

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND  
STEMEXPRESS, LLC, AND CATHERINE SPEARS DYER, FOUNDER AND CHIEF  
EXECUTIVE OFFICER OF STEMEXPRESS, LLC, IN CONTEMPT OF CONGRESS FOR  
REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE SELECT  
INVESTIGATIVE PANEL OF THE COMMITTEE ON ENERGY AND COMMERCE

REPORT  
OF THE  
SELECT INVESTIGATIVE PANEL  
OF THE COMMITTEE ON ENERGY AND COMMERCE  
  
HOUSE OF REPRESENTATIVES

The form of the resolution that the Select Investigative Panel (Panel) would recommend to the House of Representatives for citing StemExpress, LLC, and Ms. Catherine Spears Dyer, founder and chief executive officer of StemExpress, LLC, for contempt of Congress pursuant to this report is as follows:

*Resolved*, That StemExpress, LLC, shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

*Resolved*, That Catherine Spears Dyer shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

*Resolved*, That pursuant to 2 U.S.C. §§192 and 194, the Speaker of the House of Representatives shall certify the report of the Select Investigative Panel detailing the willful refusal of StemExpress, LLC, and Catherine Spears Dyer, to produce documents to the Select Investigative Panel as directed by subpoenas, to the United States Attorney for the District of Columbia, to the end that StemExpress, LLC, and Catherine Spears Dyer be proceeded against in the manner and form provided by law.

## I. EXECUTIVE SUMMARY

On October 7, 2015, the House voted to enact H. Res. 461, which established the Select Investigative Panel and “authorized and directed [it] to conduct a full and complete investigation and study and issue a final report of its findings . . . regarding (1) medical procedures and business practices used by entities involved in fetal tissue procurement; (2) any other relevant matters with respect to fetal tissue procurement; . . . and (6) any changes in law or regulation necessary as a result of any findings made under [those investigations and studies].”<sup>1</sup>

Pursuant to the authority delegated to it under H. Res. 461, the Select Investigative Panel (Panel) is investigating whether entities that procure fetal tissue are violating federal law or

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<sup>1</sup> H. Res. 461, 114th Cong. § 3(a) (2015).

engaging in business practices that have the effect of undermining the purpose of laws prohibiting the interstate transfer of any fetal tissue for valuable consideration. The Panel is examining whether 42 U.S.C. § 289g-2 is effective, or needs to be amended to better achieve Congress' legislative goals in enacting the statute. Under 42 U.S.C. § 289g-2(a), it is "unlawful for any person to knowingly acquire, receive, or otherwise transfer any fetal tissue for valuable consideration if the transfer affects interstate commerce." Under the statute, "[t]he term 'valuable consideration' does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. § 289g-2(e)(3).

On March 10, 1993, the U.S. House of Representatives debated two competing amendments to H. R. 4, the National Institutes of Health Revitalization Act of 1993. The amendments, one offered by Mr. Bliley and one by Mr. Waxman, focused on safeguards governing the donation of fetal tissue for transplantation and for research. The House passed the Waxman amendment which included the provisions codified as 42 USC § 289 g-2(a) and (e)3:

42 USC §289 g-2(a) states, "It shall be 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 USC §289 g-2(e)(3) "The term "valuable consideration" does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue."

During floor debate, supporters of the Waxman amendment repeatedly stated that fetal "tissue may not be sold."<sup>2</sup> Mrs. Morella expressed her support for the legislation because "fetal tissue could not be sold."<sup>3</sup> Mr. Waxman said:

This amendment that I am offering as a substitute would enact the most important safeguards, and those are the safeguards to prevent any sale of fetal tissue for any purpose, just not for the purpose of research. It would be abhorrent to allow for a sale of fetal tissue and a market to be created for that sale.<sup>4</sup>

The floor debate is consistent with the Committee Report on H.R. 4, which stated that, "Section 498B prohibits the purchase of human fetal tissue as well as the solicitation or acceptance of directed fetal tissue donations."<sup>5</sup>

The Committee prohibition on the sale of fetal tissue is described as making the transfer of fetal tissue parallel with donation of other organs under the Organ Procurement and

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<sup>2</sup> 139 Cong. Rec. 4653 (1993) (statement of Rep. John Edward Porter).

<sup>3</sup> 139 Cong. Rec. 4615 (1993) (statement of Rep. Connie Morella).

<sup>4</sup> 139 Cong. Rec. 4686 (1993) (statement of Rep. Henry Waxman).

<sup>5</sup> H.R. Rep. No. 103-28, at 76 (1993).

Transplantation Act.<sup>6</sup> But the Committee Report added, “Indeed the Committee has dealt with fetal tissue more restrictively . . . .”<sup>7</sup> The Committee intent was to disallow payment for procurement of any organs.

Since the intent of the statute was to prohibit profiting from the sale of fetal tissue, the Panel sought to evaluate accounting records of entities involved in the transfer of fetal tissue to determine whether the statute was effective, required amending, and whether a legislative modification would be required to achieve Congress’ intent. The Panel also sought and obtained the services of a senior auditor to assist in the review of the accounting records.

Through publicly available information and the Select Investigative Panel’s investigation, the Panel identified StemExpress, LLC, (StemExpress) as an entity that procured fetal tissue from abortion clinics and transferred it to researchers. In accordance with its authorization under H. Res. 461, and consistent with its interest in examining whether any changes in federal laws or regulations are necessary as a result of its investigation, the Panel sought documents, including accounting documents, from StemExpress.<sup>8</sup> In its first response to the Panel’s document request, StemExpress provided very limited information. For example, in response to Document Request Number 1, “A list of all entities, including firms, corporations, non-profit organizations, and educational institutions, from which StemExpress receives or procures fetal tissue,” StemExpress provided the names of two Planned Parenthood affiliates without identifying the individual clinics from which StemExpress procured fetal tissue and refused to provide the names of independent clinics from which StemExpress procured fetal tissue citing their “safety and security.”<sup>9</sup> In response to Document Request Number 2, “A list of all entities, including firms, corporations, nonprofit organizations, and educational institutions, to which StemExpress sells or donates fetal tissue,” StemExpress provided only a list of names that were already disclosed on its website and cited non-disclosure agreements as a reason for their limited response.<sup>10</sup> In response to Document Request Number 6, “All accounting records including accounting memoranda related to the cost and pricing of fetal tissue,” StemExpress provided a summary paragraph stating that “StemExpress manually reviewed records for 2014 and determined that . . . fetal tissue procured from Planned Parenthood Affiliates generated approximately \$50,000 in gross (pre-tax) revenue against expenses in excess of \$75,000.”<sup>11</sup> In response to Document Request Number 11, “All documents relating to rent or site fees paid to entities from which StemExpress obtained, sold, or donated fetal tissue,” StemExpress provided a chart titled “Estimated Cost for Procurement of Fetal Liver Tissue Sample.”<sup>12</sup> The chart showed that particular expenses accrue to StemExpress which in fact are passed on to StemExpress customers.<sup>13</sup> As an accommodation to StemExpress’ concern about safety and security, the

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<sup>6</sup> Pub. L. No. 98-507, 98 Stat. 2339 (1984).

