[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17-5276

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, *et al.*,
Plaintiffs-Appellees,

v.

ERIC D. HARGAN, Acting Secretary of Health and Human Services, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia
No. 17-cv-02122-TSC

PLAINTIFFS–APPELLEES' OPPOSITION TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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Certificate As to Parties, Rulings and Related Cases

Pursuant to this Court's Circuit Rule 28(a)(1)(A), counsel for Plaintiffs-Appellees hereby adopts Appellants' Certificate as to Parties and Amici.

INTRODUCTION

Defendants' Motion for a Stay Pending Appeal raises precisely the same issues that the *en banc* Court considered less than two months ago in *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017). As was true with respect to Jane Doe, Jane Roe is a 17-year-old unaccompanied immigrant minor who is currently in the federal government's legal custody and is living in a private, government-funded shelter. She is pregnant and has been requesting an abortion for weeks. The state in which Ms. Roe lives permits minors to consent to an abortion themselves, and does not require parental consent, parental notice, or a judicial bypass. Thus, she is in full compliance with the relevant laws of her state. Nevertheless, as a result of Defendants' policy to prevent pregnant minors in their custody from obtaining abortions, she, like Ms. Doe, has been blocked from exercising her constitutionally protected decision for almost a month. Likewise in the case of Ms. Doe, Ms. Roe is not asking the government to pay for the procedure or to transport her to an abortion provider. Private funds will pay for the abortion and the district court's order specifically gives the government the option of transporting Ms. Roe for her abortion or "allow[ing] [her] to be transported" for it. Again, Defendants are being asked only to stop blocking her access.

As was true in the case of Ms. Doe, Defendants have not met the stringent requirements for a stay pending appeal. First and foremost, Defendants cannot

make the necessary "strong showing" that they are likely to succeed on the merits. As was true with Ms. Doe, by blocking Ms. Roe from accessing an abortion, Defendants are violating decades of well-established Supreme Court precedent. 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 her pregnancy, the Court has made clear that the government may not effectuate that interest by imposing an undue burden on (or, as here, entirely barring) the woman's abortion decision. That is precisely what Defendants are doing here. They are holding Ms. Roe hostage to prevent her from obtaining the abortion she seeks.

Moreover, Defendants will not suffer any harm from allowing Ms. Roe to get the constitutionally protected care to which she is entitled. The harm to Ms. Roe from further delay, on the other hand, is extraordinary. Defendants' actions have already forced her to remain pregnant against her will for almost a month. Each day that a woman is forced by the government to remain pregnant against her will inflicts psychological, physical, and constitutional harm. Further, while abortion remains safe throughout pregnancy, delay increases the risks, and at some point, Ms. Roe will lose the ability to have an abortion at all and will be forced to continue the pregnancy and have a child against her will.

For these reasons, the administrative stay should be lifted and Defendants' motion for a stay should be swiftly denied.

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

Unaccompanied immigrant minors come to the United States without their parents, often fleeing violence or abuse. By statutory definition, unaccompanied immigrant minors are under 18 years old, have no legal immigration status, and either have no parent or legal guardian in the United States, or have no parent or legal guardian in the United States who is able to provide care and physical custody. *See* 6 U.S.C. § 279(g)(2). After their initial apprehension, the Office of Refugee Resettlement (ORR) bears responsibility for the "care and custody of all unaccompanied [] children, including responsibility for their detention, where appropriate." 8 U.S.C. § 1232(b)(1). The federal government and all of its programs are required to ensure that the best interests of the unaccompanied immigrant minor are protected. *See* 6 U.S.C. § 279(b)(1)(B); 8 U.S.C. § 1232(c)(2)(A).

Protecting the minor's best interests includes ensuring access to health care, including reproductive health care. Indeed, the federal government is legally obligated to ensure that all programs that provide care to these young people comply with the minimum requirements detailed in the Settlement Agreement in

Flores v. Reno, CV-85-4544-RJK (C.D. Cal. Jan. 17, 1997) (*Flores* agreement). The *Flores* agreement is a nationwide consent decree that requires the government to provide or arrange for, among other things, "appropriate routine medical . . . care," including specifically "family planning services[] and emergency health care services." *See Flores* agreement, Ex. 1, "Minimum Standards for Licensed Programs," at 15, *available at* https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf. Unaccompanied immigrant minors have an acute need for reproductive health care, in part because a high number of these young women are victims of sexual assault immediately before, during, and after their journeys to the United States.

