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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, JANE DOE, on behalf of herself and others similarly situated, Plaintiffs, v. DON WRIGHT, Acting Secretary of Health and Human Services, *et al.*, Defendants, v. U.S. CONFERENCE OF CATHOLIC BISHOPS, Defendant-Intervenors.	Civil No. 3:16-cv-3539-LB **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER**

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ARGUMENT

Jane Doe is seventeen years old, pregnant, and seeks an abortion, which she is legally entitled to obtain. A state court has granted her legal authority to consent to the procedure on her own in lieu of obtaining parental consent, which is a requirement of the state in which she resides. Ms. Doe's court-appointed guardian and attorney ad litems are able to transport her to a health clinic for the procedure; the clinic stands ready to see Ms. Doe; and Ms. Doe has secured her own funding for the abortion. Nonetheless, ripping a page out of a dystopian novel, the federal government is doing everything imaginable to prevent her from accessing an abortion.

Defendants do not dispute that they refuse to transport her for the medical care that she needs, and also refuse to allow someone else to take her to the appointment. Instead, they are essentially holding Ms. Doe hostage to prevent her from obtaining an abortion, purportedly to promote their interest in potential life. This is as unconscionable as it is unconstitutional. Since 1973, the Supreme Court has held that the government cannot ban abortion. Although the Court has recognized that the government has a legitimate interest in encouraging a woman to continue a pregnancy, the Court has made crystal clear that the government cannot effectuate that interest by creating roadblocks (not to mention physically confining) that prevent a woman from obtaining an abortion.

Time is of the essence. Defendants' actions have already delayed Ms. Doe's ability to access abortion, and forced her to continue her pregnancy for weeks. Each week of delay pushes Ms. Doe needlessly further into her pregnancy, which increases the risks and complexity of the procedure. Each day that Ms. Doe is unable to get the health care she needs and effectuate her very personal decision about her pregnancy, while enduring hurdle after hurdle erected by the government, is taking an enormous emotional toll. Eventually Ms. Doe will be pushed so far

into her pregnancy that she will be forced to carry the pregnancy to term against her will. For the reasons stated below, and for the reasons stated in Plaintiffs' opening brief, Ms. Doe's motion for a temporary restraining order should be granted.

I. Plaintiffs Are Likely to Succeed on the Merits of their Claims.[1]

A. Defendants Cannot Prohibit Ms. Doe From Accessing Abortion.

Plaintiffs' likelihood of success on the merits could not be greater. Astonishingly, Defendants argue that there is "no precedent" to support Plaintiffs' arguments. Defs.' Br. at 5. To the contrary, any first year law student understands that under *Roe v. Wade* the government cannot ban abortion.[2] But that is precisely what Defendants have done here, and Defendants do not deny it. Defendants are legally required to ensure that unaccompanied minors have access to medical care.[3] *See, e.g., Flores v. Reno Settlement Agreement*, CV-85-4544-RJK (Jan. 17, 1997) (requiring the government to provide or arrange for, among other things, "appropriate routine . . . medical care," including specifically "family planning services"); *see also* 45 C.F.R. § 411.92(a)

[1] Defendants shoehorn arguments related to Plaintiffs' motion to amend their complaint into arguments about Plaintiffs' success on the merits. Plaintiffs address those arguments in their simultaneously filed reply in support of their motion to amend their complaint.

[2] Defendants seem to imply that Ms. Doe's constitutional rights are diminished because of her immigration status, but the Ninth Circuit has explicitly rejected such an argument. *See Kwai Fun Wong v. U.S.*, 373 F.3d 952, 970-72 (2004).

[3] Federal prisoners and those detained by Immigration Customs and Enforcement (ICE) also have a legal right to access abortion. 28 C.F.R. § 551.23 (a federal inmate may decide whether to have an abortion, and if she does, "the Clinical Director shall arrange for an abortion to take place"); ICE Guidelines, Detention Standard 4.4, Medical Care (if an ICE detainee requests abortion, ICE "shall arrange for transportation at no cost" to the detainee), available at https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf.

et seq.[4] Nevertheless, Defendants admit they will not transport Ms. Doe to the abortion facility. But perhaps even more shockingly, they admit they will not "make her available for appointments," Defs.' Br. at 3. This is nothing more than a euphemism for the outrageous fact—which they admit—that they will not even allow her to leave the shelter to get the abortion, even under the supervision of her court-appointed attorney and guardian ad litem.[5]

Defendants make essentially three arguments in an attempt to justify their actions, one more incredible than the next. First, they argue they are entitled to hold Ms. Doe hostage in order to promote a governmental interest in promoting fetal life. But it has been well settled for decades that such an interest cannot justify actively preventing a woman from getting an abortion. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (holding that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it").

