ORAL ARGUMENT SCHEDULED OCTOBER 20, 2017 AT 10:00 A.M.

No. 17-5236

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,
Plaintiff-Appellee,

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

PLAINTIFF–APPELLEE'S 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 Plaintiff-Appellee hereby adopts Appellants' Certificate As to Parties and Amici, with the update that the States of Texas, Arkansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, and South Carolina have now filed a Motion for Leave to File a Brief As Amici Curiae in this Court.

INTRODUCTION

J.D. is a seventeen-year-old, unaccompanied immigrant minor who is currently in the federal government's legal custody, and lives in a government-funded shelter. She is pregnant, and seeks an abortion. A state court has granted her legal authority to consent to the procedure instead of obtaining parental consent, which is a requirement in Texas. J.D.'s court-appointed guardian and attorney ad litems are able to transport J.D. to a health clinic for the procedure; the clinic stands ready to see J.D.; and J.D. has secured private funding for the abortion. Defendants do not need "facilitate" J.D.'s access to abortion in any way. They simply need to step aside, and allow J.D. to go to the health care center for the abortion procedure with her court-appointed ad litems.

By blocking J.D. from accessing 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 the woman's abortion decision. That is precisely what Defendants are doing here. In fact, they are holding J.D. hostage to prevent her from obtaining an abortion.

Time is of the essence. Defendants' actions have already delayed J.D.'s ability to access abortion by more than three weeks. She is being forced to remain pregnant against her will, and each week of delay increases the risks associated with the procedure. Moreover, if J.D. is unable to obtain an abortion this week, she may require a more complex procedure, and if she is pushed further into her pregnancy, she will not be able to obtain an abortion in the region where she lives. If that happens, she will have to travel hundreds of miles north to obtain an abortion. If she is delayed even further, she will be forced to carry her pregnancy to term against her will.

The law is abundantly clear – the government cannot literally block the doors to prevent a woman from getting an abortion. Defendants thus cannot demonstrate any likelihood of prevailing on the merits of this action. Nor will they suffer any harm from getting out of the way and allowing this young woman's court-appointed representative to take her to get the constitutionally protected care she seeks.

Defendants have already caused J.D. enough damage, and this Court should not allow them to do more. Their request to stay the TRO, thereby forcing J.D. to remain pregnant against her will, should be 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 minors' 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."[1] Additionally, an ORR regulation requires all ORR-funded care provider facilities to, among other things, provide unaccompanied immigrant minors who are victims of sexual assault while in federal custody with access to reproductive healthcare. 45 C.F.R. § 411.92(a) *et seq*. 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—not even a regulation—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." Decl. of Brigitte Amiri in Supp. of Pls' Mot. for TRO/PI ("Amiri Decl."), Ex. A, Doc. 3-5. This includes arranging for pregnancy options counseling, ensuring access to court to seek a

[1] *See Flores v. Reno Settlement Agreement*, CV-85-4544-RJK (C.D. Cal. Jan. 17, 1997), Exhibit 1, "Minimum Standards for Licensed Programs", at 15, *available at* https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf.

judicial bypass in lieu of parental consent, and providing access to the abortion itself. *See, e.g.*, *id.*, Ex. B, Doc. 3-6. 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." *Id.*, Ex. B, Doc. 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, Doc. 3-7.

Defendants are currently implementing this unconstitutional policy to deny J.D. access to abortion. J.D. is 17 years old, and came to the United States from her home country without her parents. Declaration of J.D. ("Doe Decl.") ¶¶ 2–3, Doc. 3-3. She was apprehended and placed into federal custody. *Id.* ¶ 4. She is currently in a shelter in Texas. *Id.* She is pregnant, and decided to have an abortion. *Id.* ¶ 5. Instead of arranging for J.D.'s requested medical care, Defendants—based on their new policy—forced J.D. to visit a religious, anti-abortion crisis pregnancy center (CPC). *Id.* ¶ 13. CPCs are categorically opposed to abortion, and generally do not provide information about pregnancy options in a

neutral way. In fact, many provide factually inaccurate information about pregnancy and/or abortion.[2]

Despite the fact that J.D. has been abused by her parents, Defendants also contacted J.D.'s mother in her home country about J.D.'s pregnancy, over J.D.'s objections.[3] Defendants are also trying to force J.D. to tell her mother that she is considering an abortion. J.D. is concerned about her privacy, and does not want any other family members to know of her abortion decision.