Nevertheless, Defendants have implemented a newly revised policy that allows them to wield an unconstitutional veto power over unaccompanied immigrant minors' access to abortion. In March 2017, ORR announced that all federally funded shelters are prohibited from taking "any action that facilitates" abortion access for unaccompanied minors in their care without "direction and approval from the Director of ORR." Findings of Fact in Supp. of TRO (Findings of Fact) ¶ 9, ECF No. 73.[1] For example, one email from the then-Acting ORR Director summarized that: "Grantees should not conduct [abortion] procedures, or

[1] Plaintiffs incorporate by reference the facts submitted in support of their Application for a TRO and Motion for a Preliminary Injunction (ECF Nos. 3, 5).

take any steps that facilitate future [abortion] procedures *such as scheduling appointments, transportation, or other arrangements* without signed written authorization from the ORR Director." *See, e.g.*, Decl. of Brigitte Amiri in Supp. of Pls' Mot. for TRO/PI (Amiri Decl.), Ex. B, ECF No. 3-6 (emphasis added). In fact, it is the current ORR Director's position that "[g]rantees should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling." *Id.*, Ex. C, ECF No. 3-7. ORR's policy stands in sharp contrast to other federal polices, including those governing the Bureau of Prisons and ICE detention, which in recognition of the constitutional right to abortion affirmatively "arrange" for abortions to occur for women in their custody. *See* 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), 307, *available at* https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf; 28 C.F.R. § 551.23(c) (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").

Defendants are currently implementing their unconstitutional policy to deny Ms. Roe access to an abortion. Ms. Roe is 17 years old and came to the United States from her home country without her parents. Decl. of J.R. ("Roe Decl.") ¶¶ 2–3, ECF No. 63-2. She was apprehended and placed into federal custody in a

private, government-funded shelter. *Id.* ¶ 4. She learned that she was pregnant on November 21, 2017, during a medical examination, and—after having been informed of all her options by her doctor—decided to have an abortion and made that request to both the doctor and the shelter. *Id.* ¶ 5. Despite this request, and her continued insistence that she wants an abortion, Defendants have refused to grant her with access an abortion provider for almost a month. *Id.* ¶¶ 6, 8–9.

The Court has asked whether Ms. Roe's independent request for and decision to undergo an abortion fully complies with the relevant state law governing abortions by minors. The answer to that is an unequivocal yes. The state in which Ms. Roe lives permits minors to consent on their own to an abortion and does not require parental consent, parental notification, or a judicial bypass. *See* Defs.' Opp. to Pls' Mot. for TRO, at 8, ECF No. 66 (noting that Ms. Roe is in a State that does not require a determination as to a minor's maturity to be made by a judge). Thus, she is in full compliance with the relevant laws of her state.

The Court has also asked two questions about whether ORR has made an individualized decision concerning if, in its judgment, pregnancy termination would be in Ms. Roe's best interest. Plaintiffs recognize these questions are likely directed primarily at Defendants. Nonetheless, Plaintiffs note that the evidence is clear that ORR makes no such real determination. Rather, in each case,

Defendants' policy is to refuse to permit an abortion while the minor is in ORR's custody except if the minor's life is in danger.

As an initial matter, Defendants have never asserted that an abortion is not in Ms. Roe's best interest. In fact, despite the fact that she has been requesting an abortion for almost a month, Defendants affirmatively state that "ORR has *not* made a final determination on whether she would be released to obtain an abortion." Stay Br. at 4 (emphasis added). Defendants' obstruction of Ms. Roe's efforts to obtain an abortion are thus due solely to its desire "to avoid the need to facilitate the termination of Ms. Roe's pregnancy." *Id.* at 6. Indeed, any argument that Defendants are attempting to protect Ms. Roe's interests by preventing her from having an abortion would be difficult to square with their argument that they are attempting to approve a sponsor as quickly as possible so that Ms. Roe can effectuate her right to have an abortion outside of ORR's custody.