Second, Defendants attempt to rely on the Supreme Court's line of cases related to whether the government has an affirmative duty to pay for an abortion in the context of the Medicaid program. Defs.' Br. at 6-7. But those cases are inapposite. As the Supreme Court held: The "conclusion [that the government does not have to cover abortion in the Medicaid

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[4] Indeed, Defendants have it backward when they argue that Plaintiffs are seeking to change the status quo, and therefore a heightened standard applies. Defendants are legally obligated to ensure access to abortion, and until Ms. Doe's case, they had been providing transportation to the abortion facility as they would for any other medical procedure. In any event, Defendants' actions are so egregiously unconstitutional, and the harm to Ms. Doe is so great, that under any standard of review, this Court should grant Ms. Doe a temporary restraining order.

[5] Defendants do not – and cannot point – to any legal justification for restricting Ms. Doe's mobility, including travel to the abortion clinic. To the contrary, Defendants are required to place unaccompanied minors "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A).

program] signals no retreat from Roe . . . . There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also Harris v. McRae*, 448 U.S. 297, 314 (1979) (upholding restriction on Medicaid coverage of abortion because it "places no obstacles – absolute or otherwise – in the pregnant woman's path to an abortion"). As the Court explained, "Constitutional concerns are greatest when the State attempts to impose its will by force of law." *Maher*, 432 U.S. at 476. That is precisely what the federal government has done here. Not only have Defendants refused to transport Ms. Doe to the appointment – which as discussed *infra*, Defendants have a legal obligation to do – but they have placed an absolute obstacle in her path and prevented her from getting the care she needs on her own.

Finally, in a last gasp effort to attempt to justify their indefensible actions, Defendants argue that Ms. Doe can get the care she needs if she agrees to allow the government to immediately deport her back to her home country, where she suffered abuse at the hands of her parents. Alternatively, the government argues, she can simply delay her abortion for weeks or months in the hopes that she will be reunited with family here in the United States in time to still get the care. To state these propositions is to demonstrate their absurdity: The Constitution does not permit the government to penalize Ms. Doe for seeking to exercise her right to an abortion by forcing her to give up her opportunity to be reunited with family here in the United States, or forcing her to return to her home country and abuse. Allowing the government to use access to abortion as a bargaining chip for immigration status would set a truly horrendous precedent. Moreover, Defendants' speculation about when Ms. Doe might be able to obtain an abortion upon reunification with family in the United States is just that: speculation. Defendants know

full well that the timing of the reunification process is unpredictable, and there is no way to guarantee that Ms. Doe would not be pushed so far into her pregnancy that she would cross the line of viability. In any event, it is simply callous to argue that it is an acceptable alternative for Ms. Doe to delay her abortion by weeks, if not months, given the attendant risks discussed *infra*.

B. It Is Unconstitutional For Defendants To Tell Ms. Doe's Parents About Her Abortion Decision.

Defendants make the astounding argument that they are entitled to tell Ms. Doe's parents about her abortion decision. Although the Supreme Court has upheld statutes requiring parental involvement in a minor's abortion decision, it has only done so if minors who are mature enough to make the decision on their own, or if parental involvement is not in their best interest, can bypass that requirement. *Bellotti v. Baird*, 443 U.S 622, 647 (1979). "When the minor is mature enough to make her own decisions independent of her parents, the State has no more interest in notifying her parents than it would in notifying the parents of an adult woman — namely, none." *Planned Parenthood v. Wasden*, 376 F. Supp. 2d 1012, 1020 (D. Idaho 2005) (preliminarily enjoining law that allowed for notice to a parent after a minor obtained an emergency abortion); *see also Planned Parenthood v. Miller*, 63 F.3d 1452, (8th Cir. 1995) (holding that "[b]y showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women"). In cases where a judicial bypass court finds that it is in the best interest of the minor to proceed without telling her parents, "the State has no further reasons for requiring such notice." *Id*. at 1460. Defendants cannot enact by policy what it could not enact by statute, and brazenly require parental notification. Here, a state court judge has already determined that Ms. Doe can consent to the abortion on her own, and should not be forced to

notify her parents. The federal government cannot unilaterally disregard that determination as a tool to coerce Ms. Doe into a different decision, to penalize her, or as a mechanism to effectuate a *de facto* ban on abortion. Defendants' actions are particularly shocking given that they are aware she has suffered parental abuse.