Despite her ordeal, J.D. continues to be resolute in her decision to have an abortion. With the assistance of court-appointed guardian and attorney ad litems, J.D. obtained a judicial bypass of her state's parental consent requirement and therefore now has the legal right to consent to the procedure. *Id.* ¶ 6-7.[4]

Thereafter, J.D. had an appointment scheduled with a health center for state-mandated pre-abortion counseling on September 28, but ORR refused to transport, or allow J.D. to be transported by anyone, to the health center. *Id.* ¶¶ 9–11.

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[2] *See* Minority Staff of the H. Comm. on Gov't Reform, False and Misleading Health Information Provided By Federally Funded Pregnancy Resource Centers, 109th Cong. 1 (2006), *available at* http://www.chsourcebook.com/articles/waxman2.pdf.

[3] Defendants are aware of J.D.'s abuse at the hands of her parents in her home country from the sealed state court proceedings discussed *infra*.

[4] As detailed in Plaintiff's Memorandum in Support of her Motion for Preliminary Injunction, ORR has imposed these policies on other young women since March 2017 to interfere with and obstruct access to abortion care. Doc 3-2 at 6-8.

Defendants also made clear that J.D. would be prohibited from obtaining the abortion itself. Since that time, Defendants have continued to prevent J.D. from accessing abortion. ORR has ordered the shelter to place J.D. under close supervision at the shelter, and—until the issuance of the TRO—has prohibited the shelter from allowing J.D. to leave the facility for the purpose of accessing abortion counseling or an abortion.[5] Defendants' actions have already caused J.D. to delay her abortion by three weeks.

Any further delay will only be exacerbated by Texas's heavy restrictions on access to abortion. As discussed *supra*, Texas requires parental consent for minors seeking abortion; J.D. has complied with that law by obtaining a judicial order authorizing her to consent to the abortion. Texas also requires mandatory counseling and a sonogram twenty-four hours in advance of the procedure, by the same doctor who is to perform the abortion. Tex. Health & Safety Code Ann. § 171.012(a)(1) and (b). Because of numerous restrictions in Texas, there are a limited number of abortion providers in the state. The health care center closest to J.D. that provides abortion only does so until 17.6 weeks in pregnancy, as calculated from the last menstrual period (LMP). But not all of the clinic's doctors provide abortion to that point. Some only provide until 15.6 weeks in

[5] Pursuant to the TRO and this Court's October 19, 2017 Order that the TRO remain in effect to require appellants to transport J.D. to her counseling appointment, J.D. attended her counseling appointment today.

pregnancy. This week, the doctor at the health care facility in South Texas provides abortions until 17.6 weeks. But next week the doctor only provides abortion to 15.6 weeks. J.D. may be within that limit, but if she is not, her only option next week would be to travel hundreds of miles to a more remote clinic, where abortions are provided until 21.6 LMP.

II. PROCEDURAL BACKGROUND

Faced with this unconstitutional obstruction, J.D. first sought to obtain emergency relief on October 5, 2017, by seeking to join as a named plaintiff in *American Civil Liberties Union of Northern California v. Burwell*, No. 3:16-cv-03539-LB, (N.D. Cal), a case arising from other ORR practices that interfere with unaccompanied immigrant minors' ability to obtain reproductive health care, proceeding against the same Defendants in the District Court for the Northern District of California. Amiri Decl., Doc. 3-5, at ¶ 6. On October 11, 2017, after expedited briefing, Magistrate Judge Beeler issued an order denying Plaintiffs leave to amend the complaint to add J.D., finding that venue and joinder would be improper. In that ruling, however, the court noted that had it granted leave to amend it would have granted the TRO and ordered the requested relief, as the government has "no justification for restricting J.D.'s access." *See American Civil Liberties Union of Northern California v. Burwell.*, No. 3:16-cv-03539-LB, (N.D.