The documentary evidence in this case reinforces the conclusion that Defendants' refusal to allow Ms. Doe to access an abortion for almost a month is due not to any individualized determination, but rather to their blanket policy prohibiting all minors from obtaining an abortion while in ORR custody. As previously discussed, in March 2017, ORR announced that all federally funded shelters are prohibited from taking "any action that facilitates" abortion access for unaccompanied minors in their care without "direction and approval from the

Director of ORR." Findings of Fact ¶ 9, ECF No. 73. For example, one email from the then-Acting ORR Director summarized that: "Grantees should not conduct [abortion] procedures, or take any steps that facilitate future [abortion] procedures *such as scheduling appointments, transportation, or other arrangements* without signed written authorization from the ORR Director." *See, e.g.*, Amiri Decl., Ex. B, ECF No. 3-6 (emphasis added). In fact, it is the current ORR Director's position that "[g]rantees should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling." *Id*., Ex. C, ECF No. 3-7.

Were there any doubt left, a document filed by Defendants under seal with the district court yesterday regarding the reasons for denying another Plaintiff, Jane Poe's, request for an abortion makes abundantly clear that Defendants' refusal to allow young women to access abortions has nothing to do with their best interests and everything to do with Defendant ORR Director Scott Lloyd's personal opposition to abortion. Mot. to Seal Doc., ECF No. 72.[2]

[2] Because this document contains policy analysis that goes to the heart of this case, Plaintiffs have filed in the district court a motion for leave to file a redacted version of the document on the public record (ECF Nos. 77 & 78), and will shortly file a parallel motion in this Court.

II. PROCEDURAL BACKGROUND

Plaintiff Jane Doe filed her Complaint and Application for a TRO in the instant case on October 13, 2017, *see* ECF Nos. 1, 3, raising precisely the same constitutional issues as Ms. Roe raises now. On October 18, Judge Chutkan granted Ms. Doe's application for a TRO and ordered the requested relief. Order, ECF No. 20, at 1–2. Defendants appealed that TRO to this Court and sought a stay pending appeal. ECF No. 21. After a divided panel of this Court initially granted a stay pending appeal, *Garza v. Hargan*, No. 17-5236, slip op. at 2 (D.C. Cir. Oct. 20, 2017), this Court granted en banc review and denied the government's request, concluding that the government had "not met the stringent requirements for a stay pending appeal." *See Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc). Judge Chuktan then issued a revised TRO, ECF No. 29, and Jane Doe obtained her abortion on October 25, after four weeks of delay by the government.

Facing the same unconstitutional obstruction to abortion access that Ms. Doe faced, Ms. Roe and another Plaintiff, Ms. Poe, moved to file an Amended Complaint and Application for a TRO in the instant case on December 15, 2017. ECF Nos. 61, 63. The district court held a TRO hearing on December 18, 2017. During the hearing, the court noted that "the same principles are at issue as were at issue in the October hearing." Dec. 18 Hrg. Tr. at 3:24–4:3, ECF No. 75. That same day, Judge Chutkan issued the Order at issue here, granting Plaintiffs'

application for a TRO and ordering the requested relief upon finding that: "(1) Plaintiffs are likely to succeed on the merits of their action; (2) if Defendants are not immediately restrained from prohibiting shelter staff from transporting J.R. and J.P. to abortion facilities or otherwise interfering with or obstructing their access to an abortion, J.R. and J.P. will both suffer irreparable injury in the form of, at a minimum, increased risk to their health, and perhaps the permanent inability to obtain a desired abortion to which they are legally entitled; (3) the Defendants will not be harmed if such an order is issued; and (4) the public interest favors the entry of such an order." Conclusions of Law, ECF No. 73, at 4.