<sup>7</sup> H.R. Rep. No. 103-28, at 76 (1993).

<sup>8</sup> Letter from Rep. Marsha Blackburn, Chairman, House Select Investigative Panel, to Cate Dyer, Founder and CEO, StemExpress, LLC (Dec. 17, 2015).

<sup>9</sup> “StemExpress First Response to House Select Panel Document Requests,” [STEM.HOUSE.SELECT\_0227].

<sup>10</sup> “StemExpress First Response to House Select Panel Document Requests,” [STEM.HOUSE.SELECT\_0228].

<sup>11</sup> “StemExpress First Response to House Select Panel Document Requests,” [STEM.HOUSE.SELECT\_0232].

<sup>12</sup> “StemExpress First Response to House Select Panel Document Requests,” [STEM.HOUSE.SELECT\_0238].

<sup>13</sup> House Select Investigative Panel Staff analysis of STEM.HOUSE.SELECT\_0915, STEM.HOUSE.SELECT\_1414, STEM.HOUSE.SELECT\_1647, STEM.HOUSE.SELECT\_0795.

Panel agreed to limit its request on Request Number 4 to an organization chart.<sup>14</sup> These limited productions served only to demonstrate that to fully understand the business transactions of StemExpress, in light of the applicable statute, would require a subpoena, especially since the Panel sought to rely upon the analysis of a senior auditor and because the summary documents provided by StemExpress fell far short of actual accounting documents.<sup>15</sup>

As a result of StemExpress' limited compliance with the Panel's voluntary request for documents, the Chairman of the Panel concluded that a subpoena would be necessary to achieve the Panel's investigative assignment. The voluntary production included many pages but was limited by claims of safety and security, non-disclosure agreements, and StemExpress' desire to provide mere summaries rather than its actual accounting records. These limitations on voluntary production forced the Panel to conclude that compulsory process was necessary for the Panel to conduct its own accounting analysis and to select personnel to interview. Over a three-month period, the Panel subpoenaed StemExpress twice,<sup>16</sup> its CEO, Ms. Catherine Spears Dyer (Ms. Dyer) once,<sup>17</sup> and StemExpress' outside accountant, Scinto Group, LLP (Scinto) once.<sup>18</sup>

StemExpress complied with the Panel's second, March 29, 2016 subpoena requesting information relating to Institutional Review Boards ("IRBs") in many respects with one notable exception: StemExpress failed to provide any information about payments it made to Biomed IRB.<sup>19</sup> Scinto refused to comply with the Panel's subpoena and has provided no documents. Scinto represented to the Panel that StemExpress objected to Scinto's compliance with the Panel's subpoena on the grounds of several privileges.<sup>20</sup> The Panel wrote to Scinto to explain that its objections based upon the asserted privileges, including state common law privileges and provisions that expressly permit compliance with a subpoena, are inapplicable and do not vitiate

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<sup>14</sup> Email from House Select Investigative Panel Staff to Amandeep S. Sidhu, McDermott Will & Emery (Jan. 8, 2016).

<sup>15</sup> House Select Investigative Panel Staff, "Handling of Human Fetal Tissue Planning, Analysis & Reporting," House Select Investigative Panel Staff analysis of STEM.HOUSE.SELECT\_0915, STEM.HOUSE.SELECT\_1414, STEM.HOUSE.SELECT\_1647, STEM.HOUSE.SELECT\_0795.

<sup>16</sup> See Subpoena to StemExpress, LLC (Feb. 12, 2016); Subpoena to StemExpress LLC (Mar. 29, 2016).

<sup>17</sup> See Subpoena to Cate Dyer (Mar. 29, 2016) [hereinafter Dyer subpoena].

<sup>18</sup> See Subpoena to Scinto Group, LLP (Apr. 29, 2016).

<sup>19</sup> This Report does not recommend holding StemExpress in contempt related to the Panel's March 29, 2016, subpoena to StemExpress but lists its partial compliance as part of a pattern of noncompliance.

<sup>20</sup> See email from Kevin Murphy, counsel for Scinto Group LLP, to House Select Investigative Panel staff (Jun. 15, 2016) ("StemExpress has now told me definitively that it does not waive any available and applicable privileges or confidentiality rights in regard to the records related to StemExpress that are in the possession of my client, Scinto, and that StemExpress holds Scinto accountable to observe and protect those privileges and confidentiality rights. As you know, because Scinto is a CPA firm and tax preparer for StemExpress, there are potentially applicable privileges and confidentiality statutes, under the Internal Revenue Code and related provisions, under the California Business & Professions Code and Tax Code, and under professional standards. I understand that you probably do not agree that any of those laws or provisions would ultimately be found by a court to be applicable, but from our reading of the laws and provisions, we believe that the privilege and confidentiality laws/provisions could be found applicable. I have also reviewed correspondence and a memorandum from the Democratic members of the Select Investigative Panel which assert that the subpoena (and others) was issued in violation of House rules. I have also reviewed articles (including the comprehensive articles by the Congressional Research Service) and court cases regarding enforcement of subpoenas from a House committee or subcommittee or investigative committee. My conclusion, based upon a reading of all these materials, and in light of the position conveyed to me by StemExpress, is that Scinto has an obligation to object to the subpoena.").

compliance with a congressional subpoena.<sup>21</sup> Despite these efforts, Scinto continues to assert that its client, StemExpress, will not waive any of the privileges that StemExpress asserts and, consequently, refuses to comply with this Panel's subpoena.<sup>22</sup>

Ms. Dyer refused to comply with the March 29, 2016, subpoena she received from the Panel.<sup>23</sup> Like the Panel's February 12, 2016, subpoena to StemExpress, the subpoena issued to Ms. Dyer requested the names of StemExpress accounting personnel and documents showing accounts payable and receivable.<sup>24</sup> By way of response, Ms. Dyer refused to provide any of the information demanded by the Panel's subpoena. In addition to Ms. Dyer's refusal to supply the names of current accounting personnel, her response suggested that the Panel seek the information it required from Scinto or from Sara Lee Heuston, a former employee of StemExpress. Once again, attorneys for Ms. Dyer offered summary documents of revenue and costs, but no accounting records.<sup>25</sup> Noteworthy to the Panel was the offer by Ms. Dyer of Scinto as a source of accounting records, an offer that proved hollow due to StemExpress' later objection to Scinto providing any information to the Panel.<sup>26</sup> Similarly, Ms. Dyer's and StemExpress' counsel, who also represented former employee Ms. Heuston, explained that Ms. Heuston had only W-2's and related tax information. In a teleconference with Panel staff, Ms. Heuston stated that she had no documents and that if the Panel contacted her again she would call the police.<sup>27</sup>

StemExpress' offer that Ms. Heuston might have responsive documents thus produced no accounting records. This left the Panel with no accounting documents from StemExpress, a referral to a former employee who StemExpress' counsel later admitted had no accounting documents, a referral by StemExpress to its outside accountant Scinto for whom StemExpress asserted privileges, and the refusal of StemExpress and Ms. Dyer to provide the names of accounting personnel so the Panel could conduct interviews.

