[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17-5236

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D.,
Plaintiff-Appellee,

v.

ERIC HARGAN, Acting Secretary of Health and Human Services, et al.
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

The government seeks an emergency stay pending appeal of the district court's October 18, 2017 temporary restraining order, which requires the Department of Health and Human Services (HHS) to take various steps to enable Jane Doe to have an abortion as early as the morning of October 20, 2017. The district court abused its discretion in granting such so-called temporary relief, because Ms. Doe did not meet the demanding standard for the effectively permanent relief that she sought: a mandate that the government facilitate an unaccompanied minor who entered the United States illegally and who is in its custody in a shelter in Texas to obtain an irreversible elective abortion. It is undisputed that Ms. Doe still has a number of weeks in which she could legally and safely obtain an abortion. Accordingly, the government asks this Court to issue a stay, and maintain the status quo, to permit a more complete adjudication of Ms. Doe's novel Fifth Amendment claim before her preliminary relief functionally becomes permanent. In addition, we request that the Court enter a temporary administrative stay while the Court considers this motion.

Ms. Doe entered the United States illegally in September 2017, as an unaccompanied minor. Pursuant to federal statute, *see* 8 U.S.C. § 1232(b)(1), minors like Doe are initially placed into HHS's custody after apprehension, though they can be released quickly under various circumstances—including if they elect to voluntarily return to their home countries, or if they find a suitable sponsor in the U.S. who is willing to take temporary custody of them. For so long as the minors do not exercise

these options and instead remain in HHS's custody, however, they are subject to HHS's policy of refusing to facilitate abortions, including by committing staff and other resources, except in very limited circumstances. Ms. Doe—who has not elected voluntary departure or been released to a qualified sponsor—is currently subject to this HHS policy.

Because Ms. Doe has decided not to depart, she has sued HHS and made the novel argument that HHS is therefore constitutionally required to exercise its custodial obligations by facilitating her choice to terminate her pregnancy. But that argument is wrong, as HHS does not impose any undue burden on her ability to get an abortion merely by refusing to facilitate it, *see, e.g.*, *Harris v. McRae*, 448 U.S. 297, 315, 317-19 (1980), particularly given that she has at least two avenues to leave federal custody, in which case she would be in the same position as any other illegal alien entering the United States, for whom the Government plainly has no affirmative duty under the Fifth Amendment to facilitate an abortion. At a minimum, HHS's arguments have sufficient force that they should be aired in a more fulsome proceeding, and the district court abused its discretion in awarding Ms. Doe through her TRO motion what is actually permanent relief in every material respect. This is especially so because the court's finding that Ms. Doe faces irreparable harm from even an added week of delay was unsupported and is incorrect, and because any urgency has been created by Ms. Doe's decision to file two separate meritless lawsuits in other fora before bringing this one.

Pursuant to Fed. R. App. P. 8(a), the government requested a stay from the district court as part of its opposition to Ms. Doe's request for emergency relief. *See* Doc. No. 10 at 21. The district court did not expressly rule on that request, but implicitly denied it by nevertheless specifying that the government must "promptly" comply. We accordingly ask this Court to grant a stay pending appeal.[1] Because Ms. Doe may have an abortion as early as the morning of October 20, 2017, the government respectfully requests that this Court issue a decision by 9:00 p.m. on October 19, 2017.

BACKGROUND

1. When an unaccompanied alien minor enters the United States, HHS is normally responsible for the minor's care and custody pending the completion of immigration proceedings. *See* 8 U.S.C. § 1232(b)(1). HHS exercises this responsibility through its Office of Refugee Resettlement, which contracts with various private entities that operate shelters and detention centers for these minors. *See generally*, HHS, Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1*, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1. In all cases, HHS retains responsibility for (among other things) "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody" of the minor, and "implementing policies

[1] Pursuant to Circuit Rule 8(a)(2), we contacted Mr. Arthur Spitzer, counsel for Doe, by email and telephone in advance of filing this motion.

with respect to the care and placement of unaccompanied alien children." 6 U.S.C. § 279(b)(1)(B), (e).

Generally, HHS will work to identify an adult sponsor to whom the minor can be released, with preference given to the minors' relatives within the United States (if any). *See* 8 U.S.C. § 1232(c)(3); HHS, Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2*, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2; White Dec. (Ex. 1) at 4**.** Additionally, and subject to exceptions not relevant here, if the minor wishes to return to his or her home country, the minor may request permission for voluntary departure. *See* 8 U.S.C. § 1229c; 8 C.F.R. § 1240.26. If no sponsor is identified for the minor, and the minor does not voluntarily depart, the minor normally remains in an HHS-contracted facility. HHS is statutorily prohibited from releasing minors on their own recognizance. 6 U.S.C. § 279(2)(B).

2. Jane Doe is seventeen years old. Doe Dec. (Ex. 2). In early September 2017, she attempted to enter the United States without authorization. White Dec. 2. She was detained, and because she was unaccompanied, she entered HHS custody. White Dec. 2. Ms. Doe is currently cared for by a federal grantee at a shelter in Texas. White Dec. 2. No suitable sponsor has been found for Ms. Doe, nor has she filed a request for voluntary departure back to her home country. White Dec. 4-5.

Following her arrival here, Ms. Doe was given a medical examination, after which she was informed that she was pregnant. White Dec. 2. Ms. Doe requested an abortion, which under Texas law cannot be provided to a minor absent either parental consent or a judicial bypass. White Dec. 2; Complaint (Ex. 4) 4. On September 25th, a Texas state court granted Ms. Doe a bypass, and also appointed a guardian ad litem and an attorney ad litem. Amiri Dec. (Ex. 3) 1. Ms. Doe was provided access to her guardian ad litem, attorneys, and transport to court proceedings. White Dec. 2.

For all minors in HHS custody, the agency retains responsibility to ensure that the minor's interests are considered in decision-making about her care. In carrying out that duty, the Director of the HHS Office of Refugee Resettlement evaluates a minor's request for an abortion. White Dec. 3. In Ms. Doe's case, the Director determined that HHS would not permit Ms. Doe to leave her shelter for purposes of obtaining the abortion (or for purposes of attending a state-mandated counseling session 24-hours in advance of the planned abortion). White Dec. 2; Amiri Dec. 2.