This emergency motion for a stay pending appeal followed. Notably, Defendants have not sought a stay of the TRO as it relates to Ms. Poe. Stay Br. at 1 n.1. Defendants also filed an Application with the Supreme Court for a Stay Pending Appeal to the United States Court of Appeals for the District of Columbia Circuit and Any Further Proceedings in This Court and Request for an Immediate Administrative Stay.

ARGUMENT

As in the Jane Doe case, Defendants cannot meet their heavy burden of showing that a stay of the TRO is warranted here. *See Williams v. Zbaraz*, 442 U.S. 1309, 1311–12 (1979) ("the [stay] applicant must meet a *heavy burden* of showing not only that the judgment of the lower court was erroneous on the merits,

but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.") (internal quotation marks and citation omitted) (emphasis added). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)); *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 96–98 (D.D.C. 2011). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* (quoting *Virginian*, 272 U.S. at 672–73) (alterations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433–34.

There are four factors to be considered in assessing whether a stay applicant has met his heavy burden of showing that a stay is justified in any particular case: (1) whether the party seeking the stay "has made a strong showing that he is likely to succeed on the merits"; (2) whether the party seeking the stay "will be irreparably injured absent a stay"; (3) "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken*, 556 U.S. at 426. "[T]he first two factors . . . are the most critical," *id.* at 434, and, accordingly, the party seeking the stay "must make a strong showing on at least one of these two factors and some showing on the other," *Baker*, 810 F. Supp. 2d 97 (citing *Cuomo v. U.S. Nuclear Regulatory*

Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985) ("A stay may be granted with either a high probability of success and some injury, or *vice versa*.")). A failure to make a showing of irreparable harm is grounds for refusing to grant a stay, even if the other three factors merit relief. *Baker*, 810 F. Supp. 2d at 97 (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). As set forth below, Defendants here have failed to satisfy this heavy burden; indeed *all* factors militate *against* granting a stay (and in favor sustaining the District Court's Order granting temporary relief).

I. Defendants Are Unlikely to Succeed on the Merits

Defendants are exceedingly unlikely to succeed on the merits of their appeal and have not come close to making the strong showing necessary for this Court to grant a stay. In their motion for a stay pending appeal, Defendants do not take serious issue with the fact that barring unaccompanied immigrant minors from having an abortion is unconstitutional. Nor could they, as such an argument flies directly in the face of more than four decades of Supreme Court precedent. In 1992, the Supreme Court in *Planned Parenthood v. Casey* reaffirmed what it characterized as the "central holding" of *Roe v. Wade*, namely that the government may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. 505 U.S. 833, 871 (1992); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *as revised* (June 27, 2016)

(reaffirming *Casey*). That is precisely what the government has done here. Indeed, the constitutional violation could not be more blatant or straightforward: By exercising their veto power over Ms. Roe's constitutionally protected abortion decisions, the government has effectively barred them from obtaining abortions. This they may not do.

Faced with this clear constitutional principle, Defendants make a series of arguments suggesting that there are factors unique to Ms. Roe's situation that allow the government to continue to prevent this young woman from getting an abortion. None of these arguments has any merit, and none comes close to making the strong showing of likelihood of success required for this Court to grant a stay pending appeal.

First, Defendants argue that preventing Ms. Roe from obtaining an abortion is not an undue burden because ORR may, at some point, approve a sponsor for her. This argument fails on multiple levels. As an initial matter, every day that a woman is forced to remain pregnant against her will inflicts physical, psychological, and constitutional harm upon her. Here, even according to Defendants, the government would be forcing her to remain pregnant for at least two additional weeks. The government made precisely the same argument with respect to Ms. Doe, *see* Appellants' Resp. to Appellee's Pet. for Reh'g *En Banc* 1, *Garza v. Hargan*, No. 17-5236, Doc. No. 1700788, Oct. 23, 2017 (arguing to *en*

