

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ROCHELLE GARZA, as guardian ad litem to)	
unaccompanied minor J.D., on behalf of)	
herself and others similarly situated, <i>et al.</i> ,)	
)	No. 17-cv-02122-TSC
Plaintiffs,)	
v.)	
)	
ERIC D. HARGAN, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**PLAINTIFFS’ REPLY IN FURTHER SUPPORT OF THEIR EMERGENCY MOTION TO
EXTEND THE TRO FOR JANE ROE AND JANE POE**

Defendants’ response to Plaintiffs’ Emergency Motion to Extend the TRO for Jane Roe and Jane Poe (ECF No. 95) demonstrates precisely why this Court should extend the TRO.¹ Indeed, Defendants affirmatively seek to tell Jane Poe’s parents and potential sponsor about her abortion, which is stunning given that Ms. Poe’s parents and potential sponsor have threatened to physically harm her if she obtained an abortion. As for Ms. Roe, it is immaterial that she is no longer in Defendants’ custody. Defendants still possess confidential information about Ms. Roe, and they should be restrained from revealing that information to Ms. Roe’s family or anyone else. Accordingly, for the reasons below, and in Plaintiffs’ opening brief, this Court should extend the TRO.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that Defendants’ Conduct Violates Jane Roe’s and Jane Poe’s Fifth Amendment Rights.

As this Court has already found, Plaintiffs are “likely to succeed on the merits of their action.” ECF No. 73. Defendants’ disclosure of Ms. Roe’s and Ms. Poe’s abortion decisions to third parties, over their objections and without their consent, would violate their right to privacy

¹ Notably, Defendants do not oppose extension of paragraphs 4 and 5 of the Court’s order.

“in avoiding disclosure of personal matters.” *Whalen v. Roe*, 429 U.S. 589, 599 (1977). This privacy interest is only heightened here, where the “personal matter” at issue—the decision to have an abortion—is one that is highly sensitive, intimate and emotionally charged. *See, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) (“The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity.”), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992); *Planned Parenthood of S. Arizona v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) for the proposition that the abortion-related information that courts obtain in a judicial bypass proceeding is “sensitive private information . . . worthy of constitutional protection.”). This is no less true for Ms. Roe simply because she is no longer in Defendants’ custody.² Defendants are in possession of Ms. Roe’s private medical information, and know the identity of her family members. Defendants state that they have no “intention” to reveal Ms. Roe’s abortion decision. Defs.’ Resp. at 2. If that is true, Defendants should have no objection to a court order that memorializes that commitment.

Defendants also make the absurd argument by analogy that a TRO prohibiting a minor’s parents from speaking about their daughter’s abortion would violate the First Amendment. *Id.* at 4. That is not what is at issue here. Defendants do not possess a First Amendment right to tell others about Ms. Roe’s and Ms. Poe’s abortion decision. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). To the contrary, as discussed *supra*, they are bound by the Constitution—unlike a minor’s parents—to protect Ms. Roe’s and Ms. Poe’s privacy.

Furthermore, Defendants imply that Ms. Poe waived her constitutional right to privacy by

² As previously stated, Plaintiffs dispute that Ms. Roe is an adult.

informing her parents of her contemplated abortion or by telling Defendants.³ *Id.* at 3-4. But that argument has no merit. As to the former, whether Ms. Poe decides to communicate her ultimate decision to have an abortion decision is no business of the federal government. As to the latter, under the policy challenged by Plaintiffs, Ms. Poe was required to tell Defendants she was seeking an abortion in order to obtain permission to obtain one. Defendants' argument would put minors between a rock and a hard place: they wouldn't be permitted to obtain abortion if they don't ask for permission, but if they do ask for permission they have given Defendants carte blanche to tell others about their abortion decision. Such a system would impermissibly condition one constitutional right on giving up another right. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969)

II. Jane Roe and Jane Poe Will Suffer Irreparable Harm If Defendants Are Permitted to Disclose Their Abortion Decision to Third Parties Without Their Consent.