As the Office of Refugee Resettlement's Deputy Director for Children's Programs explained in his declaration, granting authorization for Ms. Doe to attend such appointments would entail facilitating an abortion. At a minimum, it would require that HHS or its contractors devote time and staff towards maintaining appropriate custody over Ms. Doe during the time she would be away from the shelter; would require staff to stay abreast of Ms. Doe's health and evaluate the propriety of her proposed procedure; would entail work by government staff to draft

and sign approval documents and provide sufficient direction to the shelter on their role in connection with the procedure; and would require that HHS expend resources to monitor Ms. Doe's health during and immediately after the abortion. White Dec. 3.

3. Ms. Doe thereafter brought several different lawsuits. First, on October 5, 2017, she filed a state habeas lawsuit, in Texas state court, directed at the shelter and some of its employees; she sought to force them to release her for her scheduled abortion. *In re Jane Doe*, No. 2017-DLL-06644 (107th Jud. Dist.). On October 8, that action was removed to the United States District Court for the Southern District of Texas, where it is now pending. *In re Jane Doe v. International Educational Services (I.E.S.), Inc.*, 1:17-cv-00211 (S.D. Tex). On October 18, 2017, that court issued an order giving "full faith and credit" to the TRO at issue here, and abated the action until further notice.[2] She filed this lawsuit despite black-letter law that state habeas is not available against federal officers and agents. *See Tarble's Case*, 80 U.S. 397, 409 (1871) (explaining that state courts cannot issue writs of habeas corpus when someone "is in custody under the authority of the United States").

Also on October 5th, Ms. Doe attempted to join an existing lawsuit in the Northern District of California that had been filed over a year earlier by an organizational plaintiff, and which had (solely) brought an Establishment Clause

[2] If this Court grants the government's request for a stay of the TRO, the Court should clarify that, while the TRO is stayed, it is not owed "full faith and credit."

challenge to HHS's practice of contracting with some religiously affiliated shelters (among others). *ACLU of Northern California v. Wright*, No. 3:16-cv-03539-LB, Dkt. Nos. 1, 57, 82 (N.D. Cal.). Ms. Doe is not in a religiously affiliated shelter. Ms. Doe proposed asserting a number of additional claims—including a Fifth Amendment claim—and simultaneously sought a TRO that would have permitted her to obtain an abortion. *Id.*, Dkt. Nos. 82, 84. The district court ultimately denied the TRO, explaining that it was denying Ms. Doe's attempt to join the lawsuit because (among other reasons) venue was improper in the Northern District of California; the court highlighted the lack of any connection between the amended claims and that forum, including the fact that "[n]o defendant resides here," "[n]o events or omissions took place here," and "Jane Doe is in Texas." Order Denying Motions for Leave to Amend and a TRO at 6, *ACLU of Northern California v. Wright*, No. 3:16-cv-03539-LB, Dkt. 102 (N.D. Cal. Oct. 11, 2017). Moreover, the court explained that a "'substantial part' of the defendants' allegedly wrongful activities relating to the new claims did not occur in California, but instead occurred in Texas." *Id.*

Ms. Doe's most recent lawsuit is the instant action, which her guardian ad litem filed on October 13th, on behalf of both Ms. Doe and a putative nationwide class of pregnant unaccompanied minors in HHS custody. Compl. 11. Ms. Doe's claims essentially reiterated the claims she sought to add to the California case, and she sought a preliminary injunction and TRO on several of those claims against HHS, including the claim that HHS was violating her Fifth Amendment rights by allegedly

blocking her access to an abortion. Ms. Doe asked that she be permitted to attend a counseling appointment on October 19th, and then obtain an abortion on October 20th or 21st. Doc. No. 1-10.[3]

After ordering expedited briefing on Ms. Doe's TRO request, the district court held an emergency hearing on October 18th. Following the hearing, the court granted the TRO, and ordered the government to transport Ms. Doe (or allow her guardian ad litem or attorney ad litem to transport her) to the nearest abortion provider for counseling and an abortion. The court concluded (without explanation) that Ms. Doe was likely to succeed on the merits of her action; that the government will not be harmed by a TRO; and that the public interest favors entry of such an order. Order at 1-2 (Ex. 5). In the absence of any supporting evidence, the court also found that if a TRO were not granted she would suffer irreparable harm in that she would have increased health risks and "perhaps the permanent inability" to obtain an abortion.

As part of its opposition to Ms. Doe's request for a TRO or preliminary injunction, the government requested that the district court stay its order pending further appellate proceedings. The district court did not expressly rule on that request, but implicitly denied it by nevertheless specifying that the government must

[3] Ms. Doe also sought a TRO and preliminary injunction on two other claims—that HHS was violating her Fifth Amendment rights by notifying her parents about her abortion decision, and that HHS was violating her First Amendment rights by compelling her to meet with a private counseling center and disclosing to them her abortion decision. Although the district court granted a TRO on those claims as well, the government is not seeking a stay pending appeal on those claims.

"promptly" comply. Order at 2. Absent this Court's intervention, Doe will obtain an abortion on either October 20th or 21st.