banc Court that stay of 11 days to reunite Ms. Doe with a sponsor was appropriate), and yet the *en banc* Court denied the stay, *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017). Finally, as developments regarding Ms. Doe have shown, Defendants' predictions on this score are notably unreliable. Although the government asserted on October 23 that it believed that Ms. Doe could be reunified with a sponsor by October 31, *see* Decl. of Jonathan White ¶ 16, ECF No. 40, it is now December 18 and Ms. Doe continues to reside in the shelter. And, as even Defendants' evidence makes plain, the two-week estimate that Defendants discuss in their brief is a rosy, best-case scenario. In fact, what their own declaration reveals is that "additional documents, fingerprint results, and a home study are required," before a sponsor can be approved. Decl. of Jonathan White ¶ 4, ECF No. 66-1. And it is only "*if* the potential sponsor promptly gets us the additional documents [the government] need[s], and *if* the background check and home visits return favorable results, [the government] *estimate[s]* the process of reunification would be completed within two weeks." *Id.* (emphases added); *see also* Dec. 18 Hr'g. Tr. at 11 (government lawyer noting that "ORR estimates it would take just two week, if, you know, the application comes, in, for that to be approved); *id.* at 13–14 (government lawyer agreeing that two week estimate is "based upon an assumption that everything will go smoothly," "that documents will be provided promptly, there won't be any major problems" and offering that "the sponsor" is in

control of the timing, somewhat, because papers and fingerprints are due).[3] Notably, all of those contingencies are entirely outside Ms. Roe's control. For all of these reasons, Defendants' reprise of their argument that they should be allowed to force a young woman to remain pregnant unless and until ORR approves a sponsor should again be rejected.

Second, Defendants make a somewhat convoluted argument that because Ms. Roe lives in a state that does not require a judge to determine whether she is mature enough to make the abortion decision, ORR somehow has the right to outright block her from having an abortion. Stay Br. 13–14. But the state in which the Plaintiff lives has determined as a matter of their public policy that neither parental consent nor a judicial bypass is required before a minor can have an abortion. Rather, minors in those states are legally entitled to consent on their own for an abortion, if, as is true for all women, the health care professional determines that they are capable of providing informed consent to the procedure. ORR cannot rely on its interest in "protecting the interests of the child," *id.* at 13, to give it

[3] Indeed, as Plaintiffs explained in their Petition for Rehearing *En Banc*, it is far from clear that the government will be able to fully vet and approve a sponsor in such a short time frame. Pls.' Pet. for Reh'g En Banc 8–9, *Garza v. Hargan*, No. 17-5236, Doc. No. 1700730 (D.C. Cir. Oct. 22, 2017). Indeed, as described in the Declaration of former Director of ORR Robert Carey that Plaintiffs submitted in support of their Petition, the process of vetting and approving a sponsor is necessarily extensive and takes significant time, at a minimum several weeks or months, not days. *See* Carey Decl. ¶ 28, ECF No. 23-1.

greater rights to interfere with a minor's abortion decision than the minor's own *parents* in the same state would have. Additionally, such an assertion turns notions of federalism on their head, giving the federal government *more* control over minors' healthcare decisions in states that have chosen to place *fewer* restrictions on those decisions. Moreover, any requirement of parental (or ORR) consent in the absence of an effective, expeditious, and confidential bypass mechanism would be unconstitutional. *See Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

Finally, Defendants make what the District Court previously characterized as an "astound[ing]" argument, Oct. 18 Hrg. Tr. at 16:13-1 (attached as Ex. A), namely that refusing to allow Ms. Roe to leave the shelter to get abortions does not impose a substantial obstacle to their ability to get abortions because, if she agrees to allow the government to immediately deport them back to her home country, where she may be able to get the care she needs. But the Constitution does not permit the government to penalize Ms. Roe for seeking to exercise their right to an abortion by forcing her to give up their opportunity to be reunited with family here in the United States, or forcing them to return to their home countries. *See, e.g.*, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (holding that the state could not penalize pregnant public school teachers by forcing them to either take maternity leave when they reached fifth month of pregnancy or face dismissal); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down state statute

that conditioned welfare benefits on a one-year residency requirement, holding that the statutes violated the right to travel). The government should not be allowed to use their constitutional right to access abortion as a bargaining chip to trade for immigration status, any more than it could require a person in Ms. Roe situation to convert to another religion, or to *obtain* an abortion, in exchange for immigration status.