Panel staff prepared a report in consultation with its senior auditor that outlined the accounting documents necessary to complete a full and professional evaluation of StemExpress fetal tissue transactions. That work product relied upon accepted accounting practices and concluded that a credible comparison of fetal tissue revenue against allowable costs required

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<sup>21</sup> See T. March Bell, Chief Counsel and Staff Director, House Select Investigative Panel, to Kevin Murphy, counsel for Scinto Group, LLP (Sept. 8, 2016). [hereinafter Scinto Sept. 8]

<sup>22</sup> See Letter from Kevin Murphy, counsel for Scinto Group, LLP, to T. March Bell, Chief Counsel and Staff Director, House Select Investigative Panel (Sept. 16, 2016) [hereinafter Scinto Sept. 16] ("First, let me reiterate that, if not for the potential application of the privilege and/or confidentiality laws, Scinto Group LLP would be willing and able to comply with a valid subpoena from the Select Investigative Panel. However, in light of the potential application of those laws, under the current circumstances, Scinto Group is not in a position to unilaterally respond to the subpoena with the requested documents, absent client consent.").

<sup>23</sup> "StemExpress First Response to House Select Panel's March 29, 2016 Subpoena," at 2-3.

<sup>24</sup> Subpoena to Cate Dyer (Mar. 29, 2016).

<sup>25</sup> "StemExpress First Response to House Select Panel's March 29, 2016 Subpoena," at 1-2.

<sup>26</sup> Scinto Sept. 16.

<sup>27</sup> Memorandum from House Select Investigative Panel Counsel to Majority Members of the House Select Investigative Panel, Mar. 7, 2016.

actual accounting records from StemExpress.<sup>28</sup> In sum, StemExpress' refusal to comply with the February 12, 2016 subpoena and Ms. Dyer's refusal to comply with the March 29, 2016 subpoena prevented the Panel from completing its assigned work.

Beginning in mid-March 2016, communication between counsel for StemExpress and Ms. Dyer and the Panel began to reach an impasse. Counsel for StemExpress wanted to provide accounting summaries, which they called "roll-ups," generated by the accounting system and the Panel continued to press for foundational accounting documents.<sup>29</sup> Panel staff has consistently stated to counsel for StemExpress that it would review the productions and determine whether they were as described and sufficient for purposes of the investigation. If not, the Panel reserved the right to insist upon complete compliance.<sup>30</sup> Despite this communication, StemExpress wrote that staff had unilaterally reneged on a previous agreement.<sup>31</sup> In fact, the accounting "roll-ups" were not actual accounting documents, but fell far short of StemExpress counsel's description during telephonic conferences.

On August 23, 2016, the Panel was informed by McDermott Will & Emery, the law firm previously representing StemExpress and Ms. Dyer throughout the course of the investigation, that StemExpress was no longer their client.<sup>32</sup> StemExpress' former attorney supplied the Panel with contact information for the new lawyer.<sup>33</sup> On September 8, 2016, Chairman Blackburn sent a letter to Mr. Frank Radoslovich, the new counsel for StemExpress and Ms. Dyer, outlining a brief history of the Panel's interactions with StemExpress, and the Panel's unsuccessful attempts to reach an accommodation with StemExpress.<sup>34</sup> The letter concluded:

Since StemExpress has been unwilling to comply with the Panel's subpoenas and having exhausted all its efforts to obtain compliance from the subpoena recipients, the Chairman of the Select Investigative Panel will recommend that StemExpress and Catherine Spears Dyer be held in contempt for their willful failure to fully comply with the Panel's subpoena issued to them . . . .<sup>35</sup>

The Chairman provided one last offer to StemExpress and Ms. Dyer to comply with the subpoenas.<sup>36</sup> The Panel also forwarded a copy of the Chairman's April 28, 2016 letter detailing

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<sup>28</sup> See "Stem Express [sic] Initial Analysis / Review of Financial Records Received as of 6/13/16," "Handling of Human Fetal Tissue Planning, Analysis & Reporting," and "Status of Response to Record Requests from Top 5 Procurement Businesses."

<sup>29</sup> Email from House Select Investigative Panel Staff to Stephen Ryan and Amandeep S. Sidhu, McDermott Will & Emery (Mar. 18, 2016).

<sup>30</sup> Teleconference between House Select Investigative Panel Staff and Stephen M. Ryan and Amandeep S. Sidhu, McDermott Will & Emery (Mar. 14, 2016).

<sup>31</sup> Email from Stephen Ryan, McDermott Will & Emery, to House Select Investigative Panel Staff (Mar. 18, 2016).

<sup>32</sup> Email from Amandeep S. Sidhu, McDermott Will & Emery, to House Select Investigative Panel Staff (Aug. 23, 2016).

<sup>33</sup> *Id.*

<sup>34</sup> Letter from Rep. Marsha Blackburn, Chairman, House Select Investigative Panel, to Frank Radoslovich, counsel for StemExpress (Sept. 8, 2016).

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

the documents that have not been produced by StemExpress.<sup>37</sup> A complete list of documents remaining to be produced can be found in Section V.B. below.

To date, the Panel has never received a single accounting record from StemExpress, no names of key personnel have been provided by Ms. Dyer so that the Panel might conduct interviews, and the cost estimates have been ambiguous and inadequate. The Panel wrote a letter to Ms. Dyer that included a chart of the missing items in an attempt to secure compliance with the congressional subpoenas.<sup>38</sup> In a response letter, former counsel for StemExpress and Ms. Dyer disputed the Panel's attempt to clarify what was missing.<sup>39</sup>

Having exhausted its efforts to obtain compliance from the subpoena recipients, Chairman Blackburn recommends that StemExpress, LLC, and Catherine Spears Dyer be held in contempt for their willful failure to fully comply with the Panel's subpoenas issued to them. The Chairman also recommends that the Speaker of the U.S. House of Representatives, pursuant to 2 U.S.C. §§ 192 and 194, certify this report of the Select Investigative Panel to the United States Attorney for the District of Columbia, and that StemExpress and Ms. Dyer be proceeded against in the manner and form provided by law.

## II. AUTHORITY AND PURPOSE

A direct corollary of Congress' constitutionally based oversight and investigative responsibility is the authority to obtain information, including by use of compulsory process.<sup>40</sup> The U.S. Supreme Court held that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."<sup>41</sup> Indeed, the Court ruled:

[T]he power to secure needed information by such means [i.e., compulsory process] has long been treated as an attribute of the power to legislate . . . . We are of [the] opinion that the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function.

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A legislative body cannot legislate wisely or effectively in the

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<sup>37</sup> Letter from Rep. Marsha Blackburn, Chairman, House Select Investigative Panel, to Cate Dyer, at Appendix A. [hereinafter Dyer letter].