ARGUMENT

The Court should grant a stay pending appeal of the district court's TRO requiring HHS to affirmatively facilitate the elective abortion of an unaccompanied minor who is in federal custody only because she illegally entered this country and refuses to seek voluntary departure—a purported "temporary" order that does not maintain the status quo, but rather provides the ultimate and irrevocable relief sought on the merits.[4]

Generally, in considering whether to grant a stay pending appeal, a court must balance four factors: the applicant's likelihood of success on the merits; whether the

[4] Although the district court characterized its relief as a temporary restraining order, that characterization does not deprive this Court of jurisdiction to enter a stay. This Court has jurisdiction to review interlocutory orders of the district courts pertaining to injunctions under 28 U.S.C. § 1291(a)(1). Although a grant of a temporary restraining order is generally not appealable, where the temporary restraining order is more akin to preliminary injunctive relief, then it is appealable under 28 U.S.C. § 1291(a)(1). *See Belbacha v. Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008); *Service Employees International Union v. National Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010). For example, "[w]here a district court holds an adversary hearing and the basis for the court's order was strongly challenged, classification as a TRO is unlikely." *Service Employees International*, 598 U.S. at 1067. Indeed, here the relief granted is in no way *temporary*, since the court has ordered the Government to transport, or permit Ms. Doe to be transported, to have an irreversible abortion procedure. This Court therefore has jurisdiction under 28 U.S.C. § 1291(a)(1). In the alternative, however, this Court has jurisdiction to stay the district court's order pursuant to the All Writs Act, 28 U.S.C. § 1651.

applicant will suffer irreparable injury; the balance of hardships to other parties interested in the proceeding; and the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). However, because the basic function of preliminary relief is to preserve the status quo pending a determination of the action on the merits, *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014), courts generally require a movant to meet a higher degree of scrutiny where she seeks to alter rather than maintain the status quo, or where issuance of the injunction will provide the movant with substantially all of the relief that would be available after a trial on the merits. *See, e.g.,* Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial § 13:46 (2017 ed.); *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1968) (per curiam) ("The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised.") (emphasis added) (internal quotations omitted); *cf. Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 69–70 (D.D.C. 2010) (noting how "courts have held the movant for a mandatory injunction to a higher burden").

And this Court reviews the district court's decision to grant a TRO or preliminary injunction, including its balancing of the relevant factors, for abuse of discretion. *Davis v. Pension Benefit Guar. Co.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). Legal conclusions embedded within that balancing—which include whether a movant has established irreparable harm—are reviewed de novo. *Id.* In this case, the government is likely to establish that the district court abused its discretion in granting the preliminary injunction given that the Court's analysis was infected by a serious

legal error: the government's refusal to facilitate an abortion does not, as a matter of law, constitute an undue burden in violation of the Fifth Amendment. Indeed, the government has a strong likelihood of success on the merits, and denying the stay would be tantamount to granting final judgment for Ms. Doe.

I. The Government Is Likely to Succeed on the Merits Because Refusal to Facilitate an Abortion Does Not Constitute an Undue Burden in Violation of the Fifth Amendment.

A stay pending appeal is appropriate because the Government is likely to succeed on the merits on its claim that the government's refusal to facilitate Ms. Doe's elective abortion, while in federal custody due to her refusal to file for voluntary departure after her illegal entry into this country or identify a sponsor, does not impose an undue burden in violation of the Fifth Amendment. The government's refusal to facilitate Ms. Doe in obtaining an abortion places no obstacle in her path, much less a significant one, as is required to constitute an undue burden. The government is merely refusing to exercise its custodial responsibilities over unaccompanied minors by taking affirmative steps to proactively assist or enable her in such an endeavor, consistent with its legitimate interest in promoting fetal life and childbirth over abortion. Ms. Doe may choose to terminate her federal custody (either by voluntarily departing the United States or by finding an appropriate sponsor), which would eliminate any alleged need for the government to facilitate her elective abortion; Ms. Doe would then be in the same situation as if she had not

entered the United States illegally and in which it would be abundantly clear that the federal government would have no obligation to facilitate her abortion.

The Supreme Court has repeatedly recognized that the government has a substantial and legitimate interest in promoting childbirth and protecting the life of an unborn child. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 145, 157, 163 (2007) ("the government has a legitimate and substantial interest in preserving and promoting fetal life"); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of O'Conner, Kennedy, and Souter, JJ.) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). That interest begins at the start of pregnancy. *See Gonzales*, 550 U.S. at 158; *Casey*, 505 U.S. at 846. In light of that interest, even under the framework of *Casey*, courts have upheld government restrictions on abortion so long as those limitations do not impose an "undue burden" on a woman's right to choose to terminate her pregnancy prior to viability. *See, e.g., Casey*, 505 U.S. at 877; *Gonzales,* 550 U.S. at 157 (upholding Partial-Birth Abortion Ban Act); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding Montana parental notification statute that had a judicial bypass provision); *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (upholding Texas statute requiring informed consent); *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (upholding Mississippi statute requiring physicians to inform the patient of medical risks of abortion and required a 24-hour waiting period before procedure did not impose an undue burden); *Karlin v. Foust*, 188 F.3d 446, 471 (7th

Cir. 1999) (upholding Wisconsin statute requiring "a physician to inform a woman seeking an abortion of the 'probable gestational age' of the fetus, the 'probable anatomical and physiological characteristics' of the fetus, and the 'medical risks' associated with abortion including the risk of 'psychological trauma' and any 'danger to subsequent pregnancies,'" and requiring a face-to-face meeting between attending physician and patient 24 hours before abortion procedure). A statute or regulation imposes an "undue burden" if it has "the effect of placing a substantial obstacle in the path of a woman's choice" to terminate her pregnancy. *Casey*, 505 U.S. at 877 (joint opinion) (emphasis added).

Moreover, in recognition of the legitimate governmental interest in promoting fetal life and childbirth, courts have held that there is no "undue burden" where government policies encourage childbirth over abortion by refusing to affirmatively facilitate a woman's right to an abortion, which the government has no duty to do. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 315, 317-19 (1980) (holding that the Due Process Clause does not confer an entitlement to government assistance in obtaining an elective abortion procedure; decision not to fund abortion does not pose any "governmental obstacle"); *see also Maher v. Roe*, 432 U.S. 464, 471-74 (1977) (rejecting claim that unequal subsidization for child birth, as opposed to abortion, was unconstitutional); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 (1989) (holding that the government has no constitutional duty to subsidize an activity merely because

the activity is constitutionally protected and specifically that government has no affirmative duty to "commit any resources to facilitating abortions").