C. Defendants Cannot Force Ms. Doe To Be "Counseled" By a Crisis Pregnancy Center.

Defendants do not dispute that they forced Ms. Doe to obtain counseling at a religiously affiliated crisis pregnancy center (CPC) against her will. Defendants do not seek to defend their actions by pointing to any case law related to the First Amendment right against compelled speech. Instead, Defendants argue that it is not clear that Ms. Doe was forced to say anything to the CPC. But in order to be "counseled" by a CPC, a person must at least reveal that they seek an abortion, which is forced government speech. *See, e.g., Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 799 F. Supp. 2d 1048, 1056 (D.S.D. 2011) (holding that law requiring visit to CPC compelled speech even if the woman simply had to reveal that she was seeking an abortion). Moreover, Defendants rely on the fact that courts have upheld "informed consent" requirements prior to abortion. But the fact that the Supreme Court has generally upheld laws that require a patient to obtain counseling *from the abortion provider* prior to obtaining an abortion, *see, e.g., Casey*, 505 U.S. at 881-84, is irrelevant. Here, Ms. Doe was forced to go to a non-medical, ideological, religiously affiliated anti-abortion entity and discuss her abortion decision. Defendants also claim that Ms. Doe's forced speech claim is moot – it is not. Defendants have forced unaccompanied minors to obtain counseling from a CPC after the abortion procedure itself. *See, e.g.*, Ex. H to Decl. of B. Amiri in Supp. of Pls.' Mot. for TRO/PI, doc. 84-9, PRICE_PROD_00010867 (S. Lloyd directing staff to notify minor's parents of her abortion "alongside of resources to the UAC for post-abortion counseling as part of post-

release care"). Defendants can, and should, be restrained from forcing Ms. Doe to – yet again – discuss the most intimate details of her life with an entity hostile to her abortion decision.

II. Ms. Doe Will Be Seriously Harmed Absent Immediate Relief.

For all of the reasons discussed in Plaintiffs' opening brief, Ms. Doe will be irreparably harmed absent immediate relief. Consistent with their other appalling arguments, Defendants claim that Ms. Doe will not suffer irreparable harm if her request for a TRO is denied because she is months away from the legal abortion limit. This argument baldly ignores that each week of delay increases the risks associated with the abortion. *See, e.g.*, Linda A. Bartlett et al., *Risk Factors For Legal Induced Abortion-Related Mortality In the United States*, 103:4 Obstetrics & Gynecology 729 (Apr. 2004) (relative risk of abortion increases 38% per gestational week). For these reasons, this Court should also deny Defendants' request to issue a preliminary injunction instead of a TRO, as to Ms. Doe's ability to access abortion. Defs.' Br. at 10. It is outrageous that Defendants have delayed Ms. Doe's abortion this long, and Ms. Doe would be subject to further delays if Defendants were allowed to mount meritless appeals. Defendants' nationwide policy of interfering with and obstructing access to abortion is also the subject of a motion for a preliminary injunction for the proposed Plaintiff Class, and to the extent Defendants continue to defend their blatantly unconstitutional policies, they can, if they so choose, take an appeal after the Court decides that motion.

III. The Balance of Hardships and Public Interest Weighs Strongly in Ms. Doe's Favor.

Defendants do not claim that they would suffer real harm if a TRO were granted – they only point to an "interest" in ensuring that they do not facilitate abortion. But Defendants' claim that they are "harmed" by transporting Ms. Doe to her health care provider is undermined by the

fact that they are legally obligated to facilitate access to medical care for unaccompanied immigrant minors, as discussed *supra*. In other words, they cannot claim to be harmed by something they are legally obligated to do. But even if "facilitating" abortion could constitute harm, Ms. Doe's guardian and attorney ad litem have offered to transport Ms. Doe to the abortion facility. Defendants only need to step aside.

Moreover, there is no harm to the public if Ms. Doe's constitutional right to make an intimate health care decision is protected. The Ninth Circuit has repeatedly held that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) *quoting Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002). Defendants' claim that the public interest is not served by a TRO because it would "incentivize" pregnant minors to leave their home countries and come to the United States to seek an elective abortion. Defendants' argument is truly offensive. By Defendants' own admission, minors leave their home country to "join family already in the United States, escape abuse, persecution or exploitation in the home country, or to seek employment or educational opportunities in the United States."[6] To trivialize the reasons minors come to the United States is beyond reproach.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant Ms. Doe's motion for a TRO.

[6] Administration for Children and Families Factsheet, available at https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf.

DATED: October 10, 2017
ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC.

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