<sup>38</sup> *Id.*

<sup>39</sup> See Letter from Amandeep S. Sidhu, McDermott Will & Emery, to Rep. Marsha Blackburn, Chairman, House Select Investigative Panel (May 6, 2016).

<sup>40</sup> See *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504 n.15 (1975) ("[T]he scope of [Congress'] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *id.* at 504 ("[i]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate."); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate.")

<sup>41</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.<sup>42</sup>

Article I, § 5, Clause 2 of the U.S. Constitution grants the House the right to “determine the Rules of its Proceedings . . . .” The current House rules delegate substantial and wide-ranging oversight and investigative authority to various committees, including the Committee on Energy and Commerce.<sup>43</sup> The Rules of the Committee on Energy and Commerce grant the “power to authorize and issue subpoenas . . . to the Chair,” who shall notify the ranking minority member prior to issuing any subpoena under such authority.<sup>44</sup> “To the extent practicable, the Chair shall consult with the ranking minority member at least 72 hours in advance of a subpoena being issued . . . .”<sup>45</sup>

H. Res. 461, approved by the House of Representatives on October 7, 2015, established the Select Investigative Panel of the Committee on Energy and Commerce, and delegated to it broad responsibilities, including the authority “to conduct a full and complete investigation” regarding “business practices used by entities involved in fetal tissue procurement” and “any other relevant matters with respect to fetal tissue procurement . . . .”<sup>46</sup> The Panel was also ordered to recommend “any changes in law or regulation necessary as a result of any findings . . . .”<sup>47</sup> Hence, the information sought from StemExpress by the Select Investigative Panel falls within its authority.

H. Res. 461 also authorizes the Chairman, upon consultation with the Ranking Member, to issue subpoenas pursuant to Rule XI.2(m), including for the purpose of taking depositions. That rule states:

For the purpose of carrying out any of its functions and duties under this rule . . . a committee or subcommittee is authorized . . . to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.<sup>48</sup>

When Congress—here the Select Investigative Panel—does resort to compulsory process, the U.S. Supreme Court has held, “[i]t is unquestionably the duty of all citizens to cooperate with

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<sup>42</sup> *McGrain v. Daugherty*, 273 U.S. 135, 161, 174 (1927).

<sup>43</sup> See House rule X, clause 1(f); House rule XI, clause 2(m)(1).

<sup>44</sup> House Committee on Energy and Commerce rule 16.

<sup>45</sup> *Id.*

<sup>46</sup> H. Res. 461, 114th Cong. (2015).

<sup>47</sup> *Id.*

<sup>48</sup> House rule XI, clause 2(m)(1); House rule XI, clause 2(m)(1)(B).

the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas . . . .”<sup>49</sup>

### **III. BACKGROUND ON THE PANEL’S INVESTIGATION OF STEMEXPRESS**

Under Title 42 U.S.C. § 289g-2(a), it is unlawful for any person to knowingly acquire, receive, or otherwise transfer any fetal tissue for valuable consideration if the transfer affects interstate commerce. The term “valuable consideration” does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. *See* 42 U.S.C. § 289g-2(e)(3). In order to complete the work assigned to it by the House, the Panel determined that it would examine whether 42 U.S.C. § 289g-2 is effective or needs to be amended to better achieve the legislative goals of the statute. Since StemExpress is an entity that engages in the sale, transfer, donation, and procurement of human fetal tissue, an examination of its business and accounting practices is pertinent to this investigation.

### **IV. EVENTS LEADING TO THE SUBPOENAS TO STEMEXPRESS**

#### **A. THE DECEMBER 17, 2015 DOCUMENT REQUEST LETTER**

On December 17, 2015, Chairman Blackburn sent a document request letter asking for, among other items: “[a] list of all entities, including firms, corporations, non-profit organizations, and educational institutions, from which StemExpress receives or procures fetal tissue;” “[a] list of all entities, including firms, corporations, non-profit organizations, and educational institutions, to which StemExpress sells or donates fetal tissue;” a list of “all entities, including firms, corporations, non-profit organizations, and educational institutions, to which StemExpress transferred, subcontracted or sold any business interest or business assets related to the procurement or sale of fetal tissue;” an “organization chart that details StemExpress personnel that procure fetal tissue at the clinic level and the supervisory personnel for those procurers of fetal tissue;” “[a]ll communications, whether internal or external, that direct StemExpress personnel to procure fetal tissue, including, but not limited to memoranda, emails, telephone messages, and purchase orders or bills of sale;” all StemExpress “accounting records including accounting memoranda related to the cost and pricing of fetal tissue;” and all documents “relating to rent or site fees paid to entities from which StemExpress obtained, sold, or donated fetal tissue, and all StemExpress banking records related to the procurement, sale, donation, or distribution or shipment of fetal tissue.”<sup>50</sup>

#### **B. STEMEXPRESS’ MINIMAL PRODUCTION OF REQUESTED DOCUMENTS**

In its January 15, 2016 response to the document request letter, StemExpress listed only the names of abortion clinics from which it procured fetal tissue that had been previously

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<sup>49</sup> *Watkins*, 354 U.S. at 187-88; *Hutchison v. United States*, 369 U.S. 599, 617 (1962). *See also United States v. Bryan*, 339 U.S. 323 (1950).

<sup>50</sup> *See* Letter from Rep. Marsha Blackburn, Chairman, House Select Investigative Panel, to Cate Dyer, Founder and CEO, StemExpress, LLC (Dec. 17, 2015).

produced to the U.S. Senate Committee on the Judiciary.<sup>51</sup> StemExpress did not provide the names of any additional clinics. StemExpress stated it “has previously obtained fetal tissue from two Planned Parenthood affiliates . . . . StemExpress has also received fetal tissue from independent (non-Planned Parenthood) clinics, but will not be voluntarily providing the names of these clinics . . . .”<sup>52</sup> Citing non-disclosure agreements, StemExpress did not provide the names of its non-public customers.<sup>53</sup> As an accommodation, the Panel and StemExpress agreed that it could produce a detailed organization chart in lieu of producing the names of individuals and supervisors involved in procuring fetal tissue. But StemExpress did not produce the detailed organization chart (instead it produced a graphic version of an organization chart)<sup>54</sup> or the accounting records and accounting memoranda.<sup>55</sup>

## V. DUE TO STEMEXPRESS’ MINIMAL COOPERATION WITH THE DOCUMENT REQUEST, THE PANEL ISSUED A SUBPOENA TO STEMEXPRESS

After reviewing the initial production and gaining an understanding of StemExpress’ position regarding voluntary compliance, the Panel determined that a subpoena would be the best approach to obtain the materials required to do its work. On February 12, 2016, the Panel authorized its first subpoena to StemExpress. The subpoena demanded *unredacted* copies of documents created since January 1, 2011, with a production date of February 17, 2016.<sup>56</sup> The Panel extended the due date to February 19, 2016.<sup>57</sup> In order to complete the work assigned to the Panel under H. Res. 461, the Panel demanded documents “sufficient to show the name and title of all StemExpress current and former personnel whose responsibilities included procuring, researching, storing, packaging for donation, sale, transport, or disposal of fetal tissue, and the identity, of any supervisory personnel under whom such individuals worked.”<sup>58</sup>