Cal), October 11, 2017 Order Denying Motions for Leave to Amend and a TRO ("Beeler Order") (Ex. J to Amiri Decl.), Doc. 3-14.[6]

Plaintiff moved quickly to file her Complaint and Application for a TRO in the instant case in the District of Columbia on October 13, 2017, raising the same constitutional issues as she had in the Northern District of California. Docs. 1, 3. During the TRO hearing, the Court noted that Plaintiff was not "asking for the government to pay for [J.D.'s] abortion . . . [and] not even asking for the government to transport [J.D.] to an abortion . . . [but] simply asking that she be allowed to go get the procedure to which a judge has said she is authorized." Hrg. Tr. at 18:12-16 (attached hereto as Ex. A). The Court questioned "how not allowing [J.D.] to be transported by government agents, not allowing her lawyer or other people to transport here isn't a substantial burden" on her seeking an abortion, *id.* at 12:14-15; s*ee also id.* at 15:5-8, maintaining that regardless as to J.D.'s immigration status and confinement in a shelter, "she still has constitutional rights," *id.* at 14:1-3. The Court also expressed that it was "astounded by [the

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[6] J.D., with the assistance of her guardian and attorney ad litems, also has initiated a confidential and sealed Texas state court proceeding, under state law, against the shelter for abuse and neglect for failure to ensure that her medical care needs are met. Although the case raises no federal question and involves no federal defendant, the Department of Justice is now representing the shelter, has removed the state case to federal court, and is seeking its dismissal. Contrary to Defendants' claims, Defs.' Br. at 6, that case is a state custody proceeding against the shelter, and does not involve any federal defendants.

government's] position . . . that [it] is going to make [J.D.] who has received judicial authorization for a medical procedure to which she is constitutionally authorized choose between pregnancy that she does not want to go forward with to term or returning to the country from which she left," *id.* at 16:13-19, and questioned how the government could maintain that denying J.D. the care she seeks does not irreparably harm her where "[w]e all know that as every day goes by . . . it becomes less and less safe for J.D. to get her abortion that she is entitled to," *id.* at 17:17-14.

Later that day, Judge Chutkan issued the Order at issue here, granting Plaintiff's application for a TRO and ordering the requested relief upon finding that "(1) Plaintiff is likely to succeed on the merits of her action; (2) if Defendants are not immediately restrained from preventing her transportation to an abortion facility or otherwise interfering with or obstructing her access to an abortion—including by further forcing her to disclose her abortion decision against her will or disclosing her decision themselves, forcing her to obtain pre- and/or post-abortion counseling from an anti-abortion entity, and/or retaliating against her for her abortion decision—Plaintiff J.D. will suffer irreparable injury in the form of, at a minimum, increased risk to her health, and perhaps the permanent inability to obtain a desired abortion to which she is 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." Order at 1-2. Notably, the Order does not require Defendants to actually transport J.D. to her abortion appointment. Rather, Defendants can comply with the order by simply ceasing to stand in the way of her court-appointed representatives' efforts to take her to her appointment for the abortion procedure.

ARGUMENT

Defendants have taken the extraordinary step of not only attempting to appeal a temporary restraining order, an order that even they acknowledge is "generally not appealable," Defs' Br. at 9 n.4, but also seeking a stay of the TRO pending that highly unusual appeal. In any event, 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 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." *Baker*, 810 F. Supp. 2d at 97. "[T]he first two factors are the most critical" 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." *Id.* (citing *Nken*, 556 U.S. at 434; *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir 1985)). 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' position—that the federal government is entitled to bar J.D. from getting an abortion—flies directly in the face of more than four decades of Supreme Court precedent, and therefore they are extremely unlikely to succeed on the merits of their appeal. 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 refusing to transport J.D., and preventing her court-appointed representatives from transporting her, to the clinic, the government has effectively barred her from obtaining an abortion. This they may not do. Defendants therefore cannot succeed on the merits.

