**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF ALABAMA**
**NORTHERN DIVISION**

| | | |
|---|---|---|
| **PLANNED PARENTHOOD SOUTHEAST, INC., JANE DOE,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **CIVIL ACTION NO. 2:15-cv-00620-MHT-TFM** |
| **GOVERNOR ROBERT BENTLEY, *et al.*,** | ) | |
| **Defendants.** | ) | |

**DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

In response to the Court's request during yesterday's telephone conference, Governor Bentley and Commissioner Azar offer the following statement regarding whether, at this time, the Court may convert Planned Parenthood SE and Doe's motion for a preliminary injunction into a request for a final injunction or other final judgment as to either their Medicaid Act claims or their constitutional claims.

## I. Medicaid Act claims

With respect to the Medicaid Act claims, the Court's ability to enter final judgment depends on two things—first, whether the Court is inclined to rule for Planned Parenthood SE and Doe or for the Governor and the Commissioner; and

second, whether the theory on which this Court is inclined to rule relates to a pure question of law.

*a. Potential Medicaid Act rulings favoring the Governor and Commissioner*

If this Court is inclined to rule for the Governor and Commissioner on the Medicaid Act claims based on a pure issue of law, the Court may proceed to enter a final judgment dismissing those claims under Rule 12(b)(6). The Governor and Commissioner have argued that Planned Parenthood SE and Doe do not have a substantial likelihood of success because of at least three separate legal arguments. First, neither Planned Parenthood SE nor Doe has a cause of action to enforce §1396a(a)(23). *See* Doc. 29 at 22-30. Second, even if §1396a(a)(23) is enforceable through §1983, the law does not allow plaintiffs like Planned Parenthood SE and Doe to use §1396a(a)(23) to collaterally attack the termination of a provider agreement, and a provider's exclusive means of challenging this sort of decision is through the administrative process envisioned by §1396a(p) and its implementing regulations. *See id.* at 33-34. Third, the provider agreements signed by Planned Parenthood SE authorized both parties to terminate the agreements at will. *See id.* at 43-44. If the Court is inclined to deny the motion for a preliminary injunction on any of these legal grounds, then further discovery likely would be unnecessary, and the Court could enter final judgment dismissing Planned Parenthood SE and Doe's

Medicaid Act count for failure to state a claim upon which relief could be granted. With the Court's leave, the Governor and Commissioner have not yet filed a motion to dismiss, but the Court may construe this document and the opposition to the motion for preliminary injunction as a request for dismissal under Rule 12(b)(6).

On the other hand, if the Court is inclined to deny Planned Parenthood SE and Doe's motion for a preliminary injunction based on the other merits arguments the Governor and Commissioner have raised—arguments that are not based on purely legal grounds—discovery will be necessary before the Court can issue final judgment dismissing those claims. For example, the Governor and Commissioner have argued that the termination of Planned Parenthood SE's was justified because of concerns that the Planned Parenthood organization has provided medical services that violate American Medical Association standards. *See* Doc. 29 at 34-42. If the Court is inclined to deny the motion for preliminary injunction because it appears more likely than not that the Governor and Commissioner will prevail on those arguments, it would appear likely that Planned Parenthood SE and Doe would seek discovery on those issues before final judgment would be appropriate.

*b. Potential Medicaid rulings favoring Planned Parenthood SE and Doe*

If the Court is inclined to grant Planned Parenthood SE and Doe's motion for a preliminary injunction based on the Medicaid Act claims, the Governor and Commissioner have discerned only one scenario under which the grounds for doing so would be purely legal in nature such that the Court could proceed to final judgment. The Court noted at the preliminary-injunction hearing that it might hold that: (1) the termination letter, on its face, terminated Planned Parenthood SE's provider agreement at-will, rather than for cause; and (2) the Medicaid Act does not allow for at-will terminations of provider agreements. Although the Governor and Commissioner disagree with those propositions and, indeed, this theory is not the same as the one Plaintiffs advanced in their Complaint and motion for preliminary injunction, both appear to involve pure questions of law. Likewise, although the Governor and Commissioner believe that the Court should not grant a preliminary injunction on that theory, if the Court does so, further discovery likely would not be necessary, and the Court could proceed to final judgment on that ground.