Central to the Panel’s investigation under H. Res. 461, the first subpoena also required the production of “[a]ll communications and documents relating to StemExpress employee compensation resulting from or relating to fetal tissue samples procured by current and former StemExpress personnel or other persons or entities that transact business with StemExpress;”<sup>59</sup> “[a]ll communications and documents regarding any direction to StemExpress current or former personnel with respect to the procurement or disposal of fetal tissue;”<sup>60</sup> and all “communications and documents, sorted by customer, referring or relating to requests or orders made to StemExpress regarding fetal tissue and the amount paid by each customer to StemExpress.”<sup>61</sup>

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<sup>51</sup> “StemExpress Second Response to Senate Judiciary Committee,” [STEM.JUD00000024; STEM.HOUSE SELECT 0057].

<sup>52</sup> “StemExpress First Response to House Select Panel Document Requests” (Jan. 15, 2016) at 1.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.* at 6.

<sup>56</sup> Subpoena to StemExpress, LLP, (Feb. 12, 2016).

<sup>57</sup> Email from Panel Staff to Amandeep S. Sidhu, McDermott Will & Emery (Feb. 16, 2016).

<sup>58</sup> Subpoena to StemExpress, LLP (Feb. 12, 2016), Schedule Item 2.

<sup>59</sup> Subpoena to StemExpress, LLC (Feb. 12, 2016), Schedule Item 3.

<sup>60</sup> *Id.* at Schedule Item 6.

<sup>61</sup> *Id.* at Schedule Item 9.

Finally, the subpoena demanded all “communications and documents, including but not limited to accounting memoranda, referring or relating to the cost and pricing of fetal tissue by StemExpress,”<sup>62</sup> and all “StemExpress banking and accounting documents, sorted by any source of fetal tissue and any customer of StemExpress, that reflect accounts payable and/or funds received that in any way refer or relate to the procurement, sale, donation, or distribution or shipment of fetal tissue.”<sup>63</sup> These documents were required by the Panel to comprehend the effectiveness of 42 U.S.C. § 289g-2, and understand the business practices of StemExpress, an entity involved in fetal tissue procurement.<sup>64</sup>

The Panel approached its evaluation of 42 U.S.C. § 289g-2 as a comparison of “valuable consideration” or revenue versus allowable costs or expenses. If revenue for fetal tissue exceeds allowable expenses then the intent of § 289g-2 has been violated. Thus, the Panel sought production of StemExpress’ banking and accounting records reflecting the company’s “accounts payable and/or funds received that in any way refer to or relate to the procurement, sale, donation, or distribution or shipment of fetal tissue” so the Panel could compare revenues to allowed expenses.<sup>65</sup> Such information is necessary to assist the Panel in examining business practices used by entities involved in fetal tissue procurement, and in informing the Panel’s decisions concerning potential recommendations for legislation relating to fetal tissue procurement.<sup>66</sup>

The Panel’s first subpoena thus called for the production of all accounting records maintained by StemExpress relating to fetal tissue cost, pricing, orders, sales, distribution, shipment, or donation.<sup>67</sup> Through counsel, StemExpress offered to produce accounting summaries or “roll-ups,” among other summaries.<sup>68</sup> Initially, Panel staff agreed to this production and was hopeful that the production would be useful, but always added the caveat that the documents would require review for completeness and adequacy. In each case, the description offered by counsel for StemExpress fell far short of the actual production. For example, even a cursory analysis by Panel accounting staff revealed that the summaries were inconsistent with actual invoices produced by StemExpress.<sup>69</sup> In particular, the accounting summaries listed the costs of “disease screening, supplies, and shipping” as an expense to StemExpress, while StemExpress’ own invoices showed that the disease screening, supplies, and

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<sup>62</sup> *Id.* at Schedule Item 8.

<sup>63</sup> *Id.* at Schedule Item 11. The definition of “Communication” provided to the subpoena recipients was “each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, text message, discussion, release, personal delivery, or otherwise.” *Id.* at Definition 3. The definition of “Document” provided to the subpoena recipients included “financial reports, working papers, . . . invoices, . . . bills, accounts, estimates, projections, comparisons . . . [and] financial statements . . .” *Id.* at Definition 1.

<sup>64</sup> See H. Res. 461, 114th Cong., § 3(a)(1) (2015).

<sup>65</sup> Subpoena to StemExpress, LLC (Feb. 12, 2016), Schedule Item 11.

<sup>66</sup> See H. Res. 461, 114th Cong., §§ 3(a)(1), (2), (6).

<sup>67</sup> See Subpoena to StemExpress, LLC (Feb. 12, 2016), Schedule Items 8, 9, 11.

<sup>68</sup> Teleconference between Panel Staff and Stephen M. Ryan and Amandeep S. Sidhu, McDermott Will & Emery (Mar. 14, 2016).

<sup>69</sup> House Select Investigative Panel Staff analysis of STEM.HOUSE.SELECT\_0915, STEM.HOUSE.SELECT\_1414, STEM.HOUSE.SELECT\_1647, STEM.HOUSE.SELECT\_0795.

shipping costs were passed on to the customer.<sup>70</sup> Such discrepancies rendered the summaries useless in comparing revenue (valuable consideration) against costs allowed under the statute, a primary concern of the Panel. Such discrepancies revealed the Panel’s need to review original accounting records pertinent to its investigation.

#### A. STEMEXPRESS REFUSED TO PRODUCE EMPLOYEE NAMES, ACCOUNTING DOCUMENTS, AND BANKING RECORDS REQUIRED BY THE FEBRUARY 12, 2016 SUBPOENA

StemExpress refused to produce the names of employees involved in the procurement of fetal tissue, saying it was “gravely concerned about the safety and security risks of identifying StemExpress personnel involved in the procurement of fetal tissue.”<sup>71</sup> StemExpress did, however, offer “[the name of] one of its employees . . . as a corporate witness . . . .”<sup>72</sup> The Panel staff and the Chairman have represented publicly and to StemExpress counsel that the Panel’s policy was to keep the names of lower-level staff and researchers redacted from any public documents or reports. Indeed, the directions to such subpoena recipients provide a methodology to protect the identities of persons in functional positions.<sup>73</sup>

StemExpress produced communications that spanned only two years instead of the five required by the subpoena and these were so replete with redactions as to render them unusable.<sup>74</sup> StemExpress produced only “roll-up” accounting summaries, which, as outlined above, lacked the authenticity and accuracy of actual accounting documents.<sup>75</sup> StemExpress produced the required invoices on May 12, 2016.<sup>76</sup> However, that production was also replete with redactions. StemExpress stated, “Based on safety and security concerns that have previously been raised with the Select Panel, StemExpress has redacted the names of individual researchers and StemExpress personnel.”<sup>77</sup> StemExpress has not produced any banking records.