The government wields especially broad authority to regulate abortion in the arena of foreign affairs. *See DKT Memorial Fund Ltd. v. Agency for Int'l Development*, 887 F.2d 275 (D.C. Cir. 1989) (upholding the federal government's authority to ban federal funding of foreign groups that perform or promote abortions). Indeed, United States foreign policy discourages elective abortion procedures and prohibits the expenditure of federal funds for non-governmental organizations that provide abortion. Mexico City Policy, 82 Fed. Reg. 8495 (Jan. 25, 2017) (prohibiting funding of entities that provide or promote abortion as a method of family planning); *see also Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002) (Sotomayor, J.) (rejecting First Amendment and equal-protection challenges to Mexico City Policy).

Under these principles, Ms. Doe failed to show that the government has imposed any undue burden on her right to an abortion such that injunctive relief was warranted.

The government has not imposed any limitations or restrictions on Ms. Doe's right to obtain an abortion. Although Ms. Doe is in government custody because she is a minor who illegally entered the United States, she can terminate federal custody by voluntarily departing. And while in federal custody, the government has provided Ms. Doe with access to her attorneys and worked to find a suitable guardian for her. White Dec. 2-4. The government stands ready to aid Ms. Doe with any request for a

voluntary departure to her home country. It also stands ready to release Ms. Doe to a sponsor who would satisfy relevant legal requirements. White Dec. 4. And the government has transported her to court proceedings. White Dec. 2.

Ms. Doe is wrong to claim that the government has imposed an undue burden on her abortion decision; the government has placed no obstacle in her path. The crux of Ms. Doe's challenge is to HHS's refusal to facilitate her elective abortion while she is in federal custody. Because Ms. Does is currently in federal custody, by virtue of the fact that she chooses not to voluntarily depart, she insists that unless the government assists her in obtaining an abortion, the government is imposing an undue burden on her right to choose. As explained above, however, courts have recognized that the government may legitimately refuse to facilitate abortion without violating a woman's constitutional rights. Indeed, Ms. Doe's request for an abortion while in federal custody would require government and shelter staff to draft and sign documents affirmatively approving an abortion; review information relevant to her health and the procedure; and maintain custody of her (while ensuring her health remains stable) during and after the abortion procedure. Contrary to Ms. Doe's allegations, therefore, for her to obtain an abortion while in federal custody, the government would have to take several affirmative steps and actions to facilitate that abortion; as a practical matter, it is not simply that the government must step aside.

There is no legal precedent to support Ms. Doe's suggestion that the government's refusal to take such affirmative steps to assist her in obtaining an

abortion constitutes an undue burden within the meaning of the Constitution. To the contrary, *McRae*, *Maher*, *Webster*, and other cases establish that, consistent with its legitimate and significant interest in promoting childbirth and fetal life, the federal government may refuse to assist a woman in obtaining an abortion. Without a case overriding that line of precedent—much less one that would require the government to devote time and resources towards authorizing an abortion, providing Ms. Doe with transportation and escorting her to and from the necessary appointments for the procedure or coordinating her temporary release from federal custody into the care of someone not otherwise approved by HHS to have custody of her, evaluating her health and the propriety of the proposed procedure, and expending resources to monitor her health before and after the procedure—Ms. Doe has no likelihood of success on the merits for her undue-burden claim.

Indeed, Ms. Doe seeks even more than run-of-the-mill facilitation. She asks this Court to rule that a pregnant minor from a foreign country, simply by crossing the border illegally, has a right under the U.S. Constitution to demand that the federal government facilitate her elective abortion while she remains in federal custody after border apprehension. She asks the court to issue such a ruling, moreover, where she has not requested a voluntary departure from the United States, which would result in her release from federal custody and leave her at liberty to pursue an elective abortion outside of federal custody. Ms. Doe cites no case supporting such a sweeping claim.

Ms. Doe should not be able to force the federal government to facilitate her access to an elective abortion simply because she was apprehended entering the United States illegally, is properly in custody, and chooses to stay here illegally rather than depart. Even if she must choose between leaving the United States and the ability to seek an abortion, that choice does not constitute an "undue burden" because Ms. Doe, as an illegal alien, has no legitimate right to remain in the United States. Thus, the federal government's refusal to affirmatively assist Ms. Doe in obtaining an elective abortion preserves the status quo by placing Ms. Doe in the same position she would have been in had she not illegally entered the United States.

Ms. Doe relies on cases addressing state laws permitting a judicial bypass mechanism for minors seeking an abortion without their parents' consent, *see, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979), as support for the contention that the federal government must not only defer to the minor's choice to terminate her pregnancy, but also assist her in obtaining an abortion. But those cases hold merely that state laws prohibiting the right to abortion absent parental consent may, in some circumstances, impose an "undue burden" on the right to choose, unless there is a judicial bypass procedure. *See, e.g., Cincinnati Women's Services, Inc. v. Taft*, 486 F.3d 361 (6th Cir. 2006). Critically, those cases do not say that the government must facilitate a minor's preference to terminate her pregnancy. Nor does case law on prisoner access to abortion help Ms. Doe's claim. *See, e.g., Roe v. Crawford,* 514 F.3d 789 (8th Cir. 2008); *Monmouth Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

A prisoner's ability to obtain an abortion is constrained solely by virtue of incarceration. That is not so here: unlike a prisoner, Ms. Doe has the ability choose to exit federal custody by voluntarily departing the United States or by finding a sponsor who could take custody of her. 8 C.F.R. § 240.25; White Dec. 4-5.

Finally, it is important to note that the court's relief is particularly troubling because it involves federal government decisions in the area of foreign affairs. Here, potential foreign policy concerns are implicated if the government must oversee elective abortions for pregnant unaccompanied alien minors who have been apprehended illegally crossing the border and are still in federal care and custody.

For these reasons, Ms. Doe has failed to demonstrate a likelihood of success on the merits of her claim.

II. The Remaining Factors Favor Granting A Stay

Under the district court's order, Ms. Doe will obtain an abortion in a matter of days—a procedure that is irreversible. The government, however, has a legitimate and significant interest in ensuring that it does not affirmatively facilitate an abortion. That interest would be completely extinguished if the court's order is not stayed.