Meanwhile, if the Court were inclined to grant Planned Parenthood SE or Doe a preliminary injunction on the Medicaid claims on any other theory, then further discovery would be necessary, and this Court would not be in a position to proceed to final judgment. For example, Planned Parenthood SE has claimed that

the evidence does not establish that its affiliates have violated medical standards or that it can be held accountable for violations by other Planned Parenthood affiliates. *See* Doc. 36 at 14. If the Court determines that the current record supports Planned Parenthood SE's arguments for the purposes of the motion for a preliminary injunction, further discovery would be necessary on these matters. In recent days, it has become all the more apparent that Planned Parenthood SE may have additional relevant evidence on these fronts. Despite Planned Parenthood SE's assertions that Planned Parenthood Federation of America "does not supervise PPSE or otherwise have control over its daily operations or its internal affairs," Doc. 36 at 14, the President of the Planned Parenthood Federation announced earlier this week that the "Federation has decided" that "all of our health centers will follow the same policy" regarding fetal tissue extraction and donation. *See* Letter from C. Richards, Pres. of Planned Parenthood Fed. of Am., to Dr. Francis Collins, Dir. of the Nat'l Inst. of Health (Oct. 13, 2015) (attached as Exhibit A). Other yet-to-be-produced evidence may confirm that Planned Parenthood affiliates have violated medical standards. Accordingly, if this Court were to grant the preliminary injunction on the Medicaid claim for any reason other than the at-will theory discussed above, it would not be appropriate to proceed to final judgment on the claim.

## II. Constitutional Claims

The Court's ability to enter final judgment on the constitutional claims also depends on whether the Court is inclined to rule for the defendants or plaintiffs at the preliminary-injunction stage. If the Court rules that Planned Parenthood SE and Doe have not alleged plausible constitutional claims for the reasons given in the Governor and Commissioner's opposition to the motion for preliminary injunction, then the Court could enter final judgment dismissing those claims under Rule 12(b)(6). *See* Doc. 29 at 44-48. Although the Governor and Commissioner do not believe that Plaintiffs have met their burden to obtain preliminary relief on the constitutional claims, *see* Doc. 29 at 44-48, if the Court is inclined to grant the preliminary injunction, it would not be appropriate to proceed to final judgment immediately. That is so because a determination of the merits of those claims would require further discovery and litigation.

## III. Class action issues

Planned Parenthood SE and Doe suggested at yesterday's phone conference that they anticipate filing a motion to certify a class in this case tomorrow. The Governor and Commissioner anticipate opposing any such motion, and class discovery would be necessary on issues relating to, among other things, whether Doe and Planned Parenthood SE can satisfy requirements of Rule 23 relating to

numerosity, adequacy of representation, ascertainability of a class, and the suitability of this case for class treatment. The Governor and Commissioner thus would request a reasonable opportunity to respond to any such motion and a reasonable opportunity to conduct discovery on those issues before the Court rules on the motion.

In any event, Doe's apparent shift to a putative class action at this point only highlights the lack of fit between her Medicaid claim and the relief that Planned Parenthood SE actually filed this complaint to obtain. As the Governor and Commissioner have observed, §1396a(a)(23) grants *patients* a right of access to providers who have agreements in place with a State. A State's decision to terminate provider agreements, on the other hand, can be challenged only by *providers*, through the administrative process envisioned by §1396a(p) and its implementing regulations. The inclusion of additional individual patients through a motion for class certification cannot change the twin realities that (1) this case is really about Planned Parenthood SE's request for reinstatement of its provider agreement, and (2) Planned Parenthood SE is using the wrong procedural mechanism to achieve that goal, given that Planned Parenthood SE did not file an administrative appeal.

Respectfully submitted,

/s/ John C. Neiman, Jr.
John C. Neiman, Jr. (ASB-8093-O68N)
OF COUNSEL

Luther J. Strange
James W. Davis
Misty S. Fairbanks Messick
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36104
(334) 242-7300
jdavis@ago.state.al.us

*Counsel for Commissioner Azar*

David B. Byrne, Jr.
OFFICE OF THE GOVERNOR
Alabama State Capitol
600 Dexter Avenue, Suite NB-05
Montgomery, Alabama 36130
(334) 242-7120
david.byrne@governor.alabama.gov

John C. Neiman, Jr.
Scott S. Brown
Prim Formby Escalona
Kasdin Miller Mitchell
MAYNARD COOPER & GALE, P.C.
1901 Sixth Avenue North, Suite 2400
Birmingham, Alabama 35203
(205) 254-1000
jneiman@maynardcooper.com

*Counsel for Governor Bentley*

**CERTIFICATE OF SERVICE**

I served a copy of the foregoing document via the Court's CM/ECF system upon all registered counsel.