#### B. THE PANEL’S ATTEMPTS TO OBTAIN COMPLIANCE WITH ITS FEBRUARY 12, 2016 SUBPOENA

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<sup>70</sup> *Id.*

<sup>71</sup> StemExpress Third Response to House Select Investigative Panel Subpoena, at 3.

<sup>72</sup> *Id.*

<sup>73</sup> Teleconference between Panel Staff and Stephen M. Ryan and Amandeep S. Sidhu, McDermott Will & Emery (Mar. 14, 2016). Once witnesses are agreed to for interview or depositions, the Panel committed in writing that the names of lower-level individuals would be kept confidential. Letter from T. March Bell, Chief Counsel and Staff Director, House Select Investigative Panel, to Neil F. Quinter, Brownstein Hyatt Farber Schreck (July 20, 2016), at 1. Chairman Blackburn told reporters after the hearing that the majority would “do everything possible to protect names and identities . . . we will do redactions as necessary to protect privacy.” Samantha Lachman, *Democrats Compare GOP Probe of Medical Organizations to McCarthyism*, Mar. 2, 2016, online at [http://www.huffingtonpost.com/entry/republicans-fetal-tissue-research\\_us\\_56d71ddee4b0871f60ed7512](http://www.huffingtonpost.com/entry/republicans-fetal-tissue-research_us_56d71ddee4b0871f60ed7512).

<sup>74</sup> “StemExpress Third Response to House Select Investigative Panel Subpoena,” [STEM.HOUSE.SELECT\_0668].

<sup>75</sup> See Letter from Amandeep S. Sidhu, McDermott Will & Emery, to T. March Bell, Chief Counsel and Staff Director, House Select Investigative Panel (Mar. 18, 2016), at 1 (emphasis in original); Letter from Amandeep S. Sidhu, McDermott Will & Emery, to Rep. Blackburn, Chairman, House Select Investigative Panel (May 6, 2016), at 2.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Although the Panel issued two additional subpoenas on March 29, 2016, one to Ms. Dyer and one to StemExpress, Chairman Blackburn wrote to Ms. Dyer, as CEO of StemExpress on April 28, 2016, regarding the production of the missing accounting records demanded under the Panel's February 12, 2016 subpoena and specifically listed the missing accounting records that were needed for the Panel to pursue its inquiry under H. Res. 461.<sup>78</sup> This list of missing accounting records reflects and reiterates demands made to the subpoena recipients.<sup>79</sup> Chairman Blackburn also required that StemExpress fully comply with the Panel's first subpoena, stating that, "Failure to comply will leave the Panel with no choice but to pursue all means necessary to compel compliance."<sup>80</sup>

StemExpress' attorney replied in a May 6, 2016 letter, mistakenly stating that the list of accounting records required to be produced under the Panel's first subpoena were "over a dozen *new* requests,"<sup>81</sup> and that "the company will not be responding to these new requests unless and until a subpoena requesting this new information is duly served."<sup>82</sup> The accounting records listed in Chairman Blackburn's April 28, 2016 letter did not constitute a new request; rather, the Chairman merely attempted, as a courtesy, to inform StemExpress of the specific records as outlined definitions provided to the subpoena recipients section that were absent from its previous productions.<sup>83</sup> The list of missing accounting document includes:

- 1) Documents sufficient to reflect StemExpress' organization chart, including information detailing StemExpress personnel who procure(d) fetal tissue at the clinic level and the supervisory personnel for those procurers of fetal tissue.
- 2) All communications, whether internal or external, that direct or relate to a direction to StemExpress personnel to procure fetal tissue, including, but not limited to memoranda, emails, telephone messages, and purchase orders or bills of sale.
- 3) All StemExpress accounting records, including but not limited to accounting memoranda related to the cost and pricing of fetal tissue.

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<sup>78</sup> Dyer letter, at 2-4.

<sup>79</sup> Additionally, the Feb. 12, 2016 Subpoena to StemExpress, LLC, defines a document as "any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, text messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets." Subpoena to StemExpress, LLC (Feb. 12, 2016), Definition 13.

<sup>80</sup> Dyer letter, at 4.

<sup>81</sup> Letter from Amandeep S. Sidhu, McDermott Will & Emery, to Chairman Blackburn (May 6, 2016), at 5. (emphasis in original).

<sup>82</sup> *Id.* at 6.

<sup>83</sup> Dyer letter, at 6.

- 4) Copies of all invoices (by month and year), reflecting the billing that StemExpress issued to all institutions or entities to which StemExpress donated or provided fetal tissues for the following years: 2010, 2011, 2012, 2013, 2014 and 2015.
- 5) Copies of all invoices (by month and year) reflecting the billing or payment of funds for fetal tissues obtained by StemExpress for the following years: 2010, 2011, 2012, 2013, 2014 and 2015.
- 6) A copy of any chart of accounts for StemExpress, including but not limited to account descriptions from any financial recording system relating to StemExpress.
- 7) StemExpress' end of year trial balance report and trial balance details for the following years: 2010, 2011, 2012, 2013, 2014 and 2015.
- 8) All documents reflecting StemExpress' statement of revenues (i.e., a breakdown by product categories) for the following years: 2010, 2011, 2012, 2013, 2014 and 2015.
- 9) All documents reflecting StemExpress' record of costs and expenses (i.e., a breakdown by operations, including fetal tissue acquisition) for administrative costs and expenses as well as compensation and benefits, for the following years: 2010, 2011, 2012, 2013, 2014 and 2015. Where applicable, records should include identification of vendors and descriptions of expenses.
- 10) StemExpress' balance sheets for the following years: 2010, 2011, 2012, 2013, 2014 and 2015. Audited statements should be provided, if available.
- 11) StemExpress' income statements, including but not limited to any profit and loss statements, statements of operations and statements of activities for the following years: 2010, 2011, 2012, 2013, 2014 and 2015. Audited statements should be provided, if available.
- 12) Copies of StemExpress' filed tax returns for the following years: 2010, 2011, 2012, 2013, 2014 and 2015.
- 13) All StemExpress bank statements from any financial institution where StemExpress has maintained an account for the following years: 2010, 2011, 2012, 2013, 2014 and 2015.
- 14) Documents sufficient to show how StemExpress calculates(d) the cost of a fetal tissue and all factors applied in determining pricing of fetal tissue. In lieu of these documents, you may provide a written explanation.<sup>84</sup>

It is this list of missing documents, lawfully subpoenaed by a congressional panel, that forms the basis for finding StemExpress in contempt.

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<sup>84</sup> Dyer letter, at Appendix A.