Defendants make three arguments in attempt to avoid this clear result.[7] First, they argue they are entitled to prevent J.D. from obtaining an abortion to

[7] Defendants also seem to suggest that Jane Doe has no right to an abortion because she is undocumented. This is indefensible. "[O]nce an alien enters the country, the legal circumstances 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." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status

further a governmental interest in promoting fetal life. Defs.' Br. at 11-12. But it has been well settled for decades that such an interest cannot justify actively preventing a woman from getting an abortion. *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.").

Second, Defendants attempt to rely on a line of cases related to whether the government must pay for an abortion in the context of the Medicaid program. Defs.' Br. at 13-14. But those cases are inapposite. As the Supreme Court held: The "conclusion [that the government does not have to cover abortion in the Medicaid program] signals no retreat from *Roe* . . . . There is a basic difference between direct state interference with a protected activity and state encouragement

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under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Mathews v. Diaz,* 426 U.S. 67, 77 (1976) (explaining that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); *Kwai Fun Wong v. U.S.*, 373 F.3d 952, 971 (9th Cir. 2004) ("Aliens inside the US, *regardless of whether their presence here is temporary or unlawful*, are entitled to certain constitutional protections unavailable to those outside [US] borders.") (internal citation omitted) (emphasis added); *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) ("Counsel has not suggested and we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien.").

of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also Harris v. McRae*, 448 U.S. 297, 314 (1979) (upholding restriction on Medicaid coverage of abortion because it "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion"). As the Court explained, "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law." *Maher*, 432 U.S. at 476. That is precisely what the federal government has done here by preventing J.D. from leaving the shelter to obtain the abortion. Thus, while Plaintiff strongly believes that Defendants do have an obligation to transport unaccompanied immigrant minors seeking abortions to their appointments, the Temporary Restraining Order does not even require them to do so. Rather, it permits Defendants to simply step aside and allow J.D.s guardian or attorney ad litem to transport her to the abortion provider. Order ¶ 1.

Nor is pointing to various incidental steps the government might have to take in connection with J.D.'s abortion helpful to Defendants' cause. Some of these "steps," such as ensuring her health remains stable, are already required of Defendants by their own policies and the *Flores* agreement, as described *supra*, and they would be required to provide considerably more monitoring and medical

care if J.D. carried to term and gave birth, which entails far more risk and is more medically complicated than abortion.[8]

In any event, those "steps" involve minimal effort on behalf of Defendants, and no more—indeed, much less—than what is required of the government in other settings such as Immigration and Customs Enforcement detention or federal prison.[9] And notably, every court to have considered the issue has held that the constitutional right to abortion survives incarceration. *See, e.g.*, *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 334 n.11 (3d Cir. 1987), *cert. denied*, 486. U.S. 1006 (1988) (holding that right to abortion survives incarceration); *Doe v. Arpaio*, No. CV 2004-009286, 2005 WL 2173988, *1 (Ariz. Super. Aug. 25, 2005) (same), *aff'd*, 150 P.3d 1258 (Ariz. App. 2007), *cert. denied*, 552 U.S. 1280 (2008); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999) (same).

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[8] Defendants also argue that they must draft and sign documents affirmatively approving an abortion. Defs.' Br. at 15. But Defendants are simply reiterating their own policy that unconstitutionally grants them veto power over J.D.'s abortion that Plaintiff is challenging. Defendants cannot manufacture a policy that allows them to interfere with a minors' abortion decision, and then claim to be burdened by it.

[9] *See* 28 C.F.R. § 551.23 (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"); 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.

