UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,	)	
Plaintiffs,	)	
v.	)	No. C-03-491-JD
KELLY AYOTTE, Attorney General of New Hampshire, in her official capacity,	)	
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANT'S OBJECTION TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND A RULING THAT THEY ARE THE PREVAILING PARTIES

Defendant's entire opposition to Plaintiffs' motion for fees is based on her quite remarkable assertion that the need for a health exception in the Parental Notification Prior to Abortion Act (the "Act") was not a significant issue in the case and, therefore, Plaintiffs cannot be considered prevailing parties because they had not yet established their entitlement to a permanent injunction against the Act in its entirety when the Act was repealed. This argument wholly mischaracterizes the facts of this litigation.

Plaintiffs brought this litigation in large measure because the Act lacked a critical exception necessary to protect the health of pregnant minors facing medical emergencies. As the evidence in this case demonstrated, without such an exception, some minors in health crises may suffer grave consequences, including kidney and liver damage, vision loss, and infertility. Pls.' Br. in Supp. of Mot. for Prelim. Inj. at 19, Planned Parenthood

of N. New Eng. v. Heed, 296 F. Supp. 2d 59 (D.N.H. 2003) ("Heed I"); Goldner Decl. ¶¶ 7-15.

Recognizing the constitutional and practical imperative to protect minors' health, all three courts to review this case, including the Supreme Court, agreed with Plaintiffs that the Constitution required that the Act contain a health exception. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 327-28 (2006); Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 62 (1st Cir. 2004) ("Heed II"); Heed I, 296 F. Supp. 2d at 65-66. And all three Courts, including the Supreme Court, agreed that an injunction preventing the State from enforcing the Act at least in those instances where a minor is facing a health crisis was both necessary and appropriate.[1] Ayotte, 546 U.S. at 331-32; Heed II, 390 F.3d at 65; Heed I, 296 F. Supp. 2d at 68. Plaintiffs maintained such an injunction throughout the litigation and Plaintiffs' entitlement to such an injunction was not in dispute on remand. Heed I, 296 F. Supp. 2d at 68; Order, Planned Parenthood N. New Eng. v. Heed, No. 04-1161, at 1 (1st Cir. Mar. 22, 2006) (leaving district court's injunction undisturbed after Supreme Court's remand).[2] Plaintiffs therefore succeeded on

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[1] That Plaintiffs paid Defendant's costs under Supreme Court Rule 43.1, which automatically awards costs to the petitioner when the lower court's judgment is vacated, is irrelevant. See Def. Br. at 1, 2, 5. Indeed, had Plaintiffs established on remand that the Act's legislative history or the flaws in the judicial bypass procedures required the Act's total invalidation there would have been no dispute that Plaintiffs were prevailing parties, yet, Plaintiffs would nonetheless have paid Defendant's Supreme Court costs. The prevailing party inquiry is simply different from and not governed by the Supreme Court cost-taxation rule. See McDonald v. McCarthy, 966 F.2d 112, 116-118 and cases cited therein (3d Cir. 1992) (discussing analogous appellate rule); Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677, 681 (6th Cir. 1985) (en banc) (same).

[2] In its brief, Defendant mistakenly states that the Supreme Court vacated the District Court's injunction, see, e.g., Def. Br. at 12. While the Supreme Court did, of course, vacate the First Circuit's judgment, neither the Supreme Court nor any other court disturbed this Court's injunction. See Order, Planned Parenthood N. New Eng. v. Heed, No. 04-1161, at 1 (1st Cir. Mar. 22, 2006). While the proceedings on remand might (or

a "significant issue in litigation" and achieved "some of the benefit the parties sought in bringing suit." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 498 U.S. 782, 791-92 (1989). Plaintiffs are thus prevailing parties within the meaning of Section 1988. See id.; see also Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 294 (1st Cir. 2001) ("If the plaintiffs' success on [a] discrete claim represented a meaningful victory, they are prevailing parties.").

Faced with a Supreme Court ruling that the omission of a health exception was unconstitutional and injunctive relief preventing the State from enforcing the Act against minors in health crises, Defendant attempts to rewrite history to argue that the health exception issue was not a significant one and the relief was meaningless because Defendant allegedly conceded the unconstitutionality throughout the litigation. See, e.g., Def. Br. at 12. As the examples below demonstrate, however, even a cursory review of Defendant's pleadings and the courts' opinions reveals that the issue was significant and relief was necessary because Defendant did argue – indeed strenuously so – that the Act need not contain a health exception.

- "The Constitution is not offended by a provision requiring notification of a parent when a minor's health is at risk." Pet'r. Br. at 14, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) ("Pet'r. Br.").

