subpoenas by the Select Panel.”¹³ In fact, the company had offered more than a month earlier to have its procurement director explain the company’s fetal tissue procurement process and answer the Panel’s questions. The Republicans refusal to hear from StemExpress and their effort to deny StemExpress the opportunity to verify and respond to their “exhibits” raises troubling questions about the integrity of this investigation.

¹⁰ Letter to Hon. Marsha Blackburn from Select Panel Democrats (April 7, 2016).

¹¹ Letter from Amandeep S. Sidhu, McDermott Will & Emery to Hon. Marsha Blackburn and Hon. Jan Schakowsky *Re: Call for Withdrawal or Amendment of Proposed Exhibits for April 20, 2016 Hearing on ‘The Pricing of Fetal Tissue’* (Apr. 19, 2016).

¹² *Id.* at 4.

¹³ *Id.* at 1.

On notice about the severe flaws in their “exhibits” – including the fact that some likely came from Mr. Daleiden, who is now under indictment in Texas and whose home has been the subject of a court-ordered search in California – Republicans nonetheless used the documents in the public hearing as alleged evidence of wrongdoing. They did so while refusing to respond to questions from Democrats about the sourcing and evidentiary foundation for their staff-created “exhibits,” and after a party-line vote against the Democrats’ motion to prevent use of these misleading and unverified materials. But even those manufactured and misleading “exhibits,” do not support the Republican’s inflammatory claims of criminal misconduct. For example:

- Republicans used a staff-created chart titled “Who Bears the Reasonable Cost of Tissue Procurement” to allege that abortion clinics have no costs related to fetal tissue donation so any payments from a tissue procurement organizations “are pure profit.”¹⁴ The claim that clinics have “no costs” was contradicted by other Republican exhibits showing that some clinics obtain consent, draw blood, and manage paperwork and other administrative tasks related to fetal tissue donation.
- Republicans used a StemExpress brochure as alleged evidence that the company markets fetal tissue donation as a profit-making partnership. That brochure was used “by StemExpress with hospitals and clinics involved in the broad spectrum of work that the company supports related to adult blood, adult tissue, biopsies, etc. – *not only fetal tissue donation.*”¹⁵ These additional services are not subject to the federal law banning profit related to fetal tissue donation, undermining any claim that the company is marketing fetal tissue donation as a money-making venture.
- Republican staff created a bar graph titled “Procurement Business’ Clinic Growth Strategy,” which purported to show a dramatic increase in partnerships with abortion clinics, from approximately 10 in 2010 to more than 250 in 2016. As confirmed by documents produced to the Panel, “[i]n reality, StemExpress has partnered with no more than a dozen clinics for fetal tissue donation at any point between 2010 and 2015. . . .”¹⁶

c. Chair Blackburn is violating House rules.

In addition to refusing to provide any explanation of what she is investigating and why, Chair Blackburn’s day-to-day operation of the Panel’s investigation violates longstanding rules and practice of the House and its committees. Chair Blackburn has denied Democrats access to the Panel’s records and files,¹⁷ refused to identify the source or foundation for materials used in public hearings, and violated House deposition rules designed to ensure that witnesses brought before Congress are treated in a fair and professional manner.¹⁸

¹⁴ *Pricing of Fetal Tissue: Hearing Before the Select Investigative Panel of the Comm. on Energy and Commerce*, 114th Cong. (Apr. 20, 2016) (“Exhibit G”).

¹⁵ Letter from Amandeep Sidhu, McDermott Will & Emery, to Chairman Blackburn and Ranking Member Schakowsky *Re: Call for Withdrawal or Amendment of Proposed Exhibits for April 20, 2016 Hearing on ‘The Pricing of Fetal Tissue’* (Apr. 19, 2016).

¹⁶ *Id.*

¹⁷ HOUSE RULE XI 2(e)(2)(A) and 9(g) (114th Cong.).

¹⁸ 114 CONG. REC. E21 (daily ed. Jan. 7, 2015) (extension of remarks of Rep. Sessions).

