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April 27, 2009

BY EMAIL and FACSIMILE

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Patricia C. Bates, Chair
Supervisor 5th District
County of Orange Board of Supervisors
333 W. Santa Ana Blvd.
Santa Ana, CA 92701

Re: *Offer of Support for a Decision by the Board of Supervisors to Maintain the Integrity of Public Funds Free from any Connection to Abortion Services*

Dear Ms. Bates:

The Alliance Defense Fund is aware of recent public reports, both from the County of Orange Board of Supervisors' website and from the news media, indicating that the Board is considering the adoption of a policy to restrict the distribution of certain county funds so that they are not used in proximate connection with abortion. We are also aware that certain groups perceive such regulations as a potential burden on speech or on women's health, and have stated their intention to challenge the proposed regulations in court if they are implemented.

I serve as Senior Legal Counsel in the Washington, D.C. office of the Alliance Defense Fund ("ADF"). ADF is a non-profit legal organization that engages in litigation to protect the sanctity of all human life, protect religious freedom and defend the family. Through its various offices nationally, including Sacramento, California, ADF has litigated numerous high-profile cases to defend reasonable government policies relating to abortion, and works with numerous allies in California on local government issues.

Our attorneys have represented state and local governments and private organizations in multiple federal and state lawsuits filed by Planned Parenthood, the Center for Reproductive Rights, the ACLU and other pro-abortion organizations who object to reasonable state and local policies that allegedly disfavor abortion. ADF has also coordinated successful briefs in numerous cases before the United States Supreme Court, including the most recent case in which the Court upheld federal restrictions on partial birth abortion, *Gonzales v. Carhart*. Because ADF is a non-profit legal organization, our attorneys represent government defendants without charge.

ADF believes that case law provides the Board with a clearly constitutional path to restrict the use of Measure H Tobacco Settlement Revenue funds to preclude any connection to the provision or promotion of abortion. The United States Supreme Court has explicitly approved a policy that not only prevents federal Title X funds from being directly used for abortion, but also that prohibits the funds from being used by an organization that performs or refers for abortion with its own funds, if the policy meets some general parameters. *Rust v. Sullivan*, 500 U.S. 173 (1991). Money is often regarded in the law as fungible, and the Court recognized that since government entities can choose not to aid in abortion, they must also be allowed to choose not to allow funding recipients to blur the lines between their abortion-related activities and contract services or to mingle the contract funds with funds that provide or promote abortions.

Moreover, the United States Court of Appeals for the Ninth Circuit, which governs federal law in California, approved a *Rust*-like policy with even broader restrictions. *Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017 (9th Cir. 1998). The policy did not allow funds to flow even proximately to activities that the government was choosing not to fund, by preventing fund recipients from engaging in those activities—even on their own dime—unless the recipients met restrictions designed to maintain the “integrity” and “independence” of government funds by making sure that such activities occurred under a legally, physically and financially separate entity. *Id.* at 1025 (listing several factors relevant to determining whether true separation existed between the funds and the restricted activities, including separation of personnel, bookkeeping, timekeeping, facilities, visible signage, and the extent to which the activities occurred).

As a result, federal precedent is clear that the County of Orange will not violate the United States Constitution by preventing Measure H funds from being used either directly for abortion, or in organizations that engage in abortion, abortion referral, or abortion advocacy, if the Board follows the fund integrity policy of *Legal Aid Society*.

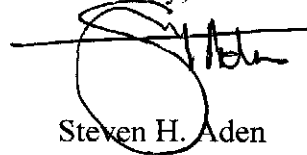
ADF attorneys have also surveyed California law, and while the California Constitution has been interpreted to require Medi-Cal to fund abortion, see *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 256, 625 P.2d 779, 780 (1981), we believe that this precedent would not be vastly extended (as it would have to be) to prohibit the Board’s adoption of *Rust*-like restrictions on this particular program.¹

¹ “In *Myers*, the only issue before the California Supreme Court was whether state Budget Acts which severely limited Medi-Cal funding for abortions violated Article I, § 1.” *Chico Feminist Women’s Center v. Butte Glen Medical Society*, 557 F.Supp. 1190, 1202 (E.D. Ca. 1983). Assuming that the County does not make the Tobacco Settlement Revenue funds available to community clinics to provide for all reproductive health services, the restriction on abortion services in the proposed policy does not contravene the holding or rationale of *Myers*. Notably in this regard, California law actually prohibits family planning grantees from offering abortion services or promoting abortion as a method of family planning. CAL.WELF. & INST.CODE § 14509(d) (“Any person awarded a

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ADF would be happy to discuss the proposed policy with you, as well as the possibility of your retaining ADF as special counsel in relation to this matter if the County of Orange adopts a policy consistent with *Rust* and *Legal Aid Society*. We are available to speak with you by conference call, and one of our staff or allied attorneys could come to Santa Ana to speak with you in person if you so desire. Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Aden", written over a horizontal line.

Steven H. Aden
Senior Legal Counsel

cc: Timothy D. Chandler, Esq., ADF Sacramento Office
Craig P. Alexander, Esq., Irvine, CA
Interested Parties

SHA/am

grant by the department pursuant to this chapter shall agree that during the term of the grant it will not be a group, clinic, or organization that, with funds provided pursuant to this chapter, advertises, advocates, or promotes abortion as a method of family planning, or that receives any fee or other consideration as payment for referrals for abortion services. Any person awarded a grant by the department pursuant to this chapter shall agree to the termination of the grant and to return all unexpended funds to the department that have been received from the department pursuant to that grant if the department finds that the grantee has violated this section.”).