II. Defendants Cannot Show Irreparable Harm from the TRO

Defendants cannot show any conceivable irreparable harm to themselves. The fact that if a stay is not granted Ms. Roe will obtain her abortion does not harm Defendants in any way. Simply put, Defendants have no right to violate Ms. Roe's constitutional rights by forcing her to remain pregnant and have a child against her will. *Roe*, 410 U.S. at 153, 156; *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."). Moreover, Defendants' obligations under the TRO are fulfilled by allowing private funds to be used to pay for Ms. Roe's procedure, and allowing her to be transported to the clinic by someone other than the government. Findings of Fact ¶ 14.

III. Issuance of A Stay Would Irreparably Harm Plaintiffs Jane Roe

Granting the stay, on the other hand, would irreparably harm Ms. Roe. The government's unconstitutional conduct has already forced Ms. Roe to remain

pregnant and delay her abortion for almost a month. Contrary to Defendants' cavalier position, forcing a woman to remain pregnant against her will, even for minimal periods, constitutes severe and irreparable harm. *See Roe*, 410 U.S. at 153; *see also Mills v. D.C.*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).[4]

Moreover, although abortion is very safe, each week of delay substantially increases the risks associated with the procedure. *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*); *Williams v. Zbaraz*, 442 U.S. 1309, 1314–15 (1979) (Stevens, J., sitting as Circuit Justice) (increased risk of "maternal morbidity and mortality" supports claim of irreparable injury).

[4] *Casey* prohibits the government from imposing an "undue burden" on a woman's right to have an abortion. Applying the *Casey* undue burden standard, courts have approved waiting periods of at most a day or two as part of state-mandated counseling laws. By contrast, the government proposes to further delay Ms. Roe's exercise of her rights for at least an additional two weeks (beyond the four they have already passed)—and quite likely more—during the uncertain sponsor-approval process, for no reason other than the government's opposition to abortion. In the short span of a pregnancy, two weeks is a delay that is orders of magnitude greater than any than any court has permitted under the "undue burden" framework.

IV. Issuance of A Stay Would Harm the Public Interest

Allowing the government to violate basic, well-established constitutional rights harms, rather than serves, the public interest. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("enforcement of an unconstitutional law is always contrary to the public interest" . . . "[t]he Constitution does not permit Congress to prioritize any policy goal over the Due Process Clause") (citing *Llewelyn v. Oakland Cnty. Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest.")). "It is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting *Abdah v. Bush*, No. 04-cv-1254, 2005 WL 711814 at *6 (D.D.C. Mar. 29, 2005)). That should be the end of the matter. In any event, Defendants' attempts to articulate a manner in which a stay would serve the public interest, *see* Stay Br. at 17–18, are entirely unavailing. As explained above, whatever interest the public may have in promoting human life through discouraging abortion may not be furthered by erecting barriers (or in this case physically confining) two young women. *See Casey*, 505 U.S. at 877 (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."). Finally, Defendants' claim that permitting Ms. Roe to exercise their right to have an

abortion will harm the public interest by "incentivizing" others to leave their home countries and come to the United States to seek an elective abortion is nothing short of preposterous. Stay Br. at 18. As Defendants themselves have explained, 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." Administration for Children and Families Factsheet, *available at* https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf. There is no evidence that Ms. Roe came to the United States to seek an abortion. Moreover, Ms. Roe (like Ms. Doe) seeks additional relief on behalf of herself and on behalf of a class of similarly situated individuals. Thus, even if there were any merit to Defendants' argument, which there is not, allowing Ms. Roe to get her abortions will not end this case. Defendants can continue to attempt to defend their unconstitutional policies after Ms. Roe gets her abortion to which she is entitled under both the Constitution and state law.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' request for a stay of the TRO pending appeal.

Dated: December 19, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2), this brief includes 4,969 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word processing system in preparing this certificate.

December 19, 2017

/s Arthur B. Spitzer

Arthur B. Spitzer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December, 2017, the foregoing Opposition Defendants' Motion for a Stay electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be made on opposing counsel who are CM/ECF users automatically through the CM/ECF system.

/s Arthur B. Spitzer

Arthur B. Spitzer