Chair Blackburn has also abused congressional subpoena authority – the most powerful investigative tool of Congress – by issuing thirty-six unilateral subpoenas in violation of the Panel’s authorizing resolution and rules of the House Energy and Commerce Committee. Those rules require notice *and* consultation with the Ranking Member at least seventy-two hours before a subpoena can issue.¹⁹ While Chair Blackburn has told Ranking Member Schakowsky that she is issuing subpoenas, she has refused to identify all of the entities or individuals to be served, refused to provide copies of subpoenas in advance of service, and refused to discuss these subpoenas with the Ranking Member. Without adequate notice and no consultation, the Chair has now issued thirty-six unilateral subpoenas. The overwhelming majority – *thirty of her thirty-six* – have been served on individuals or entities whose first contact with the Panel was service of a subpoena.

Having refused to afford entities the opportunity to comply voluntarily, the Chair has made false public claims of widespread non-compliance to justify her abuse of congressional subpoena authority and has unjustly portrayed individuals and entities as “clearly rattled with basic facts coming to light” and resistant to “letting all the facts come out.”²⁰ In fact, the Panel has received more than 19,000 pages of documents over the course of this investigation, along with answers to questions posed by the Chair.

Through H.Res. 461, the Republican Majority unfortunately gave Chair Blackburn unilateral subpoena authority; it did not grant her the power to exercise that authority in blatant disregard of House and committee rules and practice. Chair Blackburn’s “secret” subpoenas – issued without the required notice or consultation, and without any effort to obtain voluntary cooperation – do not reflect the values of the House and violate its longstanding rules and practice.

d. Republicans still refuse to put David Daleiden and his associates under oath.

Congress has known for months that the pretext of this entire investigation – the deceptively-edited videos created by David Daleiden and the Center for Medical Progress (CMP) – is not factually accurate. Those videos do not show the unlawful sale of fetal tissue. In fact, they do not show anyone, other than the makers of the videos, doing anything unlawful.

The evidence debunking the Daleiden videos is overwhelming:

- In August 2015, and after reviewing the so-called “full footage,” forensic experts concluded that the videos “cannot be relied upon for any official inquires” and that even the underlying transcripts are “useless as ‘evidence’” because they contain “numerous errors, discrepancies, and omissions.”²¹

¹⁹ H.Res. 461, 114th Cong. § 4(1) (2015) (enacted); RULES OF THE H. COMM. ON ENERGY AND COMMERCE, RULE 16 (114th Cong.).

²⁰ THE ENERGY AND COMMERCE COMMITTEE, SELECT INVESTIGATIVE PANEL, *Select Investigative Panel Issues 12 New Subpoenas to Fetal Tissue Procurement Organizations* (Mar. 30, 2016).

²¹ Fusion GPS, *Analysis of Center for Medical Progress Videos* (Aug. 25, 2015). Planned Parenthood submitted this analysis as part of the Energy and Commerce Committee’s investigation last year.

- Twelve states have investigated Daleiden’s inflammatory allegations and cleared Planned Parenthood of wrongdoing. Those states are: Florida, Georgia, Indiana, Kansas, Massachusetts, Michigan, Missouri, Nevada, Ohio, Pennsylvania, South Dakota, and Washington.
- In January 2016, a Texas grand jury tasked by Republican lawmakers to investigate Planned Parenthood instead indicted Daleiden and one of his associates for their efforts to entrap Planned Parenthood through their fraudulent video scheme.
- Just two weeks later, federal Judge William H. Orrick’s concluded that the videos were fraudulent and provided no evidence of wrongdoing by health care providers: “Having reviewed the records or transcripts in full and in context, I find that no [National Abortion Federation] attendee admitted to engaging in, agreed to engage in, or expressed interest in engaging in potentially illegal sale of fetal tissue for profit.”²²
- In April 2016, investigators with the California Department of Justice raided Daleiden’s home, seizing a laptop and multiple hard drives.²³

Remarkably, while Republicans have now issued subpoenas compelling the appearances of doctors and researchers without any apparent legitimate basis for doing so, they have steadfastly refused to obtain sworn testimony from Daleiden and his associates. In fact, not one of the four Republican-led House committees investigating his inflammatory allegations have compelled his testimony. As a witness at the Select Panel’s April 20, 2016 hearing told the Panel:

As we know, when Mr. Daleiden went under oath before a grand jury, which was demanded by an openly anti-abortion lieutenant governor to investigate Planned Parenthood, the Texas grand jury not only exonerated Planned Parenthood, it indicted Mr. Daleiden.