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might not) have narrowed the scope of the injunction, Defendant did not, and indeed could not, argue that the injunction should be lifted in its entirety. See Def.-App. Answer to Supp. Compl. ¶ 2, Planned Parenthood v. Ayotte, No. 03-cv-491 (D.N.H.) ("Plaintiffs' claim that the application of [the Act] in medical emergencies is unconstitutional [is] a claim that has already been decided by the United States Supreme Court"); Def.-App. Resp. to Pls.-Appellees' Motion for Extension of Time to Submit Application for Attorneys Fees and Costs ¶ 2, Planned Parenthood v. Ayotte, No. 04-1161 (1st Cir.) (stating that Defendant anticipates that likely outcome of remand will be injunction prohibiting State from enforcing parental notification statute in cases involving medical emergencies).

- "The Attorney General argues that a health exception is not constitutionally required in a parental notice law." Heed I, 296 F. Supp. 2d at 62.

- "The question of whether a statute regulating abortion must contain an explicit health exception has not been addressed by [the Supreme] Court. . . . Th[is] question . . . is an important issue of constitutional concern which has escaped Supreme Court review . . . ." Pet. for Cert. at 11-12, Ayotte v. Planned Parenthood of N. New Eng. ("Cert. Pet.").

- "A health exception is only required when there is substantial medical authority that supports the proposition that a specific regulation could pose a significant risk to women's health. Here this type of substantial medical authority was not presented." Pet'r. Br. at 6; see also id. at 19 (same).

- "The New Hampshire Act adequately protects the health of the mother." Id. at 20.

- "Even if this Court finds that New Hampshire's Act lacks a constitutionally required health exception or that its death exception is drawn too narrowly, the Act's judicial bypass nevertheless saves the Act . . . ." Id. at 7; id. at 20-21 (same).[3]

Given these arguments – and indeed Defendant's petition to the Supreme Court asking the Court to review the question of whether the Act requires a health exception – her suggestion that the issue was not significant or that the injunction was somehow unnecessary should be rejected out of hand.[4]

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[3] While the specifics of Defendant's argument varied throughout the litigation – ranging from the argument that parental notice could be required even in medical emergencies, see, e.g., Pet'r. Br. at 14, to the argument that other New Hampshire statutes adequately protected minors' health, see, e.g., Def. Br. in Opp. to Pls.' Mot. for Prelim. Inj. at 5-6, Heed I, 296 F. Supp. 2d 59, her bottom line – that New Hampshire's omission of a health exception was constitutionally permissible – never changed.

[4] Any eleventh hour concession the Attorney General made at oral argument in the Supreme Court did not obviate the need for judicial relief. Despite Defendant's careful wordsmithing, she never conceded that the Act's omission of a health exception was unconstitutional. Rather, after taking quite the contrary position in its opening brief to the Supreme Court, arguing that the State could constitutionally require parental notice in medical emergencies, see Pet'r. Br. at 14, at oral argument the Attorney General altered her position and conceded that a state may not restrict access to abortions that are necessary to protect women's health, Ayotte, 546 U.S. at 328. But Plaintiffs could take

Defendant's argument that "Plaintiffs vindicated no significant civil rights, nor did they materially alter Defendant's behavior toward them by judicial fiat, as the Supreme Court merely confirmed 'settled' law," Def. Br. at 14, is similarly disingenuous. Although Defendant now apparently recognizes that the need for a health exception was settled law, during the litigation on the merits Defendant took precisely the opposite position. Indeed, Defendant argued to the Supreme Court that, "[t]he question of whether a statute regulating abortion must contain an explicit health exception has not been addressed by this Court. . . . The question posed in this case is an important issue of constitutional concern which has escaped Supreme Court review . . . ." Cert. Pet. at 12; see also Pet'r. Br. at 14 ("The Constitution is not offended by a provision requiring notification of a parent when a minor's health is at risk.").

Moreover, that the need for a health exception was well-settled is irrelevant to Plaintiffs' status as prevailing parties. When a state legislature enacts a statute that flouts precedent, as the New Hampshire legislature did here, those who want to protect their rights are forced to litigate and are no less prevailing parties when they succeed in

