

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641

July 12, 2016

The Honorable Hector H. Balderas, Jr.
Attorney General of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501

Dear Attorney General Balderas:

We write to express our disagreement with the June 23, 2016 letter sent by Representative Marsha Blackburn, Chair of the Select Investigative Panel of the Committee on Energy and Commerce of the U.S. House of Representatives (“Select Panel”). That letter was not shared with the Democratic Members of the Select Panel before it was sent and does not reflect our views.

The Democratic Members of the Select Panel have a markedly different understanding of the facts and law regarding the relationship between the University of New Mexico (“UNM”) and Southwestern Women’s Options (“SWO”). We have seen no evidence of wrongdoing and do not support the Chair’s “criminal referral” to your office.

The vast majority of the Chair’s letter expresses displeasure that UNM provides reproductive health care and takes steps to ensure that medical residents and fellows obtain training that is mandated by various accrediting institutions. Chair Blackburn complains about private foundation funding for this training and takes issue that there is “too close” a relationship between SWO and university researchers, but not a single criminal law is implicated by these activities. While she ultimately alleges that UNM provides unlawful “valuable consideration” in exchange for fetal tissue donated by some women who receive care at SWO, sworn testimony obtained by the Panel rebuts these allegations. We are deeply troubled by her failure to mention this testimony in her referral.

The House Majority created the Select Panel in October 2015 after three House Committees – Energy and Commerce, Oversight and Government Reform, and Judiciary – already had investigated and found no evidence that fetal tissue is being sold for profit, as has

been alleged by anti-abortion activist David Daleiden and the “Center for Medical Progress” through a series of deceptively-edited videos. Thirteen states also investigated these allegations and found no wrongdoing by clinic personnel, doctors, and researchers. In fact, the only misconduct that has been uncovered is that of Mr. Daleiden, who now faces criminal charges after a Texas grand jury tasked with investigating Planned Parenthood cleared the organization and indicted him instead.

The Select Panel – like the three House and thirteen state investigations that preceded it – has similarly uncovered no evidence of the unlawful sale of fetal tissue. With specific regard to UNM and SWO, the Panel has known since January that SWO donates fetal tissue at no cost to a researcher at UNM. SWO receives no money related to that donation, not even reimbursements for expenses as expressly permitted by federal law. Chair Blackburn acknowledges this, but asserts that UNM provided various non-monetary benefits to SWO in exchange for fetal tissue and that these non-monetary benefits constituted unlawful “valuable consideration” within the meaning of 42 U.S.C. § 289g-2(a).

We do not believe that Chair Blackburn’s theory is supported by the law or the facts. As to the law, the United States Justice Department’s Office of Legal Counsel (“OLC”) concluded in 2007 that the federal prohibition on “valuable consideration” does not reach non-monetary benefits exchanged in connection with organ donation programs.¹ Providing that opinion in the context of the National Organ Transplant Act (“NOTA”), the OLC noted that the decision to use that same language in 42 U.S.C. § 289g-2 demonstrated Congress’s intent for “that text to have the same meaning in both statutes.”² It then looked to the method of calculating fines under 42 U.S.C. §289g-2(c)(2) to conclude that “‘valuable consideration’ is monetary or at least has a readily measurable pecuniary value.”³

Not only is Chair Blackburn’s theory at odds with the law, it has no support in the facts. As noted above, there is no exchange of money or anything of “readily measurable pecuniary value” when women who receive care at SWO elect to donate fetal tissue to a university researcher. Moreover, evidence obtained by the Panel, including sworn testimony from UNM and SWO, also shows that there is no non-monetary exchange related to donation of fetal tissue to UNM either. As the evidence shows:

- SWO receives no money – not even for the recovery of costs as permitted by law – when women at SWO elect to donate fetal tissue.⁴

¹ See Attachment 1, Department of Justice, Office of Legal Counsel, *Legality of Alternative Organ Donation Practices Under 42 U.S.C. §274e* (Mar. 28, 2007).

² *Id.* at 4.

³ *Id.*

⁴ Letter from UNM Counsel to Hon. Marsha Blackburn, Chair, and Hon. Jan Schakowsky, Ranking member, Select Investigative Panel (January 29, 2016) (*see* Letter from Hon. Marsha Blackburn, Chair, Select Investigative Panel to Hon. Hector H. Balderas, Jr., Attorney General of New Mexico, June 23, 2016, Attachment 24).