We also know that a federal judge, the Honorable William Orrick of the United States District Court for the Northern District of California, enjoined Mr. Daleiden from releasing additional heavily doctored videos because viewing all the footage in context – as Judge Orrick did – revealed Daleiden’s edited versions were “fraudulent.” . . .

Any investigation worthy of the name would begin with taking sworn testimony from Mr. Daleiden, Ms. O’Donnell, and their associates.²⁴

²² Nat’l Abortion Fed’n v. Ctr. for Med. Progress, No. 15-cv-03522-WHO, 2016 U.S. Dist. LEXIS14485 at *28-29 (N.D. Cal. Feb. 5, 2016) (granting motion for preliminary injunction).

²³ Sandhya Somashekhar, *California authorities raid home of anti-Planned Parenthood videographer*, WASH. POST (Apr. 5, 2016).

²⁴ *Hearing on ‘The Pricing of Fetal Tissue’ before the Select Investigative Panel of the Comm. on Energy and Commerce*, 114 Cong. (Apr. 20, 2016).

Select Panel Democrats have asked Chair Blackburn to bring Daleiden and his associates for questioning under oath.²⁵ Thus far, she has refused. Until and unless this Panel does so, this investigation should be terminated.

II. NO EVIDENCE OF WRONGDOING

Despite the lack of any credible or objective evidence of unlawful profit, Republicans continue to claim that the fraudulent Daleiden videos raised “troubling questions” about whether clinics and tissue procurement organizations are charging and receiving money in excess of permissible costs.²⁶ Three House Committees investigated these allegations and found no evidence to support these claims. Seven months and thousands of documents later, neither has the Select Panel.

a. No wrongdoing by clinics or researchers.

With regard to the university and the clinic subject to unilateral subpoenas from Chair Blackburn, the Panel has known since late January that the clinic receives no money – not even for expenses as expressly permitted by law – related to fetal tissue that is donated to university researchers. This information was provided voluntarily, before the Chair issued her subpoenas and falsely declared that these entities had failed to cooperate in her investigation.

Documents received from other clinics similarly show that many do not accept reimbursement for expenses related to fetal tissue donation. This means that these health care providers receive no payment – not even for their expenses as expressly permitted by law – when a woman chooses to donate tissue for research purposes.

Other clinics recover amounts similar to the costs identified by the Government Accountability Office (GAO) sixteen years ago.²⁷ In its study of the acquisition of fetal tissue for biomedical research, the GAO reported in October 2000 that researchers paid fees per sample to health clinics ranging between \$2 and \$75 dollars. Researchers had “additional expenses for transporting, processing, preserving, storing, and ensuring the quality of human fetal tissue specimens, even if they paid nothing to acquire the tissue.”²⁸ These additional costs included:

[C]osts associated with transporting tissue samples from the supplier to the researcher by any means, including by personal delivery or commercial shipping company, and shipping supplies such as sample containers or sterile media provided by the researcher. Other direct costs include renting space at a

²⁵ See, e.g., DEMOCRATS ON THE SELECT INVESTIGATIVE PANEL OF THE ENERGY AND COMMERCE COMMITTEE, *Democrats Call for Sworn Testimony of Creators of Deceptively-Edited Videos* (Apr. 21, 2016). Democrats also asked for examination of Daleiden and his claims as part of their proposed investigative plan, provided to Chair Blackburn on February 11, 2016. Letter to Hon. Marsha Blackburn from Select Panel Democrats (February 11, 2016).