By contrast, not only would Ms. Doe not suffer irreparable injury if the stay were granted, she would suffer comparatively little harm. It is undisputed that Doe still has a number of weeks remaining in which she is safely and legally able to obtain an abortion in Texas. *See* Doc. No. 15 at 9. And the government is prepared to brief this case on an expedited briefing schedule if necessary. Stays (and preliminary

injunctions) help "preserve the status quo" pending further adjudication, *Aaemer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014), and ensure that reviewing courts need not choose "between justice on the fly" and "participation in what may be an idle ceremony." *Nken*, 556 U.S. at 527; *see also id.* at 427 (explaining that stays pending appeal ensure that "appellate courts can responsibly fulfill their role in the judicial process"). This is precisely such a situation where the issues at stake are such that a stay is warranted to allow for effective appellate review.

In the district court, Ms. Doe asserted that any delay in having an abortion is associated with unspecified "increased medical risks." Doc. No. 1-12 at 15. But as Ms. Doe herself acknowledges, even second trimester abortions are still "very safe." *Id.*; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016) (noting evidence that first trimester abortions have major complications is in less than 0.25% of cases, while second trimester abortions have major complications in less than 0.5% of cases); *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (discussing how second trimester abortions have very low rates of complications). Ms. Doe, therefore, failed to prove irreparable harm for a TRO, much less to overcome the government's undisputed harm in the permanent extinguishment of its interest in not facilitating Ms. Doe's abortion. In addition, any purported urgency was exacerbated by Ms. Doe's decision to file two separate meritless lawsuits in other fora prior to this one.

In any event, a stay would not itself deprive Ms. Doe of the ability to obtain an abortion for the pendency of this appeal. She could moot the appeal because she still

retains the ability to leave federal custody by requesting a voluntary departure, or if she identified a suitable sponsor. If either of those were secured, Ms. Doe would be released from federal custody and could seek an abortion on her own. And if Ms. Doe were to request a voluntary departure, the government would be willing to work with her to make that happen as expeditiously as possible.

Finally, the public interest favors the grant of a stay. To a significant extent, the public's interest overlaps with the government's interests here since the public—like the government—has an interest in promoting human life and in not using public resources to facilitate abortion. Moreover, denying the stay could incentivize illegal immigration by pregnant minors by compelling the federal government to facilitate an unaccompanied alien child's request for an elective abortion.

The balance of the hardships and the public interest, thus, weigh in favor of a stay. In contrast to the immediate and irreparable harm the government would suffer if it were ordered to facilitate Ms. Doe's abortion, granting the stay would not preclude Ms. Doe from obtaining an abortion: she could do so after voluntarily departing federal custody, or if she were to secure a permanent injunction, after prevailing on the merits of her claim in an expedited proceeding.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court enter a stay pending appeal of the district court's October 18, 2017 temporary restraining order. Because Ms. Doe may have an abortion as early as the morning of October 20, 2017 pursuant to that order, defendants respectfully request that this Court issue a decision on this motion by 9:00 p.m. on October 19, 2017. Defendants also request that the Court enter an immediate administrative stay pending consideration of this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, the following counsel for appellee was served by e-mail (by consent):

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,111 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Catherine H. Dorsey
Catherine H. Dorsey

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D.,
Plaintiff-Appellee,

v.

ERIC 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

EXHIBITS TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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Exhibit 1 – White Declaration

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, et al.	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 1:17-cv-2122**
	)	
ERIC HARGAN, et al.	)	
	)	
Defendants.	)	
	)	

DECLARATION OF JONATHAN WHITE, DEPUTY DIRECTOR FOR CHILDREN'S PROGRAMS, OFFICE OF REFUGEE RESETTLEMENT, ADMINISTRATION FOR CHILDREN AND FAMILIES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

I, Jonathan White, for my declaration pursuant to 28 U.S.C. § 1746, hereby state and depose as follows, based on my personal knowledge and information provided to me in the course of my official duties:

1. I am the Deputy Director for Children's Programs of the Office of Refugee Resettlement ("ORR"), an Office within the Administration for Children and Families ("ACF"), Department of Health and Human Services ("HHS").

2. I am familiar with ORR policies and procedures concerning requests for and approval of medical procedures, including abortions, on unaccompanied alien children ("UACs") in ORR care and custody, and on the procedures involved when ORR approves medical procedures.

3. I am also familiar with the policies, procedures, and decisions concerning the request for an abortion by the minor identified in the complaint as J.D.

4. According to ORR records (which have been provided to attorneys for J.D.), in early September 2017, J.D. attempted to enter the United States without lawful authorization, J.D. was detained and placed in federal custody.

5. J.D. is currently sheltered by a federal grantee (hereinafter the "shelter"), under a cooperative agreement with the Department of Health and Human Services.

6. Organizations that provide shelter and services to UACs, including the shelter in this case, do so in compliance with ORR policies and procedures and for certain medical procedures, such as abortion or significant surgery, ORR provides additional direction. ORR maintains legal custody of J.D. and, under the requirements of the cooperative agreement, exercises decision-making authority for many determinations, according to ORR policies and procedures.

7. J.D. was given a physical medical examination after which she was informed that she was pregnant.

8. J.D. requested an abortion. ORR has not been advised of a medical report indicating that continuing the pregnancy is required to preserve the minor's physical health.

9. At ORR's direction and consistent with ORR policies and procedures, shelter staff contacted her parents in home country to inform them she was pregnant.

10. On September 27, the ORR Director denied J.D.'s request to obtain an abortion, and to be transported from her shelter so that she could attend the abortion and associated appointments.

11. ORR and shelter staff have provided Ms. Doe with requested access to her guardian ad litem, her attorneys, and transport to court proceedings.

12. ORR policies and procedures require ORR direction and approval for abortions by UACs. For a UAC to undergo an abortion consistent with ORR policies and procedures, the ORR Director would need to make a decision authorizing the abortion, consistent with his duties under 6 U.S.C. § 279, and communicate that decision to ORR staff and the shelter.