- SWO's supervision of medical residents and fellows benefitted UNM, not the clinic. "Teaching residents and fellows created more work for SWO doctors. It slowed down the procedures and required SWO preceptors to take more time and effort to teach and train."⁵
- The "volunteer faculty" positions held by three SWO physicians "are not only uncompensated, they are not unique at UNM. Indeed, there are approximately 1000 Volunteer Clinical Faculty throughout UNMHSC [University of New Mexico Health Sciences Center], of which the Ob-Gyn department has 58."⁶ The "benefits" outlined in the Chair's letter (at page 5 and attachment 20) are available to all volunteer faculty and "are not material inducements to provide fetal tissue."⁷
- SWO did not get insurance coverage under the New Mexico Tort Claims Act as a benefit or in exchange for fetal tissue donation. SWO "had to obtain and pay for its own insurance coverage" independent of any coverage under the New Mexico Tort Claims Act, which applies to issues arising from care provided by "UNM medical students, residents, fellows and faculty."⁸ SWO has never made a claim for coverage under UNM's state-issued insurance.⁹

Chair Blackburn also asserts that the transfer of fetal tissue from SWO to UNM "is a systematic violation of New Mexico's *Jonathan Spradling Revised Uniform Anatomical Gift Act (Spradling Act)*." Proper interpretation and enforcement of state law is beyond the jurisdiction of this Panel and the Chair cites no supporting case law, legislative history, or interpretive guidance for her claim. The Chair never raised this issue with us or with UNM or SWO. In fact, Chair Blackburn did not notify, much less afford UNM or SWO an opportunity to address her state law assertions before issuing a press release and posting the letter on the Majority's website, along with several documents that they had asked the Panel to treat as confidential.¹⁰ However, UNM has since informed the Panel that it "denies in every respect that it has done or taken any action in receiving donated fetal tissue from SWO in violation of New Mexico's version of the Uniform Anatomical Gift Act."¹¹

The Democratic Members of the Select Panel remain deeply concerned that Chair Blackburn is using the power of the Congress to chase unfounded allegations of anti-abortion extremists.¹² This latest referral follows that pattern as the claims being championed by Chair Blackburn have already been made by the New Mexico Alliance for Life, Protest ABQ, and

⁵ See Attachment 2, Letter from UNM Counsel to Hon. Marsha Blackburn, Chair, and Hon. Jan Schakowsky, Ranking Member, Select Investigative Panel (June 27, 2016).

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.* at 3-4.

⁹ *Id.* at 3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 1-2.

¹² See Letter from Select Investigative Panel Democrats to Hon. Marsha Blackburn, Chair, Select Investigative Panel (April 7, 2016).

others.¹³ Chair Blackburn used her unilateral subpoena authority to investigate the claims of these groups. She then suppressed the facts that did not fit their preferred narrative when she sent a “criminal referral” without acknowledging sworn testimony that rebuts these unfounded theories. We agree that Congress can play an important role in referring matters to appropriate law enforcement agencies where the facts and law support it. However, we do not believe that standard has been met here, particularly given the Chair’s failure to disclose evidence obtained by the Select Panel that rebuts her allegations.

Federal and state investigators have already spent millions of taxpayer dollars chasing inflammatory allegations of anti-abortion extremists regarding the unlawful sale of fetal tissue. These investigations have uncovered no evidence of wrongdoing and are putting doctors and researchers – along with life-saving research and critical health care – at grave risk. We do not believe that there is a sufficient legal or factual basis to warrant a criminal referral of UNM or SWO and respectfully ask that you take our views into consideration with regard to any further investigation into this matter.

We also invite you to contact the Democratic Staff of the Select Investigative Panel at (202) 226-9471 should you have any questions.

Sincerely,



Jan Schakowsky
Ranking Member
Select Investigative Panel



Jerrold Nadler
Member
Select Investigative Panel



Diana DeGette
Member
Select Investigative Panel



Jackie Speier
Member
Select Investigative Panel

¹³ See Tara Shaver, *Breaking: UNM Halts Abortion Rotation at Late-Term Abortion Facility But Continues to Break the Law*, PROTEST ABQ (Dec. 20, 2015); Cheryl Sullenger, *Select Panel Refers UNM & Late-term Abortion Facility for Criminal Charges Related to Fetal Tissue Procurement*, OPERATION RESCUE (June 24, 2016).