Permitting Defendants to violate Ms. Roe's and Ms. Poe's right to privacy by disclosing their abortion decision to others will irreparably harm them. Numerous courts have found that disclosure of the fact that a woman is seeking or has obtained an abortion risks exposing her to serious harm, including harassment, ostracism, rejection and even abuse or violence. *See Bellotti v. Baird*, 443 U.S. 622, 645 (1979); *Thornburgh*, 476 U.S. at 767 & n.12; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897–98 (1992); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758–59 (1994); *Margaret S. v Edwards*, 488 F. Supp. 181, 216 (E.D. La. 1980) (threat to privacy of abortion patient is of "impressive dimensions"); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:17-cv-01636-SEB-DML, 2017 WL 2797757, at *13 (S.D. Ind. June 28, 2017) (discussing numerous reasons why a minors may not want legal

³ Plaintiffs do not concede that Ms. Poe told her parents on her volition.

guardians to be notified of their abortion decisions, including fear of “abuse at the hands of one or more of their parents”); *Lawall*, 307 F.3d at 790 (maintaining that “disclosure of [abortion related] information would cause significant harm.”). This concern is heightened for Ms. Poe, whose family and potential sponsor have explicitly threatened to harm her if she obtained an abortion. Defendants’ desire to tell Ms. Poe’s potential sponsor and her parents of her abortion would cause her harm, and is downright cruel.

III. Defendants’ Interest In Fulfilling Their Custodial Obligations Will Not Be Harmed By Extending the Injunction.

Conversely, the extended injunction imposes no harm on Defendants. That Ms. Roe and Ms. Poe have now obtained their abortion changes nothing—Defendants have the same interest in notifying third parties today as they did before the abortion procedure, “namely, none.”

Planned Parenthood of Idaho, Inc. v. Wasden, 376 F. Supp. 2d 1012, 1019–20 (D. Idaho 2005) (preliminarily enjoining law that allowed for notice to a parent *after* a minor obtained an emergency abortion). In fact, ORR policies regarding the disclosure of similarly sensitive information about minors who are over the age of 14 require that the minor’s consent be obtained prior to any disclosure.⁴

⁴ See, e.g., ORR Policies and Procedures, Section 8.101 Information Sharing: Requests for UC Case File Information (2013), *available at* <https://www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information> (“In addition to a written request, [outside entities, attorneys, or other individuals seeking copies of UC case files, specific information contained in a UC case file, or other confidential information pertaining to a UC] . . . must complete . . . an Authorization for Release of Records . . . [that] must be signed by the UC if the UC is 14 years of age or older.”); ORR Policy Guide, Section 4.10.4 Notification and Access to Attorneys/Legal Representatives, Families, Child Advocates and Sponsors (2015), *available at* <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-4#4.10.4> (instructing the care provider to notify the attorney of record of a minor who is over 14 years old of any allegations of sexual abuse or harassment *only if* that minor authorizes the disclosure); *see also* Section 3.4.7 Maintaining Health Care Records and Confidentiality, *available at* <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3> (“The care provider must have written policies, procedures, and

In the unlikely event this information is relevant and/or requested by a health care provider, Ms. Poe—who is 17 years old—is more than capable of providing this information to her health care provider herself.⁵ Indeed, this is exactly what would be expected of a teenager who was not in federal custody, and who had the right to consent to the abortion on her own; it would be incumbent on her—not her parent or legal guardian—to provide her confidential medical history to her doctors, within the confines of the protected patient-physician relationship.

Nor have Defendants identified any way in which they will be harmed if they are prohibited from disclosing Ms. Poe’s abortion decision to prospective sponsors. Both common sense and jurisprudence dictate that if Defendants truly desire to prevent Ms. Poe from being retaliated against for her abortion decision by her sponsor, there is a simple solution—they should not divulge her abortion decision to her sponsor. *See, e.g., Casey*, 505 U.S. at 897–98 (striking down spousal notification requirement because some women fear the consequences of notifying their husbands about their abortion decision).

CONCLUSION

For all of the reasons stated above, and in Plaintiffs’ opening brief, Plaintiffs’ motion to

practices that protect the confidentiality of [unaccompanied alien children’s] medical information.”).

⁵ In an effort to assuage Defendants’ alleged concerns regarding emergency care, Plaintiffs would be amenable to further amending the TRO to include a limited exception permitting Defendants to reveal certain information regarding Ms. Poe’s abortion (1) in the event of a medical emergency in which (2) Ms. Poe is, by virtue of an emergency medical condition, rendered unable to communicate this information to the medical provider herself, and only so long as (3) the relevant medical provider to whom the information is to be disclosed certifies in advance of the disclosure that this information is medically necessary to in order to provide adequate care, (4) only such information as is medically necessary to the provision of adequate care is revealed, and (5) this information is revealed only to the requesting medical provider and those working with the requesting medical provider who have a need to know this information in order to provide Ms. Poe with adequate medical care.

extend the TRO should be granted.

Date: December 30, 2017

Respectfully submitted,

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