²⁶ Letter to StemExpress from Hon. Marsha Blackburn (Apr. 28, 2016).

²⁷ U.S. Government Accountability Office, Letter to Sens. Arlen Specter, Tom Harkin, and Bob Smith, Human Fetal Tissue: Acquisition for Federally Funded Biomedical Research (Oct. 4, 2000).

²⁸ *Id.* at 6.

supplier’s facility, in-kind services or donations of staff time or supplies to the tissue supplier, and any other financial considerations as a result of acquiring fetal tissue that they would not have otherwise, such as equipment for storing the tissue.²⁹

Overall, the GAO found that “federal human fetal tissue procurement policies and guidance are consistent with federal law.”³⁰ It also noted that review boards at research institutions play the primary role in ensuring that fetal tissue procurement complies with federal, state, and local laws.

Far from profiting through the “sale” of fetal tissue, the documents received by the Panel so far demonstrate that health clinics are most likely losing money in connection with fetal tissue donation programs. This is not what Congress intended when it passed a law that expressly permits reimbursement for costs. These clinics should not have to operate at a loss in order to facilitate fetal tissue donation. The fact that, even when they do, Republican lawmakers make inflammatory and baseless claims of unlawful profiteering is further evidence that this is not an objective or fact-based search for the truth.

b. Republicans have ignored the facts provided by tissue procurement companies.

Not surprisingly, the Chair has targeted the same company (StemExpress) that received the most attention in the Daleiden videos. That company has already produced more than 1,500 pages of documents to the Panel and has offered witnesses to explain its tissue procurement process and answer the Panel’s questions. However, and as described above, Chair Blackburn refused this offer, electing instead to hold a public hearing and asking witnesses to speculate about possible criminal misconduct based on staff-created “exhibits” that Republicans refused to provide to StemExpress.

Prior to the hearing, StemExpress submitted two letters on April 19 to the Panel, the first of which addressed “gross inaccuracies, manipulation of evidence, and misstatement of facts” contained in the Republicans’ hearing “exhibits.”³¹ The company also detailed its business structure and pricing of fetal tissue, explaining that – once costs were balanced against revenue – the company has lost money providing fetal tissue to researchers:

The majority of StemExpress’s business involves isolating and purifying cells derived from donated tissue and blood. An exceedingly small portion of the company’s revenue is derived from the provision of fetal tissue. For example, over the past several years revenue derived from fetal tissue has constituted roughly 1% of the company’s total revenue before accounting for costs and expenses. Taking into account these costs and expenses, StemExpress operated in the red providing fetal tissue The financial impact of these

²⁹ *Id.*, n. 10.

³⁰ *Id.* at 2.

³¹ Letter from Amandeep S. Sidhu, McDermott Will & Emery to Hon. Marsha Blackburn and Hon. Jan Schakowsky *Re: Call for Withdrawal or Amendment of Proposed Exhibits for April 20, 2016 Hearing on ‘The Pricing of Fetal Tissue’* (Apr. 19, 2016).

substantial costs is a two-year loss estimated at \$20,205 on providing fetal tissue to clients Stem Express has always supported fetal tissue at a financial loss.³²

Republicans nonetheless used their “exhibits” in their April 20 public hearing to accuse the company and others of possible criminal misconduct related to fetal tissue donation. Then, shortly after the hearing, the Chair issued a series of press releases, once again falsely claiming that StemExpress had failed to produce information requested by the Panel and issuing another round of subpoenas for accounting and banking records.³³ Those subpoenas – sent to a commercial bank (Five Star Bancorp) and an accounting firm (Scinto Group LLP) –demand *all* documents related to StemExpress, not just those related to fetal tissue services, which the company has explained comprise only about one percent of its overall revenue. These sweeping demands go well beyond the permissible scope of this investigation; they also raise significant and troubling privacy concerns by failing to exclude personal financial or otherwise identifiable information. The company responded with a detailed six-page letter and sixteen-page production log rebutting Chair Blackburn’s claims of non-compliance, and questioning the legitimacy of the Republicans’ requests. As the company explained:

StemExpress remains committed to responding to the Select Panel’s inquiries, but respectfully implores the Chairman and the leadership of the Majority party to restore a sense of order and decency to this investigation. . . . [T]he ever-shifting prerogative of the Majority staff, including renegeing on explicit agreements reached during the course of the investigation, and the recent foray into law enforcement by the Majority members on the Select Panel, all raises serious questions about the purpose and legitimacy of this investigation.³⁴

So far, Republicans have refused to narrow or explain their overbroad, invasive demands.