Suzan K. DelBene
Member
Select Investigative Panel



Bonnie Watson Coleman
Member
Select Investigative Panel

Attachments

cc: The Honorable Marsha Blackburn, Chair
Select Investigative Panel

The Honorable Susana Martinez
Governor of New Mexico

The Honorable John A. Sanchez
Lieutenant Governor of New Mexico

The Honorable Michelle Lujan Grisham
First Congressional District, New Mexico

The Honorable Steve Pearce
Second Congressional District, New Mexico

Attachment 1

3/28/07 DOJ

Office of Legal Counsel Memo

**LEGALITY OF ALTERNATIVE ORGAN DONATION PRACTICES
UNDER 42 U.S.C. § 274e**

Two alternative kidney donation practices, in which a living donor who is incompatible with his intended recipient donates a kidney to a stranger in exchange for the intended recipient's receiving a kidney from another donor or increased priority on a waiting list, do not violate the prohibition on transfers of organs for "valuable consideration" in 42 U.S.C. § 274e.

March 28, 2007

**MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Section 301 of the National Organ Transplant Act ("NOTA" or "Act"), entitled "Prohibition of organ purchases," imposes criminal penalties of up to \$50,000 and five years in prison on any person who "knowingly acquire[s], receive[s], or otherwise transfer[s] any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." 42 U.S.C. § 274e (2000). You have asked whether certain arrangements for donation of kidneys by living donors involve "valuable consideration" under this statute. We conclude that they do not.

I.

Someone requiring a kidney transplant may generally obtain a kidney in two ways. First, he may join a national waiting list to receive a kidney from a deceased donor. There are far more people waiting, however, than there are cadaveric kidneys available, and the wait can be long. Alternatively, such a person may receive a kidney from a living donor. In many cases, however, the would-be donor is biologically incompatible with the intended recipient.

Two alternative donation practices have developed to mitigate these problems. In a Living Donor/Deceased Donor ("LDDD") Exchange, a living donor donates a kidney to an unknown, compatible recipient on the list for a deceased donor. The living donor's intended (but incompatible) recipient receives in turn some priority on the deceased-donor waiting list, and this priority may significantly shorten his waiting time. In a Paired Exchange, an organ procurement and transplantation network matches two or more incompatible donor/recipient pairs where each living donor is compatible with another living donor's intended recipient. Hospitals have performed a number of transplants involving Paired Exchanges. *See, e.g., Susan Levine, Hopkins Celebrates Quintuple Transplant, Wash. Post, Nov. 21, 2006, at A21.* You seek our views primarily so that the Secretary of Health and Human Services may know whether section 301 imposes a barrier to his taking certain actions to encourage these practices.

When a living donor simply gives the gift of a kidney to his intended recipient, he receives in return only the satisfaction of helping that recipient. Although a knowing "transfer" of a "human organ . . . for use in human transplantation" has occurred, the lack of any exchange eliminates any question of the transfer's being "for valuable consideration." 42 U.S.C. § 274e(a). But when a donor transfers the kidney through an LDDD or Paired Exchange to be

implanted into someone else, the donor does so in exchange for a benefit to his intended recipient as a third party. The intended recipient either receives from a network advancement on the waiting list for a cadaveric kidney or receives a kidney from another living donor. Thus, the question arises whether either of these donative practices involves a transfer for “valuable consideration” under section 301.

II.

The term “consideration” has deep roots in the common law of contracts and a fairly established meaning, but the meaning of the term “valuable consideration” is less clear. Drawing on the available sources of guidance, however, we conclude that the latter term as used in section 301 does not apply to an LDDD Exchange or a Paired Exchange, because neither involves the buying or selling of a kidney or otherwise commercializes the transfer of kidneys.¹

Section 301 does not define “valuable consideration,” but it and a related provision in the Act provide some initial guidance. Section 301 lists certain acts that do *not* involve “valuable consideration”: “The term ‘valuable consideration’ does not include the *reasonable payments* associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the *expenses* of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.” 42 U.S.C. § 274e(c)(2) (emphases added). These exclusions address types of “payments” and “expenses” that may otherwise fall within the term “valuable consideration” on the theory that they involve monetary benefits or at least a monetary transfer. Any benefits received in the LDDD and Paired Exchanges, on the other hand, are not monetary or otherwise pecuniary. To the extent that Congress concluded that exclusions from the prohibition on transfers for “valuable consideration” were necessary only for the specified monetary payments and reimbursements, the lack in section 301 of a comparable exclusion for non-monetary benefits may suggest that non-monetary exchanges such as LDDD and Paired Exchanges do not involve valuable consideration.