## VI. THE PANEL ISSUED A SUBPOENA TO STEMEXPRESS' CEO, MS. DYER, ON MARCH 29, 2016

On March 29, 2016, the Panel issued a subpoena to Catherine “Cate” Spears Dyer, StemExpress’ founder and CEO, requiring documents sufficient to identify (or, if she preferred, a list identifying) the company’s finance director, finance manager, account manager, or equivalent position(s).<sup>85</sup> That subpoena also required the production, in unredacted form, of “all communications and documents sufficient to show accounts payable and receivable concerning in any way the storage, purchase or transport of fetal tissue, received by or sent by StemExpress’ Director of Finance, Finance Manager, Account Manager, or equivalent positions.”<sup>86</sup> Ms. Dyer refused to comply with the subpoena and failed to turn over a single document in response to the subpoena.<sup>87</sup> Such information, in addition to the accounting information compelled by the Panel’s subpoena to StemExpress, is vital for the Select Investigative Panel to assess the efficacy of § 289g-2. Interviews of accounting personnel and the records they create and maintain would provide indispensable information regarding whether allowed costs under the statute are less than or greater than the revenue derived from fetal tissue. That this issue is central to the operation and efficacy of the statute is not only the opinion of the Panel, but was confirmed by hearing witnesses during the Panel’s April 20, 2016 hearing, “The Pricing of Fetal Tissue,” in which senior law enforcement attorneys and others stated the accounting and banking documents were critical to any analysis of § 289g-2.<sup>88</sup> Even though she is under subpoena, and despite the

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<sup>85</sup> See Dyer subpoena, Schedule Item 1. The Panel issued two subpoenas on March 29. The second subpoena addressed to StemExpress regarding Institutional Review Boards is not part of the basis for contempt in this Report.

<sup>86</sup> See Dyer subpoena Schedule.

<sup>87</sup> “StemExpress First Response to House Select Panel’s March 29, 2016 Subpoenas” (Apr. 11, 2016). StemExpress merely produced additional “roll-up” accounting reports of StemExpress’ 2011 through 2013 fetal tissue sales. StemExpress stated those reports “were generated in lieu of producing additional email correspondence, purchase orders, invoices, and other documentation related to fetal tissue transactions in response to Spec. Nos. 6, 9, and 11 in the Feb. 12, 2016 subpoena.” *Id.* [STEM.HOUSE.SELECT\_0715].

<sup>88</sup> *The Pricing of Fetal Tissue: Hearing before the Select Investigative Panel of the H. Comm. on Energy and Commerce*, 114th Cong. (Apr. 20, 2016) [hereinafter *Pricing of Fetal Tissue*]. In particular, the witnesses made the following statements when asked by Chairman Blackburn what information the Panel should pursue:

Former Senior Litigation Counsel, U.S. Department of Justice - Brian Lennon: The only element where investigation is needed, and that would include I believe forensic accounting and analysis thereof, is whether the payments made by the research institutions that ultimately receive the human tissue to the procurement businesses were a valuable consideration or, alternatively, reasonable payments associated with the specific allowable services in the statute... Because the businesses do in fact incur costs associated with these delineated services, a forensic accounting would be essential to breaking down the company's financials. *Pricing of Fetal Tissue*, unedited transcript, at 53.

Former United States Attorney- Kenneth Sukhia: I would also want to know what communications occurred between -- other communications, email and so forth, back and forth between those people. We would seek those items as well, and of course the accounting records. *Pricing of Fetal Tissue*, unedited transcript, at 79.

Panel's clear and direct need for the documents, Ms. Dyer still refuses to comply with the Panel's subpoena.

Due to StemExpress' and Ms. Dyer's failure to comply with the Panel's subpoenas and their continual refusal to provide accounting information directly pertinent to the Panel's investigation and study, conducted pursuant to H. Res. 461, the Panel was forced to subpoena Scinto, StemExpress' outside accountant.<sup>89</sup> Scinto listed three general objections to the subpoena.<sup>90</sup> The Panel responded, rejecting each objection as meritless.<sup>91</sup> For example, counsel for Scinto proposed that the Internal Revenue Code (IRC) provisions prevent disclosure of tax returns to a non-client.<sup>92</sup> Panel staff emailed Scinto 26 CFR 301.7216-2(f)(3), which makes it

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Former United States Attorney Mike Norton: First of all, I would start by looking at the videos, which I have seen. I would start by reading the forensic accounting report by Coalfire Investigations made up of former FBI agents, which found that the videos were credible and the redacted versions say what the longer versions say. I would obtain the accounting records, the financial records of the abortion clinic, of the procurement business, and, frankly, I would obtain the records of the end user as well, and subpoena both records and witnesses from all of those entities to flesh out the facts in this case, which I think are there. *Pricing of Fetal Tissue*, unedited transcript, at 125-126.

Brian Lennon: As I said in my opening, you need a forensic -- if I was a prosecutor, you have to have a forensic evaluation accounting of the procurement business, because that is not clear from the records here. So following the money, you have got to have the entire picture. *Pricing of Fetal Tissue*, unedited transcript, at 139.

Mike Norton: I would get forensic accounting. I would get all of the financial records. I would get the profit and loss statements, the income and expense statements, and I would get people under oath before a grand jury. Letters are not particularly valuable. *Pricing of Fetal Tissue*, unedited transcript, at 139.

Attorney Catherine Glenn Foster: There are two things that I would specifically seek among many different documents. First of all, financial records. That is something that must be brought to light. And, second, women of every generation are unique human beings who can speak for themselves, but the baby body parts profiteers have created a market in which their profits rise if they pressure and coerce women into signing donation consent forms. *Pricing of Fetal Tissue*, unedited transcript, at 140.

Attorney Fay Clayton: The second thing I would do is ask them, in each particular case, what aspect of the actual costs does a particular clinic incur? For example, does the clinic provide space? Does the clinic, as we have seen in your charts, provide the blood draws which requires a technician, perhaps a nurse, materials? Does the clinic have to do paperwork? And, if so, how much? And, therefore, how much of the actual reasonable cost is incurred by the clinic itself as opposed to by the procurement business? *Pricing of Fetal Tissue*, unedited transcript, at 138.

<sup>89</sup> See Subpoena to Scinto Group, LLP (Apr. 29, 2016).

<sup>90</sup> Letter from Kevin M. Murphy, Carr Maloney, to T. March Bell, Chief Counsel and Staff Director, House Select Investigative Panel (Jun. 28, 2016) [hereinafter Murphy Jun. 28 letter], at 2, 3-4.

<sup>91</sup> Letter from T. March Bell, Chief Counsel and Staff Director, House Select Investigative Panel, to Kevin M. Murphy, Carr Maloney (Sept. 8, 2016).