Finally, Defendants make what the District Court characterized as an "astound[ing]" argument, Ex A, Hrg. Tr. at 16:13-19, namely that refusing to allow J.D. to leave the shelter to get an abortion does not impose a substantial obstacle to her ability to get an abortion because, if she agrees to allow the government to immediately deport her back to her home country, where she suffered abuse at the hands of her parents, she may be able to get the care she needs. Alternatively, the government argues, she can simply delay her abortion for weeks or months in the hopes that she will be reunited with family here in the United States in time to still get the care she wants and needs. But the Constitution does not permit the government to penalize J.D. for seeking to exercise her right to an abortion by forcing her to give up her opportunity to be reunited with family here in the United States, or forcing her to return to her home country and abuse. *See, e.g.*, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (holding that that 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 her constitutional right to access abortion as a bargaining chip to trade for immigration status, any more than it could require a person in J.D.'s situation to

convert to another religion, or to *obtain* an abortion, in exchange for immigration status. Moreover, Defendants' speculation about when J.D. might be able to obtain an abortion upon reunification with family in the United States is just that: speculation. Defendants know that the timing of the reunification process is unpredictable, and there is no way to guarantee that J.D. would not be pushed so far into her pregnancy that she would cross the line of viability. In any event, it is not an acceptable alternative to require J.D. to remain pregnant against her will and to delay her abortion by weeks, if not months, particularly given the attendant risks discussed *infra*.

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 J.D. will obtain her abortion does not harm Defendants in any way. Simply put, Defendants have no right to violate J.D.'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."). To the extent that Defendants argue that they have an "interest" in ensuring that they do not facilitate abortion, this is not irreparable harm. In any event, as explained *supra,* the TRO does not even require Defendants to take the minimal step of transporting J.D. for

the abortion; rather Defendants' obligations under the TRO are fulfilled by allowing J.D.'s guardian or attorney ad litem to transport her to the abortion facility. All Defendants need do here is step aside.

III. Issuance of A Stay Would Irreparably Harm Plaintiff Jane Doe

Granting the stay, on the other hand, would irreparably harm J.D. The government's unconstitutional conduct has already forced J.D. to remain pregnant and delay her abortion for more than three weeks. Contrary to Defendants' cavalier position, forcing a woman to remain pregnant against her will, even for minimal periods, constitutes severe and irreparable harm. *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)). Moreover, if the stay is granted, even if J.D. is ultimately able to get the care she needs, it will be further delayed. This too constitutes irreparable harm because although as Defendants correctly point out abortion continues to be very safe, each week of delay does 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). Moreover, if even an extremely brief stay is granted, the procedure may be more complex, and it may no longer be available in the area where J.D. resides. Rather, J.D. might have to travel hundreds of miles to get the care she needs. And, at some point in the not too distant future, J.D. will be pushed so far into her pregnancy that permanently lose her constitutional right to have an abortion altogether and will be forced to continue the pregnancy and have a baby against her will.

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* Defs. Br at 20, 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) a young woman. *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."). Nor does compliance with the TRO require Defendants to facilitate the abortion. *See supra* at 2; Beeler Order, Doc. 3-14, at 13 ("Standing aside – and not any facilitative step – is all that is required of the government and its grantees."). Finally, Defendants' claim that permitting one young woman to exercise her right to have an abortion will harm the public interest by "incentivizing" other to leave their home countries and come to the United States to seek an elective abortion is nothing short of preposterous. 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."[10] There is no evidence that they come to the United States to seek abortions. Indeed, as Defendants admit, J.D. did not learn that she was pregnant

[10] Administration for Children and Families Factsheet, *available at* https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf.

until after her arrival in the United States. White Dec ¶ 7, Doc. 10-1. Moreover, J.D. 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 J.D. to get her abortion will not end this case. Defendants can continue to attempt to defend their unconstitutional policies after J.D. gets the abortion to which she is entitled under both the Constitution and Texas law.

CONCLUSION

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

Dated: October 19, 2017

Respectfully submitted,

/s Arthur B. Spitzer

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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 5,554 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.

October 19, 2017

/s Arthur B. Spitzer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of October, 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

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