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little comfort in this "concession" as, even in the Supreme Court, the Attorney General maintained that this requirement did not affect the constitutionality of the Act because a minor facing a medical emergency could be required to pursue a judicial bypass and a physician who performed an emergency abortion should rely on the competing harms defense. The Supreme Court, however, rejected the Attorney General's argument that these provisions were sufficient to protect minors facing medical emergencies. Id. Thus, the Attorney General's "concession" did not negate the need for judicial relief. Rather, the injunction remained necessary to protect the health and constitutional rights of Plaintiffs and their patients and represented a "material alteration of the legal relationship" between the parties. See Texas State Teachers Ass'n, 489 U.S. at 792. (Indeed, federal courts are not in the business of issuing unnecessary injunctions.) Moreover, aside from the factual inaccuracy, Defendant has cited no authority for the proposition that a mere eleventh hour oral concession is sufficient to deprive a plaintiff of prevailing party status. Cf. Gay Officers Action League, 247 F.3d at 294 (finding that plaintiffs were prevailing parties despite fact that defendant claimed challenged regulation was never, and would never, be enforced).

convincing the Supreme Court to reaffirm its prior rulings then they would be were the Supreme Court to change the law or to rule on a question for the first time. Defendant cites no case to show otherwise.

To be sure, Plaintiffs believe they were entitled to a ruling that the Act must be enjoined in its entirety. But the fact that Plaintiffs had not, at the time the legislature repealed the Act, obtained such a judgment does not negate the fact that Plaintiffs achieved success on a significant issue in the litigation which achieved some of the benefits – indeed the primary benefit – the parties sought in bringing suit, namely the protection of the health of minors facing medical emergencies. Plaintiffs are therefore "prevailing parties." See Texas State Teachers Ass'n, 498 U.S. at 791-92 (holding that plaintiffs need not prevail on every issue in the case or even the central issue in the case to qualify as prevailing parties as long as they prevail on "any significant issue in the litigation" and achieve some of the benefits the parties sought in bringing suit); see also Farrar v. Hobby, 506 U.S. 103, 114 (1992) ("the prevailing party inquiry does not turn on the magnitude of the relief obtained"); Gay Officers Action League, 247 F.3d at 294 ("If the plaintiffs' success on [a] discrete claim represented a meaningful victory, they are prevailing parties."); Ackerly Commc'n of Mass. v. City of Cambridge, 135 F.3d 210, 215 n.5 (1st Cir. 1998) (explaining that plaintiff became a prevailing party when it succeeded on its claim for limited injunctive relief even as it continued to litigate its request for a broader injunction).[5]

[5] Defendant's citation to various cases including Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health and Human Svcs., 532 U.S. 598 (2001), Sole v. Wyner, 127 S. Ct. 2188 (2007), and Rossello-Gonzalez v. Acevedo-Vila, 483 F.3d 1 (1st Cir. 2007), is likewise premised on her erroneous assertion that the only relief that could entitle Plaintiffs to prevailing party status was an injunction that prevented the State from

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Respectfully submitted,

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enforcing the Act in its entirety. Given that the law bestows prevailing party status on Plaintiffs for their vindication of minors' constitutional right to protect their health, these cases are entirely irrelevant.

For example, Defendant invokes Buckhannon for the general proposition that a plaintiff may not claim prevailing party status where the legislature repeals a law before a court has the opportunity to rule on the merits of the plaintiff's claim. Def. Br. at 7-8. But that proposition simply does not apply to the facts here. Prior to the legislature's repeal, three courts had agreed with Plaintiffs that the Constitution requires that the Act contain a health exception and held that, at minimum, an injunction preventing the unconstitutional applications was appropriate. See Staley v. Harris County, Tex., 485 F.3d 305, 314 & n.7 (5th Cir.) (en banc) (holding that where defendant takes action to moot case after plaintiff has obtained judicially-sanctioned relief, plaintiff is prevailing party and Buckhannon is inapplicable), cert. denied, 128 S. Ct. 647, 650 (2007). Defendant's reliance on Sole and Rossello-Gonzalez, and its assertion that Plaintiffs' relief was temporary, Def. Br. at 13-14, are similarly misguided. In Sole, the Court ruled that a plaintiff was not a prevailing party where, despite having initially obtained a preliminary injunction, the state's action was ultimately determined to be constitutional. 127 S. Ct. at 2192. And in Rossello-Gonzalez, the Court ruled that plaintiffs were not prevailing parties where an appellate court reversed all of the district court's rulings on the merits and dismissed their case. 483 F.3d at 5. In contrast, here, the Supreme Court agreed that omission of a health exception was unconstitutional and expressly affirmed the propriety of an injunction preventing the State from enforcing the Act in a manner that violated Plaintiffs' constitutional rights. Ayotte, 546 U.S. at 327-28, 331-32.

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Certificate of Service

I hereby certify that on this 4th day of February, 2008, the foregoing motion was served by the ECF system on Senior Assistant Attorney General Maureen Smith, counsel for Defendant.

/s/ Martin P. Honigberg
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