<sup>92</sup> Email from Kevin M. Murphy to House Select Investigative Panel Staff (May 26, 2016).

clear that a congressional subpoena is an exception to non-disclosure provisions of the IRC.<sup>93</sup> Scinto's counsel next response was to question whether a subpoena issued by the Select Investigative Panel was equivalent to a subpoena issued by a full house of Congress.<sup>94</sup> In addition, Scinto stated through counsel that it had consulted with StemExpress counsel and that StemExpress expressly instructed Scinto that it would not waive any state common law privileges that protect StemExpress from disclosure by its accountant.<sup>95</sup>

A. STEMEXPRESS REFUSED TO PRODUCE KEY EMPLOYEE NAMES AND ACCOUNTING DOCUMENTS REQUIRED BY THE FEBRUARY 12, 2016, SUBPOENA AND PERTINENT TO ITS INVESTIGATION

StemExpress did not produce the subpoenaed names of StemExpress personnel who procure(d) fetal tissue at the clinic level and the supervisory personnel for those procurers of fetal tissue, stating it “remains gravely concerned about the safety and security risks associated with identifying additional [other than the single employee previously named] personnel.”<sup>96</sup> The firm did, however, supply the name of its outside accountant, Scinto.<sup>97</sup> StemExpress also did not produce all of the subpoenaed accounting records, and produced only additional “‘roll-up’ reports of StemExpress 2011 through 2013 fetal tissue sales . . . .”<sup>98</sup>

Accordingly, as noted in the Executive Summary, the Panel issued a subpoena to Scinto for all StemExpress accounting documents.<sup>99</sup> Citing state common law “privilege and/or confidentiality provisions” and laws that expressly permit disclosure pursuant to subpoena, Scinto stated it “respectfully declines to produce the requested records.”<sup>100</sup> The Panel has rejected Scinto's objections and its attempts to use inapplicable provisions and common law privileges to avoid compliance with the subpoena.

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<sup>93</sup> Email from House Select Investigative Panel Staff to Kevin M. Murphy, Carr Maloney (May 26, 2016).

<sup>94</sup> Murphy Jun. 28 letter, at 2.

<sup>95</sup> *Id.* at 1.

<sup>96</sup> “StemExpress First Response to House Select Panel's March 29, 2016 Subpoenas” (Apr. 11, 2016), at 1.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 3.

<sup>99</sup> Subpoena to Scinto Group, LLP (Apr. 29, 2016);

<sup>100</sup> *See* Murphy Jun. 28 letter, at 2.

## VII. ANALYSIS OF ISSUES RAISED BY STEMEXPRESS

### A. POTENTIAL HARM TO PERSONNEL, CUSTOMERS, AND CLIENTS

StemExpress, in its document productions and letters, repeatedly has raised the concern that public disclosure of materials might lead to harm of its personnel, customers, and clients. However, courts repeatedly have held that disclosure of information to a congressional committee is not a “public disclosure.”<sup>101</sup> The Select Investigative Panel is mindful of valid safety concerns and has at no time threatened to expose individuals to public scrutiny for the sake of exposure.

## VIII. HISTORICAL PERSPECTIVES ON CONTEMPT

The history of Congressional contempt dates back to 1795, shortly after the ratification of the Constitution.<sup>102</sup> Since then, Congress has used its contempt powers multiple times with regard to a subpoena recipient’s refusal to provide either witness testimony or the production of documents.<sup>103</sup>

As noted above, the first instance of congressional contempt was in 1795, when three Members of the House of Representatives reported that they had been offered what they interpreted to be a bribe by men named Robert Randall and Charles Whitney. The House approved a resolution finding the allegations were sufficient evidence of an attempt to corrupt its proceedings, and reported a resolution ordering their arrest and detention by the Sergeant-at-Arms, pending further action by the House. The matter was then referred to a special Committee on Privileges, which reported out a resolution recommending that formal proceedings be instituted against Randall and Whitney in the House.

The resolution was approved by the House, which spelled out the first-ever contempt procedure: Members provided written interrogatories and Randall and Whitney were provided counsel, given the right to call witnesses on their behalf, the right to cross-examination of the complaining Members through written questions submitted to the Speaker, and an adequate time to prepare a defense. By a vote of 78-17, the House found Mr. Randall guilty of contempt, and ordered that he be reprimanded by the Speaker and held in custody until further resolution of the

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<sup>101</sup> See, e.g., *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (holding that executive agency “may not deny Congress access to confidential documents, including those that contain trade secrets,” because “[r]elease to a congressional requestor is not a public disclosure forbidden by section 6(f) of the [Federal Trade Commission] Act”); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585-86 (D.C. Cir. 1978); *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977, 979 (D.C. Cir. 1976) (per curiam). *Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (quoting *Exxon Corp.*, 589 F.2d at 589) (Indeed, courts have presumed just the opposite is true—that “[o]nce documents are in congressional hands . . . ‘committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.’”). See also *Jaymar-Ruby, Inc. v. F.T.C.*, 496 F. Supp. 838, 845 (N.D. Ind. 1980) (“[W]hile Courts have held that as a matter of law, it cannot be presumed that private persons will honor commitments not to disclose information, Courts do presume that government officials will honor similar commitments.”) (citation omitted).

<sup>102</sup> Todd Garvey and Alissa M. Dolan, Cong. Res. Service, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 4 (2014).

<sup>103</sup> *Id.* at 4-30, 40-50.

House. Mr. Randall was detained until January 13, 1796, when the contempt was discharged by the House. Mr. Whitney, on the other hand, was absolved of any wrongdoing.<sup>104</sup>

## IX. CRIMINAL CONTEMPT

In 1857, a statutory criminal contempt procedure was enacted. The statute provides for prosecution by a United States Attorney and trial in U.S. District Court rather than a trial at the bar of the House. A criminal contempt referral was made in the case of John W. Wolcott in 1858. However, in the ensuing two decades after its enactment, most contempt proceedings continued to be handled at the bar of the House, rather than by the criminal contempt method.<sup>105</sup> With only minor amendments, the 1857 statutory provisions are codified today as 2 U.S.C. §§192 and 194, which state:

Every person who having been summoned as a witness by the authority of either House of Congress to . . . produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default . . . shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$100,000] nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.<sup>106</sup>

Whenever a witness . . . fails to produce any books, papers, records, or documents, as required, joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.<sup>107</sup>

Under the procedure outlined in the law, “the following steps precede judicial proceedings under [the statute]: (1) approval by committee; (2) calling up and reading the

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<sup>104</sup> *Id.* at 4-5.

<sup>105</sup> *Id.* at 18.

<sup>106</sup> 2 U.S.C. § 192. As a result of congressional classification of offenses, the penalty for contempt of Congress is a Class A misdemeanor; thus, the \$1,000 maximum fine under § 192 has been increased to \$100,000. *See* 18 U.S.C. §§ 3559, 3571.

<sup>107</sup> 2 U.S.C. § 194.

committee report on the floor; (3) either (if Congress is in session) House approval of a resolution authorizing the Speaker to certify the report to the U.S. Attorney for prosecution, or (if Congress is not in session) an independent determination by the Speaker to certify the report; [and] (4) certification by the Speaker to the appropriate U.S. Attorney for prosecution.” The law states that after contempt has been certified by the Speaker, it is the “duty” of the United States Attorney “to bring the matter before the grand jury for its action.”<sup>108</sup>

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<sup>108</sup> *Id.*