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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,

Plaintiff,

v.

DON WRIGHT, Acting Secretary of Health and Human Services, et al.,

Defendants,

and

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,

Intervenor-Defendant.

Case No. 3:16-cv-3539-LB

Hon. Laurel Beeler

BRIEF OF THE STATES OF TEXAS, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA AND SOUTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

Hearing date: **Oct. 11, 2017**

Hearing time: **9:30 a.m.**

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INTEREST OF *AMICI CURIAE*

Amici are the States of Texas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, and South Carolina. The States have "a legitimate and substantial interest in preserving and promoting fetal life," as well as an "interest in promoting respect for human life at all stages in the pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 145, 163 (2007). The States further have an interest in cooperating with the federal government to establish a consistent and correct understanding of the rights of aliens unlawfully present in the United States, as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012).

In this case, Plaintiffs ask the Court to declare that the U.S. Constitution confers on unlawfully-present aliens the absolute right to an abortion on demand even when they have no ties to this country other than the fact of their arrest while attempting to cross the border unlawfully. As far as *amici* can ascertain, no court has ever issued such a sweeping order—and with good reason. If the Court grants the requested relief, there will be no meaningful limit on the constitutional rights an unlawfully-present alien can invoke simply by crossing the border. Such relief would also contradict longstanding Supreme Court precedent that full Fifth Amendment rights vest only in those aliens who "have come within the territory of the United States *and developed substantial connections with this country*." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added).

Amici thus urge the Court to reject Plaintiffs' radical request.[1]

[1] Neither *amici* nor counsel received any monetary contributions intended to fund preparing or submitting this brief. No party's counsel authored this brief in whole or in part.

INTRODUCTION

The temporary restraining order and preliminary injunction Plaintiffs seek is unprecedented. No federal court has ever declared that unlawfully-present aliens with no substantial ties to this country have a constitutional right to abortion on demand. The Court should decline to break that new ground. It should deny the motion for a TRO and preliminary injunction because Plaintiffs cannot prevail on the merits: The Constitution does not confer on Jane Doe the right to an abortion.

Furthermore, granting a TRO and preliminary injunction would harm the public interest. Plaintiffs argue that the public is better off if Doe can get an abortion. The *amici* States strongly disagree. Granting Plaintiffs' motion for a TRO and preliminary injunction would create a right to abortion for anyone on Earth who entered the United States illegally, no matter how briefly. And with that right, countless others undoubtedly would follow. If, on the facts this case presents, Doe has a right to an abortion, it is difficult to imagine what other constitutional protections she would not enjoy by extension. The free-for-all that would flow from that perverse incentive burdens the public at large as well as the governmental entities who will be tasked with honoring these newfound rights.

The Court also may deny the TRO and preliminary injunction on alternative and equally compelling grounds: Plaintiffs' motion for leave to amend the operative complaint is impermissible under Rule 15. The relief Plaintiffs seek—namely, an order granting Doe access to an abortion—is fundamentally different from the Establishment Clause dispute in the currently operative complaint. The proposed second amended complaint establishes no nexus at all between Doe and any religiously affiliated entity. It does not allege that Doe is housed at a religiously affiliated shelter. And it does not allege that any sectarian entity played any role in the denial of her request for an abortion. Rule 15 does not allow Plaintiffs to glue two unrelated lawsuits together. That is especially so because Doe already has initiated her own lawsuit in Texas, which is now pending before the U.S. District Court before the Southern District of Texas. *Doe v. United States*, No. 1:17-cv-

00211 (S.D. Tex.) (notice of removal filed Oct. 8, 2017). She thus has other opportunities to press her claim.

The Court should deny the motion for a TRO and preliminary injunction and the motion for leave to amend.

MEMORANDUM OF POINTS AND AUTHORITIES

I. UNLAWFULLY-PRESENT ALIENS WITH NO TIES TO THE UNITED STATES HAVE NO CONSTITUTIONAL RIGHT TO AN ABORTION ON DEMAND.

The Court should deny the motion for a TRO and preliminary injunction because Plaintiffs cannot prevail on the merits: the right Plaintiffs ask the Court to enforce does not exist. They therefore cannot make the threshold showing of a likelihood of success on the merits, and their motion for a TRO and preliminary injunction necessarily fails. *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) ("Likelihood of success on the merits 'is the most important' *Winter* factor; if a movant fails to meet this 'threshold inquiry,' the court need not consider the other factors."); *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (same).[2]

1. The Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. While the Supreme Court held that unlawfully-present aliens constitute "persons" protected by the Fifth Amendment, *Plyler v. Doe*, 457 U.S. 202, 210 (1982), the full scope of the Fifth Amendment's protections that apply to citizens do not cover everyone who merely crosses the border. As the Supreme Court clarified in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990), *Plyler*'s Fifth Amendment analysis "establish[es] only that aliens receive constitutional protections when they have come within the territory of the United States *and developed substantial connections with this country*." *Id.* at 271 (emphasis added).