13. Obtaining ORR direction and approval also involves work by shelter and/or ORR field staff including, but not limited to: bringing the minor to and from medical appointments diagnosing the minor's pregnancy and evaluating her health; communicating the minor's medical and personal information to ORR; discussing the potential procedure with the minor and her parents; and maintaining custody of the minor for any legal proceedings.

14. In addition, to approve a proposed procedure such as abortion requires work by ORR staff, including but not limited to: drafting approval documents and routing them through ORR leadership; reviewing the information about the minor relevant to the proposed procedure; providing pre-procedure direction to field and shelter staff; and providing and communicating ORR authorization for a procedure to take place. To my knowledge, ORR has not yet reached the stage of drafting such approval documents, and the Director has not approved the procedure.

15. If a medical procedure such as abortion were approved, ORR and shelter staff would be responsible to engage in work to retain custody of the minor during the procedure and appointments related to the procedure, and during transport to and from such appointments. Abortion is one of several kinds of medical procedures that require heightened ORR involvement under ORR's policies and procedures. For example, ORR would need to ensure that the minor's health is stable during and immediately after an abortion.

16. In Texas and some other states, ORR's involvement in retaining care and custody of the minor would involve ORR or shelter staff oversight of at least two appointments separated by 24 hours, because of state laws requiring pre-procedure counseling and a waiting period.

17. In the particular case of J.D., at issue in this matter, ORR was asked to transport the minor to two appointments, and the request indicated that each appointment would be at a clinic located approximately one-hour away from the shelter by car.

18. In addition, ORR maintains policy and regulations regarding a volunteer of a shelter accompanying a child to a procedure, including a medical procedure. Under such procedures, a volunteer who is not the attorney of record would be subject to a background check in order to have direct contact with a UAC. See 4.3.2 of the ORR Policy Guide, available at: https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-4#4.3.2. Also see 45 C.F.R. § 411.16(d), stating "(d) Care provider facilities also must perform a background investigation before enlisting the services of any contractor or volunteer who may have contact with UCs."

19. Although the guardian ad litem is not a volunteer working directly for the shelter, it would be consistent for ORR or the shelter to perform a background check prior to releasing a minor to the individual who is not an attorney of record, for purposes of transporting the minor to a medical appointment.

20. J.D. may exit federal custody by seeking voluntary departure of the United States, or if a sponsor is located who could take custody of her.

21. J.D. identified two potential sponsors to ORR. ORR/shelter staff promptly contacted those potential sponsors. For reasons involved in ORR's standard process to review the suitability of potential sponsors, ORR determined that they were not willing to act as sponsors or

were not suitable candidates to sponsor J.D. ORR, J.D., and her family have not further identified additional potential sponsors.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 17, 2017.

Jonathan White, *ORR Deputy Director for Children's Programs*

Exhibit 2 – Doe Declaration

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, Plaintiffs, v. ERIC D. HARGAN, *et al.*, Defendants.	Civil No. 17-CV- **Declaration of** [redacted]

I, [redacted], do hereby depose and state as follows:

1. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order.
2. I came to the United States from my home country without my parents.
3. I am 17 years old.
4. I was detained upon arrival, and am currently in a shelter in Texas.
5. I am pregnant. I have decided to have an abortion.
6. I have sought and obtained a judicial bypass of Texas's parent consent law.
7. Both an attorney ad litem and a guardian ad litem were appointed to assist me in the judicial bypass. They both speak Spanish and have explained what is happening to me and my legal rights.
8. This declaration has been translated for me by my ad litems so that I know its contents and it states the truth.
9. I have had several appointment scheduled with a licensed health care facility in Texas for an examination by a licensed physician who specializes in obstetrics and gynecology, and to obtain options counseling, including on September 28 and October 6, 2018.

CONFIDENTIAL

10. I had an appointment scheduled for the abortion on September 29 and October 7, 2017.
11. I have been told my ad litems that Defendants prohibited me from traveling to the health care center for the examination, counseling, and abortion.
12. I am hopeful to obtain an abortion as soon as possible. I understand the next counseling appointment should have been October 12, with the abortion appointment on October 13. However, because I keep being delayed, the only appointments available to me are on October 18 and 19, 2017.
13. Defendants have forced me to obtain counseling from a religiously affiliated crisis pregnancy center where I was forced to look at the sonogram.
14. Defendants have been talking to me about my pregnancy – I feel like they are trying to coerce me to carry my pregnancy to term.
15. Defendants told my mother about my pregnancy and are trying to force me to tell her as well.
16. I do not want to be forced to carry a pregnancy to term against my will.
17. I do not want to proceed in court using my real name because I fear retaliation because I am seeking an abortion. I do not want my family to know that I am seeking an abortion.
18. I agree to be a class representative for similarly situated individuals.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 11, 2017

[redacted]

Exhibit 3 – Amiri Declaration

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, Plaintiff, v. ERIC D. HARGAN, *et al.*, Defendants.	)	No. 17-cv-

DECLARATION OF BRIGITTE AMIRI IN SUPPORT OF PLAINTIFF'S APPLICATION FOR A TRO AND MOTION FOR A PRELIMINARY INJUNCTION

I, Brigitte Amiri, declare as follows:

1. I am a Senior Staff Attorney at the American Civil Liberties Union Foundation and counsel for Plaintiff in the above captioned matter. I have personal knowledge of the facts stated in this declaration and I could and would testify competently to them, if called to do so.

2. On September 21, 2017, I became aware that J.D., an unaccompanied immigrant minor, was in a federally funded shelter in Texas, and that the Defendants were resisting her request for access to abortion. I learned that Defendants were going to require J.D. to obtain counseling from a religious, anti-abortion crisis pregnancy center (CPC). I contacted Defendants' counsel on September 22, 2017, and raised concerns about the constitutionality of forcing J.D. to be counseled by a CPC, and Defendants' overall interference with J.D.'s abortion access.

3. After I contacted Defendants' counsel, Defendants allowed J.D. to access state court to obtain a judicial bypass in lieu of parental consent, as required for abortion in Texas. She was appointed a guardian ad litem and an attorney ad litem, and secured a judicial bypass on September 25, 2017, giving her the legal right to consent to the procedure.