³² See Letter from Amandeep Sidhu, McDermott Will & Emery to Hon. Marsha Blackburn and Hon. Jan Schakowsky *Re: StemExpress Statement Regarding Select Investigative Panel and April 20, 2016 Hearing on “The Pricing of Fetal Tissue”* (Apr. 19, 2016).

³³ THE ENERGY AND COMMERCE COMMITTEE, SELECT INVESTIGATIVE PANEL, *Democrat Witness Says StemExpress Should Turn Over Accounting Records* (Apr. 20, 2016); THE ENERGY AND COMMERCE COMMITTEE, SELECT INVESTIGATIVE PANEL, *Blackburn to Cate Dyer: Turn Over StemExpress Documents* (May 2, 2016); THE ENERGY AND COMMERCE COMMITTEE, SELECT INVESTIGATIVE PANEL, *Select Investigative Panel Issues Subpoenas for StemExpress Accounting & Banking Records* (May 5, 2016).

³⁴ Letter from Amandeep S. Sidhu, McDermott Will & Emory to Hon. Marsha Blackburn and Hon. Jan Schakowsky *Re: StemExpress Response to Chairman Blackburn’s April 28 Letter to StemExpress* (May 6, 2016).

c. Republicans have no legitimate reason for continuing this investigation.

Panel Republicans repeatedly assert that it is their duty to investigate the claims of anti-abortion extremist David Daleiden to determine whether 42 U.S.C. § 289g – the law passed by Congress in 1993 that already prohibits the sale of fetal tissue for profit – has been broken. They are wrong. That responsibility lies squarely with the executive branch, not the Congress.

Republicans have already asked the Department of Justice to investigate. In fact, they did so last July, immediately after Daleiden’s inflammatory videos were released.³⁵ Attorney General Loretta Lynch responded that the Department would “review all the information and determine what steps, if any, to take.”³⁶ Of course, the Texas lieutenant governor’s similar demand for investigation did not turn out as he expected when the grand jury exonerated Planned Parenthood and indicted Daleiden instead.

Undeterred by these facts, Republicans claim that they have documents – invoices, inventory logs, email requests from researchers, and agreements between clinics and researchers – that prove the need for continued congressional inquiry. As discussed above, these documents and other Republican-created “exhibits” do not support their inflammatory claims. Congress expressly allowed reimbursement for costs associated with fetal tissue donation in 42 U.S.C. §289g-2(e)(3), which means that these documents may merely reflect lawful, reimbursable costs. But instead of getting the explanation and facts directly from the tissue procurement organizations – something that StemExpress offered months ago – Republicans prefer to continue spinning their own sensational narrative as to what these documents mean.

Sixteen years ago, Republican Members of the Subcommittee on Health and Environment of the House Commerce Committee used similar materials in a hearing into the alleged unlawful sale of fetal tissue. That hearing collapsed when the Republicans’ star witness admitted that he had lied during a videotaped interview with an anti-abortion group.³⁷ Then, as now, Republicans used documents – for example, a “fee for service schedule” showing amounts charged for types of tissue, “transaction logs” with charges for tissue on particular dates, and agreements between providers and procurement organizations – as evidence of criminal misconduct.³⁸ After thorough investigation, however, the Department of Justice determined that no laws had been broken.³⁹

This time around, three House Committees, twelve states, and a Texas grand jury have already investigated the current allegations of illegal profit. The only wrongdoing that has been uncovered is that of video maker David Daleiden and his associates. Republicans have provided no legitimate basis for continuing this investigation, and should stop putting life-saving research and health care at risk.