/s/ John C. Neiman, Jr.
John C. Neiman, Jr.
OF COUNSEL

# EXHIBIT A

Planned Parenthood®
Care. No matter what.

Planned Parenthood Federation of America

434 West 33rd Street
New York, NY 10001
p: 212.541.7800 · f: 212.245.1845
www.plannedparenthood.org

October 13, 2015

Francis Collins, M.D., Ph.D.
Director
National Institutes of Health
9000 Rockville Pike
Bethesda, Maryland 20892

Dear Director Collins,

I am writing to follow up on the letter I sent you on July 29.

In that letter, I reviewed the development of the bipartisan 1993 legislation that authorized federal funding of fetal tissue transplantation research and the policies Planned Parenthood has in place to exceed the federal requirements. I also explained how that law was the result of a blue ribbon panel appointed by the Reagan Administration to consider the underlying medical and ethical issues. My letter outlined the very limited role that Planned Parenthood plays in fetal tissue research that can contribute to important medical breakthroughs. Currently, Planned Parenthood operates nearly 700 health centers that provide a wide range of vital health services to millions of women and men every year. Our role in fetal tissue research is an extremely small part of what we do. In fact, just 1% of our health centers currently facilitate tissue donation for fetal tissue research.

Over the last two months, opponents of safe and legal abortion have turned patently false claims about our role in fetal tissue donation into fodder to advance their extreme political agenda – including votes in the U.S. House of Representatives and Senate that would have blocked Planned Parenthood from receiving federal reimbursements for providing cancer screenings and other preventive care. I am pleased to report that those efforts, which would have jeopardized millions of people's access to health care, have failed thus far. But this isn't just about Planned Parenthood, and it isn't over. These false claims are being used to advance politically motivated legislation in Congress and in state legislatures across the country to deny women access to basic health care and to impose medically unnecessary restrictions on safe and legal abortion. The American public overwhelmingly opposes this political agenda.

Through it all, we've heard from leading research institutions and practitioners across the country, asking Planned Parenthood not to bow to political pressure and to continue our support

for patients to contribute to this important work. As the nation's leading women's health care provider, our promise to both our patients and the medical community is that we will never bow to political pressure and we will never back down from advancing women's health every way we can.

As I have stated repeatedly, the accusations leveled against Planned Parenthood are categorically false. Planned Parenthood adheres to the highest legal, medical, and ethical standards. The outrageous claims that have been made against Planned Parenthood, which have been widely discredited and debunked, are the worst kind of political interference in women's health. The real goal of these extremists has nothing to do with our fetal tissue donation compliance process but is instead to ban abortion in the U.S. and block women from getting any health care from Planned Parenthood. Today, we're taking their smokescreen away and pushing forward with our important work on behalf of millions of women, men, and young people.

The participation by a handful of our affiliates in supporting women who choose to make fetal tissue donation has always been about nothing other than honoring the desire of those women and contributing to life-saving research and cures. In order to completely debunk the disingenuous argument that our opponents have been using – and to reveal the true political purpose of these attacks – our Federation has decided, going forward, that any Planned Parenthood health center that is involved in donating tissue after an abortion for medical research will follow the model already in place at one of our two affiliates currently facilitating donations for fetal tissue research. That affiliate accepts no reimbursement for its reasonable expenses – even though reimbursement is fully permitted under the 1993 law. Going forward, all of our health centers will follow the same policy, even if it means they will not recover reimbursements permitted by the 1993 law.

I want to be completely clear about two things: First, Planned Parenthood's policies on fetal tissue donation already exceed the legal requirements. Now we're going even further in order to take away any basis for attacking Planned Parenthood to advance an anti-abortion political agenda. And, second, our decision not to take any reimbursement for expenses should not be interpreted as a suggestion that anyone else should not take reimbursement or that the law in this area isn't strong. Our decision is first and foremost about preserving the ability of our patients to donate tissue, and to expose our opponents' false charges about this limited but important work.

Finally, in my previous letter to you, I suggested that the widespread confusion over fetal tissue research merits a review by an expert independent panel. There is now proposed federal and state legislation to ban fetal tissue donation for research. I believe these public policy proposals would benefit from the expertise from NIH and medical and ethical leaders, and I again encourage you to develop a deliberative process to ensure that Congress and state legislatures have the benefit of such guidance and recommendations.

Thank you for your interest in this issue.

Sincerely,

Cecile Richards

Cecile Richards
President
Planned Parenthood Federation of America

cc: Secretary Sylvia Matthews Burwell