4. J.D. had an appointment scheduled for counseling and a medical examination on September 28, 2017, and an appointment for the abortion on September 29, 2017. Defendants, through their counsel, announced on September 27, 2017 that they were prohibiting J.D. from keeping her appointments on September 28 or September 29. Defendants refused – and are continuing to refuse – to transport J.D., and are refusing to allow anyone to transport J.D. to the abortion facility.

5. On September 28, 2017, I contacted Defendants' counsel to clarify Defendants' position about J.D.'s access to abortion. Defendants' counsel told me that Defendants would not allow J.D. access to abortion. I indicated that Plaintiff would likely seek to challenge Defendants' blatantly unconstitutional actions in court.

6. Given Defendants' continued refusal to transport or permit J.D. to be transported to the abortion facility, J.D. sought to obtain emergency relief on October 5, 2017, by joining 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 Office of Refugee Resettlement ("ORR") practices that interfere with the ability of unaccompanied immigrant minors' ability to access to abortion care, proceeding against the same Defendants in the U.S. District Court for the Northern District of California.

7. On October 11, 2017, after expedited briefing, Magistrate Judge Beeler issued an order denying Plaintiffs leave to amend the complaint in that case to add J.D. as a named plaintiff, 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 (attached hereto as Exhibit J).[1]

9. In support of Plaintiff's Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, Plaintiff relies upon documents that the ACLU of Northern California received from Defendants in discovery in *American Civil Liberties Union of Northern California v. Burwell, et. al.* and from advocates working with unaccompanied immigrant minors. The documents that the ACLU of Northern California received in discovery have been redacted pursuant to the parties' protective order and further agreements in that case. These documents are attached to and referenced in Plaintiff's Memorandum in Support of Plaintiff's Application for a Temporary Restraining Order and Motion for a Preliminary Injunction as follows:

7. **Exhibit A:** March 4, 2017 Memorandum from Kenneth Tota, Acting Director, Office of Refugee Resettlement, Re: ORR custodial decisions to preserve the health of a pregnant UAC, PRICE_PROD_00005146.

8. **Exhibit B:** March 3, 2017 Email from Acting ORR Director Ken Tota to Staff Re: Heightened Medical Procedures Guidance; March 10, 2017 Email Re: ORR Guidance for Pregnant UC, PRICE_PROD_00004528-32.

9. **Exhibit C:** March Email Exchanges between ORR Director Scott Lloyd and Senior Management Regarding UC Pregnancy Termination Policies, Including Director Lloyd's Instructions that "Grantees Should Not Be Supporting Abortion Services Pre or Post-Release; Only Pregnancy Services and Life-Affirming Options Counseling", PRICE_PROD_00010706.

[1] J.D., with the assistance of her guardian and attorney ad litems, also initiated a confidential and sealed state court proceeding, under state law, against the shelter where she currently resides for abuse and neglect for failure to ensure that her medical care needs are met. Although that case raises no federal question, the Department of Justice is now representing the shelter, has removed the state case to federal court, and is seeking its dismissal.

10. **Exhibit D:** March 14, 2017 Email from S. Lloyd Re: Personal Meeting with UAC in San Antonio, Texas and Discussion Regarding Her Pregnancy Decision, PRICE_PROD_00010950-52.

11. **Exhibit E:** April 1 – 4, 2017 Email Exchange Regarding Scott Lloyd's Discussion with UAC in Arizona, PRICE_PROD_00010616.

12. **Exhibit F:** ORR's "Trusted Providers in HHS Cities" Excel Spreadsheet (Reformatted as PDF).

13. **Exhibit G:** March 24, 2017 Email from S. Lloyd Re: CPC Counseling, PRICE_PROD_00010709-10.

14. **Exhibit H:** March 29 – April 3, 2017 Internal ORR Email Exchange Regarding Informing UAC's Mother and Sponsor about Abortion Procedure, PRICE_PROD_00010866-67.

15. **Exhibit I:** March 31, 2017 Email to ORR's J. De La Cruz Re Directions to Notify Mother of UAC Despite UAC's Desire Not To, PRICE_PROD_00010623.

16. **Exhibit J**: October 11, 2017, Judge Beeler Order

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed October 13, 2017, in New York, New York.

By: /s/ Brigitte Amiri _____
Brigitte Amiri

Exhibit 4 – Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, c/o ACLU 125 Broad Street, 18th Fl. New York, NY 10004, Plaintiff, v. ERIC HARGAN, Acting Secretary of Health and Human Services U.S. Department of Health & Human Services 200 Independence Avenue, S.W. Washington, D.C. 20201; STEPHEN WAGNER, Acting Assistant Secretary for Administration for Children and Families, in his official and individual capacity 330 C Street, S.W. Washington, D.C. 20201; and SCOTT LLOYD, Director of Office of Refugee Resettlement, in his official and individual capacity 330 C Street, S.W. Washington, D.C. 20201, Defendants.	No. 17-cv- _____

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES
(Interference with minor's constitutional right to obtain an abortion)

Plaintiff Rochelle Garza, court-appointed guardian ad litem to minor J.D., on behalf a class of similarly situated pregnant unaccompanied immigrant minors in the legal custody of the federal government, for her complaint in the above-captioned matter, alleges as follows:

PRELIMINARY STATEMENT

1. There are currently thousands of unaccompanied immigrant minors (also known as unaccompanied children, or "UCs") in the legal custody of the federal government. These young people are extremely vulnerable: Many have come to the United States fleeing abuse and torture in their home countries; many have been sexually abused or assaulted either in their home countries, during their long journey to the United States, or after their arrival; some have also been trafficked for labor or prostitution in the United States or some other country; and many have been separated from their families.

2. The federal government is legally required to provide these young people with basic necessities, such as housing, food, and access to emergency and routine medical care, including family planning services, post-sexual assault care, and abortion. And as is true with everyone in the United States, the Constitution prohibits the government from imposing an "undue burden" on the right to obtain an abortion.