³⁵ Letter from Hon. Mike Lee et. al. to Hon. Loretta Lynch, Attorney General and Hon. Sylvia Mathews Burwell, Secretary of the Department of Health and Human Services (July 21, 2015).

³⁶ Reena Flores, *DOJ to review Planned Parenthood videos*, CBS NEWS (July 23, 2015).

³⁷ *Fetal Tissue: Is it Being Sold in Violation of Federal Law: Hearing Before the Subcomm. on Health and the Env’t of the H. Comm. on Commerce*, 106th Cong. 2 (2000).

³⁸ *Id.*

³⁹ *FBI ends investigation into fetal tissue marketing*, ASSOCIATED PRESS (Sep. 2, 2001).

III. REPUBLICANS ARE THREATENING LIFE-SAVING RESEARCH

In 1993, Congress voted on an overwhelmingly bipartisan basis – 93 to 4 in the Senate and 290 to 130 in the House – to lift the ban on federal funding for fetal tissue research put in place five years earlier.⁴⁰ Back then, many leading Republicans spoke passionately about the value of this research and urged their colleagues to join them in voting for the NIH Revitalization Act of 1993.⁴¹ Modeled on the National Organ Transplant Act, the NIH Revitalization Act provisions on fetal tissue donation mirror guidelines for adult organ donation. Both laws prohibit the transfer of fetal tissue for “valuable consideration” but expressly allow reimbursement for costs associated with donation.⁴²

This investigation, like those before it, has turned up no evidence of unlawful profit related to fetal tissue donation. Nonetheless, Chair Blackburn has attacked the need for and value of fetal tissue research. She has challenged leading research associations and academic institutions to prove how fetal tissue research has furthered our understanding of diseases or led to cures or treatments. Chair Blackburn appears determined to bring a halt to fetal tissue research in this country.

As the Panel has repeatedly heard, however, virtually every single American has benefitted from fetal tissue research and millions more could be helped by ongoing research. The Department of Health and Human Services (HHS) and other leading doctors, scientists, and academic institutions have confirmed the need and value of this work. HHS even highlighted for the panel – titled by Chair Blackburn the “select panel on infant lives” – how this research has enhanced our understanding of fetal and maternal development:

Human fetal tissue is critical for understanding how typical fetal development occurs and addressing diseases and conditions that affect the health of developing infants. For example, scientists are using fetal tissue to study the immune systems of the fetus and mother, and any incompatibilities arising due to infection or inflammation that may lead to rejection, miscarriage, or preterm birth. Fetal tissue is being used to identify biomarkers in maternal blood serum to help predict early pregnancy loss and allow for possible interventions to prevent such events. Additionally, fetal tissue is also being used to study the

⁴⁰ National Institutes of Health Revitalization Act of 1993, Roll Call Votes, S.1, 103d Congress (1993), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00015; <http://clerk.house.gov/evs/1993/roll178.xml> (other current Senators who also voted for the bill include Sens. Coats (R-IN), Cochran (R-MS), Grassley (IA), Hatch (UT), McCain (AZ) and Shelby (AL). Representative Lamar Smith (R-TX) also voted in favor of the legislation).

⁴¹ See, e.g., DEMOCRATS ON THE SELECT INVESTIGATIVE PANEL OF THE ENERGY AND COMMERCE COMMITTEE, <https://selectpaneldems-energycommerce.house.gov/our-work/benefits-fetal-tissue-research> (last visited May 16, 2016) (statements of Senators Bob Dole (R-KS) and Strom Thurmond (R-SC) and Representative John Porter (R-IL)).

⁴² National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 42 U.S.C. § 289g–2 (1993); National Organ Transplant Act, Pub. L. No. 98-507, 42 U.S.C. §274e (1984).

origin and genetic roots of structural birth defects that are the leading cause of infant deaths.⁴³

The Select Panel is putting this type of life-saving research at risk. At the Panel's first hearing, for example, the only research scientist invited to testify highlighted the real-world consequences of Republican investigations and attacks on fetal tissue research:

Ms. DelBene. And do you think the political climate can have a chilling effect on scientific research going forward if that continues?