The title that Congress affixed to section 301 supports such an interpretation. It is established that “the title of a statute or section can aid in resolving an ambiguity in the legislation’s text.” *INS v. Nat’l Ctr. for Immigrants’ Rights*, 502 U.S. 183, 189 (1991) (concluding that the term “employment” in statutory text referred to “unauthorized employment,” in accordance with heading of section). Here, although the title does not expressly address “valuable consideration,” it does describe section 301 as involving a “[p]rohibition of organ purchases.” 42 U.S.C. § 274e; NOTA, Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346-47 (1984). Reading the statutory text in light of this title suggests that the

¹ In considering this question, we have benefited from the views of your office as well as those of the Department of Justice’s Criminal Division. Our conclusion is consistent with the views of both.

vague phrase “valuable consideration” addresses organ transfers that could be considered to involve a “purchase[],” rather than all donations that may involve some exchange.

In addition, section 301 applies only “if the transfer affects interstate commerce.” Apart from the distinct question whether a transfer that did involve valuable consideration would satisfy this requirement, the requirement indicates that section 301 rests on Congress’s power to “regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. That foundation further suggests that “valuable consideration” involves some sort of commercial transaction. *See United States v. Lopez*, 514 U.S. 549, 561 (1995) (finding criminal statute not authorized by this power, because having “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”); *cf. Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (“Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act] are quintessentially economic. . . . [It] regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”); *Perry v. St. Francis Hosp. & Med. Ctr.*, 886 F. Supp. 1551, 1563-64 (D. Kan. 1995) (“For whatever reason, . . . society presently rejects the commercialization of human organs . . . and tolerates only an altruistic system of voluntary donation.”).

As a further, albeit less direct, indication, the Act in another section gives certain duties to an organ procurement and transplantation network established by the Secretary. The network has a duty to “work actively to increase the supply of donated organs.” 42 U.S.C. § 274(b)(2)(K) (2000). One should seek to interpret the provisions of an act in harmony with one another; here, that rule of interpretation indicates that this statutory mandate to increase the supply of donated organs can illuminate the statute’s unclear phrase “valuable consideration.” In particular, section 301 should be read to allow creative practices that “increase the supply of donated organs,” *id.*, but do not involve buying, selling, or otherwise commercializing the transfer of organs. Both of the forms of exchange at issue enable someone who desires simply to donate his kidney to a family member or another specific individual, but is unable to do so directly due to incompatibility, to benefit that individual by other means. By donating his kidney to someone other than his intended recipient, the donor does receive something in exchange, but not a payment, financial gain, or direct personal benefit; rather, he receives an increased opportunity for his intended recipient to obtain a compatible kidney. These arrangements may fairly be described as enabling donations rather than as transfers for “valuable consideration.”²

² The Act’s legislative history does not directly suggest a meaning of “valuable consideration” but is consistent with the above indications and interpretation. The Senate Report states that the bill “prohibits the interstate buying and selling of human organs for transplantation” and “is directed at preventing the for-profit marketing of kidneys and other organs.” S. Rep. No. 98-382, at 2, 4, *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976, 3978. It adds that “individuals or organizations should not profit by the sale of human organs” and that “human body parts should not be viewed as commodities.” *Id.* at 16-17, 1984 U.S.C.C.A.N. at 3982. The House Conference Report explains that the final bill “intends to make the buying and selling of human organs unlawful.” H.R. Conf.