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[2] Plaintiffs' motion argues that a "stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." Mot. 6 (quoting *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). But that standard has no relevance where, as here, Plaintiffs have *no* likelihood of success on the merits. *See Disney Enters.*, 869 F.3d at 856.

Thus, to invoke Fifth Amendment rights, an unlawfully-present alien must at a minimum demonstrate a "previous significant voluntary connection with the United States" sufficient to prove a "substantial connection with our country." *Id.*; *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (staying injunction of immigration order for aliens "who lack any bona fide relationship with a person or entity in the United States"); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (alien's "constitutional status changes" only after he "gains admission to our country and begins to develop the ties that go with permanent residence").[3]

The Ninth Circuit has not conclusively defined what a plaintiff must show to establish a "significant voluntary connection" under *Verdugo-Urquidez*. But relying on *Verdugo-Urquidez*, the Ninth Circuit has held that studying for four years at Stanford University was sufficient to establish a "'significant voluntary connection' with the United States." *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012). And *Ibrahim* explicitly left unresolved the question whether certain lawfully admitted aliens—such as "tourists, business visitors, and all student visa holders"—could avail themselves of the Fifth Amendment's protections. *Id.*

2. The proposed Second Amended Complaint (Dkt. 82-2) never alleges any facts that would establish that Doe has significant ties to this country. To the contrary, the five paragraphs that state facts pertinent to Doe establish no connection to the United States at all:

[3] In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court reiterated that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." But the Court said nothing to alter or undermine *Verdugo-Urquidez*'s pronouncement that to invoke the full scope of Fifth Amendment rights, an unlawfully-present alien must demonstrate "substantial connections." *See Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (applying "significant voluntary connection" test from *Verdugo-Urquidez*); *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (same).

- Paragraph 4 summarizes Doe's current situation but offers no allegations establishing a connection to the United States other than her current unlawful presence.
- Paragraph 22 alleges: "Jane Doe came to the United States without her parents from her home country. She was detained by the federal government and placed in a federally funded shelter in Texas." This paragraph also offers no allegations establishing a connection to the United States.
- Paragraph 39 alleges Doe's recent efforts to obtain an abortion during her time in custody.
- Paragraphs 43 and 44 allege that the defendants have restricted Doe's ability to receive an abortion in the United States.

There are 114 paragraphs in the proposed complaint, and not one of them attempts to meet the burden that *Verdugo-Urquidez* established and the Ninth Circuit reaffirmed. *See Ibrahim*, 669 F.3d at 996-97.

The declaration that Doe submitted in support of her motion for a temporary restraining order offers nothing further. Dkt. 83-2.[4] Doe alleges that she "came to the United States from [her] home country without [her] parents," and that she is 17 years old. *Id.* ¶¶ 2, 3. She admits that she was "detained upon arrival." *Id.* ¶ 4. And at no point does she offer any fact establishing a connection to this country. *See id.* ¶¶ 5-17.

3. Not only are Plaintiffs' factual assertions inadequate, but they further offer no case or authority establishing the right they ask this Court to create.

Plaintiffs rely on *Roe*, *Casey*, and *Whole Woman's Health v. Hellerstedt* for the proposition that "the government may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Mot. 6. (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality op.); *Whole Woman's Health v.*

[4] It appears that this declaration was filed via ECF in support of Plaintiffs' motion for class certification (*see* Dkt. 83), but the declaration states that it supports Plaintiffs' motion for a TRO and preliminary injunction. *See* Dkt. 83-2 ¶ 1.

Hellerstedt, 136 S. Ct. 2292 (2016)). But those cases never say or even imply that the substantive due process right to an abortion recognized by the Supreme Court extends to unlawfully-present aliens—especially not those who, like Doe, have no ties to this country and were merely apprehended at the border.

Plaintiffs rely further on *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976), and *Bellotti v. Baird*, 443 U.S. 622, 633 n.12 (1979), for the proposition that the principles of *Roe* and *Casey* extend to minors. Mot. 7-8. Those cases, too, did not involve unlawfully-present aliens. Plus, those cases simply confer on minors the right to bypass parental-consent requirements by initiating a judicial proceeding to establish that an abortion is in their best interests. *See Bellotti*, 443 U.S. at 651. As Plaintiffs admit, "if *Bellotti* means anything, 'it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, independent of parents or legal guardians." Mot. 8 (quoting *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1112 (1997)). But Doe concedes that she already has received a judicial bypass in Texas state court. *See* Dkt. 83-2 ¶ 6. That ends the relevance of *Bellotti* and *Planned Parenthood of Central Missouri*.[5]

Lacking case support, Plaintiffs' proposed Second Amended Complaint (Dkt. 82-2 ¶ 35) cites 45 C.F.R. § 411.92(a) for the proposition that unlawfully-present, unaccompanied minors such as Doe are entitled to reproductive care. But they mischaracterize § 411.92(a), which merely requires certain medical services, including emergency contraception, to minors who are "victims of sexual abuse." Doe has not alleged that she is the victim of sexual abuse. *See* Dkt 83-2.