Mr. Goldstein. It is already having it.

Ms. DelBene. It is already having it. In what way are you seeing that today?

Mr. Goldstein. So, there is another project that I am involved with that is basically seeing a supply of fetal material dry up completely and it was a very promising therapy for MS [multiple sclerosis].⁴⁴

Extensive press reporting substantiates what the Panel has heard directly about the risk to this type of life-saving work, including efforts to understand and find a possible cure for the Zika virus. Many scientists worry that this investigation “could hamper essential research on the Zika virus,”⁴⁵ and that this and state-level actions “are becoming roadblocks to the research needed to combat Zika.”⁴⁶ Despite Chair Blackburn's claims that Democrats are “exaggerating” its importance, key studies have relied heavily on fetal tissue to increase our understanding of this virus.⁴⁷ The threat to this, and other potentially life-saving research, should be stopped.

The Panel has also heard directly from universities, associations, and academic institutions who have confirmed that “[m]any scientists and physicians are deeply concerned for their safety and that of their patients, colleagues, and students in light of inflammatory statements and reports surrounding fetal tissue donation.”⁴⁸ Many have objected to the Chair's demand for a database of names, stating that they “are troubled by the practice of issuing subpoenas that would risk making public the names of researchers, students and others involved in fetal tissue research.”⁴⁹

⁴³ Letter from Jim R. Esquea, Assistant Secretary for Legislation, Department of Health and Human Services to Hon. Jan Schakowsky (Apr. 6, 2016).

⁴⁴ *Bioethics and Fetal Tissue: Hearing Before the Select Investigative Panel of the Comm. on Energy and Commerce*, 114th Cong. (Mar. 2, 2016).

⁴⁵ Erika Check Hayden, *Zika highlights role of fetal-tissue research*, NATURE (Apr. 7, 2016).

⁴⁶ Brett Norman, *Slew of anti-abortion laws may thwart Zika research*, POLITICO (Mar. 27, 2016).

⁴⁷ See Jernej Mlakar et. al, *Zika Virus Associated with Microcephaly*, THE NEW ENGLAND JOURNAL OF MEDICINE (Mar. 10, 2016).

⁴⁸ Letter from the American Association for the Advancement of Sciences to Hon. Marsha Blackburn and Hon. Jan Schakowsky (Mar. 15, 2016).

⁴⁹ Letter from the Association of American Medical Colleges, Association of American Universities, and Association of Public and Land-grant Universities to Hon. Marsha Blackburn and Hon. Jan Schakowsky (Mar. 31, 2016).

IV. CONCLUSION

Doctors and clinic staff who provide reproductive health care in this country are at grave risk. Their workplaces are picketed and bombed, they and their families are targeted on web sites and receive harassing mail and phone calls, and some have been murdered. Scientists conducting life-saving research have also been the targets of threats and harassment, particularly since the July 2015 release of the fraudulent videos alleging unlawful sale of fetal tissue.

House and Senate Democrats have asked several times for Speaker Ryan to disband the Select Panel. Witnesses called to appear before the Panel have also sought assistance from the Speaker and other Republican leaders in an effort to curb Panel Republicans' dangerous abuse of congressional authority.⁵⁰ Those requests have been refused or met with deafening silence.

Six months and nearly 20,000 pages of documents later, there still is no evidence to support the inflammatory allegations of anti-abortion extremists and their allies in Congress. Republicans have offered no legitimate reason for continuing this investigation, which is putting lives, life-saving research, health care at risk, and wasting taxpayer dollars.

⁵⁰ See, e.g., Letter from Jessica Hertz and Mary Ellen Callahan, Jenner & Block, to Hon. Fred Upton, Chairman, Committee on Energy and Commerce (Apr. 28, 2016); Letter from Jessica Hertz and Mary Ellen Callahan, Jenner & Block, to Hon. Paul Ryan, Speaker of the House of Representatives (May 3, 2016).