Some other references to “valuable consideration” in the United States Code reinforce these indications from the Act (while the remainder of the references are inconclusive). The most relevant reference tracks section 301 by making it “unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.” 42 U.S.C. § 289g-2(a) (2000). The title—“Purchase of tissue”—also parallels section 301. It is an accepted rule that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005). The prohibition on the purchase of fetal tissue was enacted nine years after NOTA, *see* National Institutes of Health Revitalization Act, Pub. L. No. 103-43, § 112, 107 Stat. 122, 131 (1993), and is codified with NOTA as part of the Public Health Service Act, 42 U.S.C. §§ 201-300gg-92 (2000). Thus, the penalty for violating the prohibition is illuminating: a “fine . . . in an amount not less than twice the amount of the valuable consideration received.” *Id.* § 289g-2(c)(2). The requirement for calculating the fine presumes that the “valuable consideration” is monetary or at least has a readily measurable pecuniary value. It is reasonable to apply that same meaning to the identical term in section 301, and “valuable consideration” so understood would not include the two donative practices at issue.³

A further indication of the meaning of “valuable consideration” in section 301 is usage in similar contexts in contemporaneous state laws. A California law enacted in 1984, the same year as NOTA, makes it “unlawful for any person to knowingly acquire, receive, sell, promote the transfer of, or otherwise transfer any human organ, for purposes of transplantation, for valuable consideration.” Cal. Penal Code § 367f(a) (2005). That statute defines “valuable consideration” to mean “financial gain or advantage.” *Id.* § 367f(c)(2). An essentially identical South Dakota prohibition enacted in 1992 likewise defines “valuable consideration” to mean “financial gain or advantage.” *See* S.D. Codified Laws §§ 34-26-43 (definition), 34-26-44 (prohibition) (2005). And the Uniform Anatomical Gift Act, while not defining “valuable consideration,” does provide that “[a] person may not knowingly, for valuable consideration, *purchase or sell* a part for transplantation or therapy, if the removal of the part is intended to occur after the death of the decedent.” Unif. Anatomical Gift Act § 10(a) (1987) (emphasis added). (All three of these sources also have exclusions for reasonable payments similar to the exclusions in section 301.)

Rep. No. 98-1127, at 16, *reprinted in* 1984 U.S.C.C.A.N. 3989, 3992. The legislative history does not suggest that any Member of Congress understood the bill as addressing non-monetary or otherwise non-commercial transfers.

³ Several other federal statutes use “valuable consideration” in different contexts and without defining it or otherwise clearly indicating its meaning, although they seem to suggest some sort of commercial transaction. *See, e.g.*, 15 U.S.C. § 1060 (2000) (protecting “subsequent purchaser [of a trademark] for valuable consideration”); 31 U.S.C. § 3125(a) (2000) (defining “obligation” to mean “a direct obligation of the United States Government issued under law for valuable consideration, including bonds, notes, certificates of indebtedness, Treasury bills, and interim certificates”); 47 U.S.C. § 338(e) (2000) (making it unlawful for a satellite carrier to “accept or request monetary payment or other valuable consideration” for certain actions).

This usage also indicates that “valuable consideration,” at least as applied to organ donations, involves some sort of buying and selling, or otherwise commercial transfer, of organs.

It also is appropriate, as suggested above, to look to the common law of contracts, because “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (citation omitted). With regard to mere “consideration,” a broad range of promises and actions may suffice, though even there the outer limits are hazy. Compare 2 William Blackstone, *Commentaries on the Laws of England* *440 (5th ed. 1773) (“[I]n case of leases, always reserving a rent, though it be but a peppercorn [such] . . . considerations will, in the eyes of the law, convert the gift . . . into a contract.”), with *Restatement (Second) of Contracts* § 79 cmt. d (1979) (“Disparity in value, with or without other circumstances, sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense.”). With regard to “valuable consideration,” however, there is much less of a “settled meaning.” The term is rarely defined, and its apparent meaning has varied over time and among jurisdictions. It also is difficult to determine how it differs from mere “consideration,” even though, under normal rules of interpretation, one would expect the additional word to have some meaning. In addition, the definitions indicated by various authorities are not specific to the context of organ transfers. Nevertheless, the common law does at least allow for the reading of section 301 that we have derived from relevant statutory usage; it certainly does not foreclose it.

Black’s Law Dictionary defines “consideration” generally as “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.” *Black’s Law Dictionary* 324 (8th ed. 2004) (“*Black’s*”). It then defines “valuable consideration” as “[c]onsideration that is valid under the law; consideration that either confers a *pecuniarily* measurable benefit on one party or imposes a *pecuniarily* measurable detriment on the other.” *Id.* at 326 (emphasis added). This latter definition dates to the 1999 edition, which was a significant update and revision. *Black’s* at 302 (7th ed. 1999). The definition in the edition current when NOTA was enacted had not required “pecuniarily measurable” consideration:

A class of consideration upon which a promise may be founded, which entitles the promisee to enforce his claim against an unwilling promisor. Some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. . . . It need not be translatable into dollars and cents, but is sufficient if it consists of *performance, or promise thereof, which promisor treats and considers of value to him.*

Black’s at 1390 (5th ed. 1979) (emphasis added). (This edition did, however, define “valuable” to mean “[o]f financial or market value; commanding or worth a good price; of considerable

worth in any respect, whether monetary or intrinsic.” *Id.*) Under this definition, a kidney made available to a third party in an LDDD or Paired Exchange could be viewed as a “benefit” “of value to” the donor of a kidney; in turn, the network in an LDDD Exchange and the complementary donor in a Paired Exchange could be viewed as undertaking a “responsibility” toward the intended recipient.

The case law is similarly inconclusive as to whether “valuable consideration” necessarily involves a pecuniary element, though it does suggest that valuable consideration typically involves consideration that can be measured in monetary terms. In *Prewitt v. Wilson*, 103 U.S. 22 (1881), the Supreme Court quoted Sir Edward Coke for the proposition that “[m]arriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents.” *Id.* at 24 (citation omitted). Other authority also indicates that “valuable” generally refers to a pecuniary value. See, e.g., *Nelson v. Brown*, 164 Ala. 397, 405, 51 So. 360 (1910) (marriage “is valuable in a way which must be differentiated from that valuable consideration which will support a contract in that ordinarily the word ‘valuable’ signifies that the consideration so described is pecuniary, or convertible into money”); *In re Haugh’s Estate*, 12 Ohio Supp. 57, 1943 WL 3216, at *3 (Ohio Prob. 1943) (quoting digest for the proposition that “[m]arriage, however, is distinguishable from other valuable consideration in that it is not capable of being reduced to a value which can be expressed in dollars and cents,” but noting that “an antenuptial contract does have certain very valuable considerations which can be reduced to dollars and cents”). In *Stanley v. Schwalby*, 162 U.S. 255 (1896), however, the Court concluded that the promise to establish a military headquarters on particular land was valuable consideration for a city’s conveyance of the land to the United States, as “[a] valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance.” The Court explained that “[t]he advantage enuring to the city of San Antonio from the establishment of the military headquarters there was clearly a valuable consideration for the deed of the city to the United States,” but did not discuss how readily that promised act could be converted into a pecuniary value to the city. *Id.* at 276.

Thus, the common law understanding of “valuable consideration” either is inconclusive, leaving open the meaning we derive from statutory sources, or tends to confirm that meaning by suggesting that consideration, to be “valuable,” should be pecuniary, readily convertible into monetary value. There is no doubt a sense in which any act or thing could be given some value in dollars and cents. But the third-party benefits received under the donative practices at issue here are not commonly or readily so measured, as far as we are aware.

Finally, notwithstanding the above indications of the meaning of “valuable consideration,” the scope of the phrase does remain open to some question. Given that section 301 is a criminal statute, it is therefore appropriate to apply the rule of lenity in favor of a narrower reading, and thus to understand “valuable consideration” in section 301 of the Act as referring to the buying and selling of organs for monetary gain or to organ exchanges that are

otherwise commercial. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (“Even if [the relevant statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner’s favor.”). As the Supreme Court has stressed: “[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *Dowling v. United States*, 473 U.S. 207, 214 (1985) (citations and internal quotations omitted). Setting aside the strong circumstantial evidence of meaning discussed above, it is certainly true, at a minimum, that section 301 does *not* “clear[ly] and definite[ly]” encompass LDDD and Paired Exchanges, as distinct from “purchases” or other transfers for a profit.

For all of the above reasons, the donative practices you have described do not violate section 301.

/s/

C. KEVIN MARSHALL
Deputy Assistant Attorney General
Office of Legal Counsel

Attachment 2

6/27/16 UNM Letter to

House Select Panel

McDermott Will & Emery

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.