4. Granting the relief Plaintiffs seek would have far-reaching and dire consequences throughout constitutional law and would undermine settled precedents.

[5] A judicial bypass order does not confer on a minor the right to obtain an abortion. *See In re Doe*, 501 S.W.3d 313, 315-16 (Tex. App.—Houston [14th Dist.] 2016). It simply relieves Doe's abortion provider of any duty to consult her parents.

If on the facts of this case Doe has a Fifth Amendment right to an abortion, it is hard to imagine why she could be denied any other constitutional rights—such as the Second Amendment right to keep and bear arms. *See McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (the "right to keep and bear arms" lies among the "fundamental rights necessary to our system of ordered liberty"). Yet courts have consistently rejected the notion that unlawfully-present aliens with no substantial connections to this country are protected by the Second Amendment. *See United States v. Portillo–Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) ("the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States"); *United States v. Carpio–Leon*, 701 F.3d 974, 979 (4th Cir. 2012) ("illegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection"); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) ("the protections of the Second Amendment do not extend to aliens illegally present in this country"); *cf. Meza-Rodriguez*, 798 F.3d at 669-672 (unlawfully present alien enjoys Second Amendment rights only because he has lived here for 20 years and arrived at a young age).

To hold that Doe enjoys a constitutional right to an abortion in this case would undermine these and others cases holding that individuals in Doe's circumstances possess only narrow constitutional protections. The Court should decline to take that dramatic step.

II. GRANTING A TRO OR PRELIMINARY INJUNCTION WILL HARM THE PUBLIC INTEREST.

Plaintiffs' motion for a TRO and preliminary injunction should be denied because granting it will harm the public interest. As the Supreme Court has recognized, the States already "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. *See Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997) (Texas' "educational, medical, and criminal justice expenditures on undocumented aliens" are over a billion dollars annually).

If the Court grants Plaintiffs' motion for a TRO, it will effectively announce that anyone on Earth has any number of constitutional rights simply by being apprehended at the United States border. That dramatic expansion of rights available to unlawfully-present aliens with no substantial connection to this country will incentivize even more unlawful entries and further consume public resources at the State and local level.

III. THE COURT SHOULD DENY THE MOTION FOR LEAVE TO AMEND THE OPERATIVE COMPLAINT.

Finally, there is an alternative and equally compelling ground on which to deny the motion for a TRO and preliminary injunction. Doe is not yet a named plaintiff in this lawsuit; Plaintiffs have filed a motion for leave to file a second amended complaint with Doe as a named Plaintiff. Because the issues Doe presses are fundamentally different from those presented in the current litigation, the Court should deny the motion for leave to amend under Rule 15.

1. Rule 15(a) permits a plaintiff to amend his complaint a second time with leave of the court. But the court need not grant leave when the proposed amendment seeks to add "a new legal theory." *United States v. $11,500.00 in U.S. Currency*, 710 F.3d 1006, 1017 (9th Cir. 2013); *see Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990). Courts in other jurisdictions have denied leave to amend when the amendment "would fundamentally alter the nature of the case." *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004). When a proposed amendment would plead "a fundamentally different case with new causes of action and different parties," the court may deny leave to amend. *Id.*

2. The Court should deny Plaintiffs' motion for leave to amend their complaint because it seeks to add "a new legal theory" that "would fundamentally alter the nature of the case." *$11,500.00 in U.S. Currency*, 710 F.3d at 1017; *Mayeaux*, 376 F.3d at 427. Until last week, this was an Establishment Clause case. Plaintiff ACLU sued three federal agencies challenging their affiliation with (and their financial awards to) entities tied to the U.S. Conference of Catholic Bishops. *See* Dkt. 57 (amended complaint). The operative

complaint requests only two substantive forms of relief: a declaration that Defendants' actions violate the Establishment Clause, and a permanent injunction enjoining that alleged violation. *Id*. at 21.

Plaintiffs' proposed amendment will transform this Establishment Clause case under the First Amendment into an abortion case under the Fifth Amendment. That is inappropriate—especially where, as here, Doe's abortion-related claim has no apparent connection of any kind to the religious entities that Plaintiff ACLU complains of in the operative complaint.

3. Finally, denying leave to add Doe and her Fifth Amendment claim will not in any way restrict Doe's access to the courts, nor will it impede her efforts to litigate her case. Doe already has initiated her own lawsuit in Texas, which is now pending before the U.S. District Court for the Southern District of Texas. *Doe v. United States*, No. 1:17-cv-00211 (S.D. Tex.) (notice of removal filed Oct. 8, 2017). She thus already has a full and fair opportunity to press her claims before a federal court in which she is already a party. The Court need not permit her claims to coopt a fundamentally different lawsuit on the other side of the country.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to deny Plaintiffs' motion for leave to amend the operative complaint and deny their motion for a temporary restraining order or preliminary injunction.

Respectfully submitted this 10th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017 I filed the foregoing document with the Clerk of the Court via CM/ECF, which automatically sends notice of the filing to all counsel of record.

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