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June 27, 2016

BY U.S. MAIL AND EMAIL

The Honorable Marsha Blackburn, Chairman
The Honorable Jan Schakowsky, Ranking Member
House Select Panel on Infant Lives
H2-316 Ford House Office Building
Washington, DC 20515

Re: Letter Regarding UNM and Fetal Tissue Research

Dear Chairman Blackburn and Ranking Member Schakowsky:

The Select Panel has for several months been inquiring about the University of New Mexico's ("UNM") relationship with Southwestern Women's Options ("SWO"). The Panel's Majority has issued document subpoenas, taken depositions under oath, and worked closely with New Mexico anti-abortion groups to conduct its investigation. The Majority staff has known from the outset that SWO donated fetal tissue to a single neonatologist at UNM, and that UNM did not provide SWO with any compensation in or even reimbursement for costs incurred by SWO in exchange for fetal tissue. Since no payment was ever made, the Panel's majority staff probed deeply to be certain there was no other valuable consideration in return for the donation of fetal tissue. This effort turned up no new evidence. This letter summarizes the testimony and documents in this regard.

To be lawful, the Select Panel's investigative activities must have a legislative purpose, which is to examine whether federal law or policy should be changed. This past week the Chairman made a series of unsupported allegations against UNM, including crafting a new claim that UNM violated New Mexico state law, which it purported to refer to New Mexico Attorney General Hector H. Balderas, Jr. Making an unfounded 'criminal referral' regarding state law is well outside of the Panel's mandate. UNM will respond to its Attorney General regarding the baseless allegations in the Chairman's letter.

The Chairman's new and unfounded allegation that UNM has potentially violated New Mexico's version of the Uniform Anatomical Gifts Act is not a subject the Select Panel ever asked UNM or its deposition witness about before publicly opining about it. It is based solely on the conclusions of the Panel Majority's lawyers, none of whom are admitted to practice law in New Mexico. Suffice it to say, UNM denies in every respect that it has done or taken any action in

receiving donated fetal tissue from SWO in violation of New Mexico's version of the Uniform Anatomical Gift Act.

UNM also objects to the Select Panel Majority's tactics in issuing last week's press release and allegations. UNM was never provided a copy of the allegations. The materials were provided to the press hours before they were provided to the public online. In fact, UNM began receiving calls about the matter from the press approximately two hours before UNM was able to obtain a copy of the Chairman's allegations from the Panel's public website. Counsel for UNM sent an email to the Majority staff asking for a copy of the allegations. Majority staff never responded to this request.

UNM's Relationship with SWO

Referrals by UNM to SWO Are Not Unique or Exclusive

Your staff has sought to understand whether UNM provides some meaningful consideration, including but not limited to referrals to SWO for abortion procedures. The facts do not support the existence of any special relationship in this regard.

UNM generally will not perform a voluntary abortion procedure for a woman beyond the gestational age of 24-weeks because of a policy followed by UNM's hospital and the UNM Medical Group, Inc.'s Center for Reproductive Health Clinic. Faced with a woman beyond that gestational age, where the health of the mother or significant fetal anomalies are not present, the physicians at UNM will only provide options counseling to those patients. These options always include counseling about the woman continuing her pregnancy and adoption. It also includes providing the woman a list of non-UNM facilities that do not follow UNM's time limits for non-medically indicated procedures. Among the facilities UNM does provide information about is SWO. But that is not the only such facility listed. This options counseling is constitutionally protected activity between these women and their doctors.

UNM Residency/Fellow Rotations at SWO Did Not Benefit SWO

Your staff has asked UNM about the training program for medical residents and fellows (fully licensed doctors who seek additional training). Under this program, one or two Family Planning fellows from the Department of Obstetrics and Gynecology each year spent two, two-week rotations at SWO. Under the residency program, two to three residents spent portions of two weeks at SWO. This fellowship rotation at SWO began in 2011, but terminated before this congressional investigation began, in 2015. The program was terminated because the Family Planning Fellowship Program, which conducts a routine review of fellowship educational content every year or two, determined that 'learners,' a term used for all students and doctors undergoing training, were not obtaining the volume of practice at SWO to become competent in second trimester termination procedures.

UNM Dr. Administrator testified in her deposition on May 11, 2016 that having UNM learners at SWO did not benefit SWO. In fact, she stated just the opposite: Dr. Administrator stated that teaching residents and fellows created more work for SWO doctors. It slowed down the procedures and required SWO preceptors to take more time and effort to teach and train. The testimony is clear that any benefit accrued to UNM learners and UNM in this relationship, not SWO.

SWO Doctors Were Provided Unpaid Volunteer Faculty Appointments Due to Accrediting Body Rules, But Provided No Financial Benefit to SWO or the Doctors at SWO

As UNM explained in its response of March 3, 2016 to the Select Panel's subpoena, it is a requirement that preceptors, whose duties include training learners at UNM, must be members of the faculty. Accordingly, three SWO doctors—Dr. B., Dr. L., and Dr. C.—were appointed as Volunteer Faculty during the time that the training rotation program was in existence. Volunteer Faculty positions are not only uncompensated, they are not unique at UNM. Indeed, there are approximately 1000 Volunteer Clinical Faculty throughout UNMHSC, of which the Ob-Gyn department has 58.

Volunteer Clinical Faculty receive no financial compensation. Accordingly, the SWO doctors who served as preceptors for UNM learners were not paid by UNM for training these learners, or for any duties they performed. As UNM explained in its March 3, 2016 response to the Select Panel's subpoena, the Volunteer Faculty Guidelines indicate that Volunteer Faculty receive certain de minimus non-monetary benefits, such as access to purchase tickets to UNM sporting events, and access to the UNM fitness center. The benefits UNM gave to the SWO doctors was consistent with the benefits received by all Volunteer Faculty, and are not material inducements to provide fetal tissue which SWO had been donating for some time prior to 2011.

SWO Had Its Own Malpractice Insurance and Did Not Ever Make A Claim For Coverage Under UNM's State Issued Insurance

The Select Panel has inquired about the insurance coverage relationship between UNM and SWO. UNM has explained in its response to the Select Panel's subpoena on March 3, 2016, as well as in Dr. Administrator's testimony, the following facts regarding insurance coverage:

UNM medical students, residents, fellows, and faculty are covered by the New Mexico Tort Claims Act for any issue of malpractice that may arise from their performance of medical procedures or medical care, whether that care is given at UNM or at another facility, such as SWO. Likewise, preceptors that supervise UNM learners may be covered by the New Mexico Tort Claims Act for claims that arise while a UNM learner is conducting a procedure and a preceptor is supervising that learner. However, in any case, it is the New Mexico Risk Management Department that would make a determination regarding the coverage of the New Mexico Tort Claims Act. No such situation has arisen.

The bottom line is SWO had to obtain and pay for its own insurance coverage. UNM did not provide that coverage.

SWO's Ability to Refer Its Patients In an Emergency To UNM Hospital Is Not In Any Way Unique

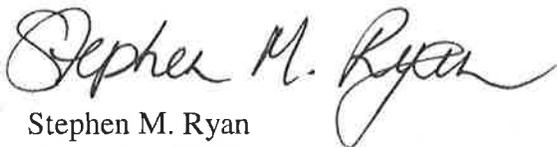
If a patient of SWO needed to be transported on an emergency basis to UNM's hospital, UNM would accept such patients, as it regularly takes emergency cases and is the only hospital with a Level 1 Trauma Center in all of New Mexico. (Another very skilled hospital, nearby to SWO and UNM is Presbyterian Hospital, where, upon information and belief, SWO could also send its patients in need of emergency or other care). In this respect, however, SWO is treated no differently than any other medical institution or medical practice in the state. Nor were SWO doctors automatically given clinical privileges to practice in the hospital. The volunteer faculty status does not carry with it such hospital privileges. In fact, the only Doctor at SWO who had the privilege to practice at UNM was Dr. C. This was provided to her by UNM due to her having been a fellow at UNM, not due to her work at SWO. This was used on a single occasion to allow Dr. C. to supervise a procedure at UNM, for the benefit of UNM. Dr. C. was not paid for this procedure.

Conclusion

UNM has been entirely forthright and has fully cooperated with all aspects of this investigation for six months, including providing documents, witnesses and answers. UNM has been targeted by the Panel majority due to its relationship with SWO and because SWO performs abortions into the third trimester. However, the Panel has learned that UNM's relationship with SWO is limited, and the key facts are known. There is no evidence that UNM has reimbursed or compensated SWO for providing fetal tissue to UNM's fetal tissue researcher. UNM ended its no-fee relationship to send learners to SWO before this Panel began its work.

Given the record, we fail to see any reason why UNM should continue to be the subject of any inquiry at this time. Indeed, the Supreme Court of the United States confirmed again today that abortion is a legal right protected by the Constitution. Accordingly, we respectfully request the Panel terminate its investigation of UNM.

Sincerely,



Stephen M. Ryan
Counsel to UNM

The Honorable Marsha Blackburn, Chairman
The Honorable Jan Schakowsky, Ranking Member
June 27, 2016
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