3. Defendants have recently revised nationwide policies that allow them to wield an unconstitutional veto power over unaccompanied immigrant minors' access to abortion in violation of their Fifth Amendment rights. Under these nationwide policies, Defendants also force unaccompanied minors who request abortion to visit a pre-approved anti-abortion crisis pregnancy center, which requires the minor to divulge the most intimate details of her life to an entity hostile to their abortion decision, in violation of her First and Fifth Amendment rights. Defendants also force minors to notify parents or other family members of their request for abortion and/or the termination of their pregnancy, or notify family members themselves, in violation of the First and Fifth Amendments.

4. Recently, an unaccompanied immigrant minor in the legal custody of the federal government, J.D., learned she was pregnant and told the shelter in Texas where she lives that she would like to have an abortion. Because Texas requires parental consent or a judicial waiver of that requirement, J.D. (for "Jane Doe;" a motion to refer to her by pseudonymous initials will be forthcoming) went to court and, with the assistance of an attorney ad litem and a guardian ad

litem, received judicial permission to consent to the abortion on her own. Defendants have, however, taken the position that J.D. is prohibited from accessing an abortion: Defendants will not transport her for the abortion, nor will they allow anyone else to do so. Defendants are essentially holding J.D. hostage to prevent her from getting an abortion in blatant violation of J.D.'s constitutional rights.

5. Defendants have also forced J.D. to visit a religious, anti-abortion crisis pregnancy center, and, over J.D.'s objections, told J.D.'s mother that J.D. was pregnant. To vindicate her constitutional rights to terminate her pregnancy and to avoid compelled speech, her court-appointed guardian ad litem, Rochelle Garza seeks an immediate TRO to grant J.D. access to judicially approved abortion, and on behalf of the class of similarly situated unaccompanied immigrant minors, a preliminary injunction to prevent Defendants from obstructing, interfering with, or blocking other individuals' access to abortion.

6. While abortion is a very safe procedure, each week of delay increases the risk associated with it.

7. Absent emergency injunctive relief, Defendants' actions will have the effect of forcing J.D. to continue her pregnancy and have a baby against her will.

JURISDICTION AND VENUE

8. This action arises under the First and Fifth Amendments to the United States Constitution and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331.

9. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Federal Rules of Civil Procedure 57 and 65, and by the inherent equitable powers of this Court.

10. Plaintiff J.D. is entitled to damages based on civil rights violations committed by federal officials contrary to the First and Fifth Amendments to the United States Constitution pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

11. The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412.

12. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

13. Plaintiff Rochelle Garza is the court-appointed guardian ad litem for J.D., a minor who came to the United States without her parents from her home country. J.D. was detained by the federal government and placed in a federally funded shelter in Texas. J.D. is years old, pregnant, and told the staff at the shelter where she is currently housed that she wanted an abortion. J.D. faced extreme resistance from Defendants. After Plaintiff's counsel contacted Defendants' counsel, J.D. was allowed to pursue a judicial bypass in lieu of securing parental consent for the abortion as required by Texas law. With the assistance of attorney and guardian ad litems, J.D. secured a court order permitting her to have an abortion without parental consent. Nevertheless, Defendants have now taken the position that they will not allow J.D. to access abortion.

14. J.D. was forced to cancel multiple appointments for state-mandated counseling and the abortion due to Defendants' obstruction, which has pushed J.D. later into pregnancy; although abortion is very safe, each week of delay increases the risks. Abortion is approximately 14 times safer than childbirth in terms of morbidity. Absent a TRO from this Court, J.D. will be forced to carry to term against her will.

15. Defendants also forced J.D. to visit an anti-abortion crisis pregnancy, and over J.D.'s objection, Defendants told J.D.'s mother about her pregnancy.

16. Defendants' actions have caused, and continue to cause, J.D. physical, mental, and emotional pain and suffering.

17. J.D. will move this Court to be referred to in this litigation by the initials "J.D." for "Jane Doe" to protect her privacy. She fears retaliation because she has requested an abortion, and she does not want her family to know she is seeking an abortion.

18. J.D. sues on her own behalf and as the class representative of other similarly situated young women.

19. Defendant Eric Hargan is the Acting Secretary of the United States Department of Health and Human Services ("HHS") and is responsible for the administration and oversight of the Department. Defendant Hargan has authority over the Administration for Children and Families, a subdivision of HHS. By interfering with, prohibiting and/or obstructing unaccompanied immigrant minors' access to abortion, Defendant Hargan is violating the First and Fifth Amendments.

20. Defendant Steven Wagner is the Acting Assistant Secretary for Administration for Children and Families. Defendant Wagner has authority over the Office of Refugee Resettlement ("ORR"), a subdivision of Administration for Children and Families. By interfering with, prohibiting and/or obstructing unaccompanied immigrant minors' access to abortion, Defendant Wagner is violating the First and Fifth Amendments. Defendant Wagner is sued in his individual capacity.

21. Defendant Scott Lloyd is the Director of ORR. By interfering with, prohibiting and/or obstructing unaccompanied immigrant minors' access to abortion, Defendant Lloyd is violating the First and Fifth Amendments. Defendant Lloyd is sued in his individual capacity.

FACTS GIVING RISE TO THIS ACTION

The Unaccompanied Children ("UC") Program

22. ORR has responsibility for the "care and custody of all unaccompanied [] children, including responsibility for their detention, where appropriate." 8 U.S.C. § 1232(b)(1). 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 there is no parent or legal guardian in the United States able to provide care and physical custody. 6 U.S.C. § 279(g)(2).

23. By statute, any federal department or agency that determines that it has an unaccompanied immigrant minor in its custody must transfer the minor to ORR within 72 hours

of making that determination. *Id.* § 1232(b)(3). The federal government reports that in Fiscal Year 2016, 59,692 unaccompanied immigrant minors were referred to ORR.

24. The federal government and all of its programs are required to ensure that the best interests of the unaccompanied immigrant minor are protected. Section 462 of the Homeland Security Act requires ORR to "ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied child." 6 U.S.C. § 279(b)(1)(B).

25. In addition, Section 235 of the Trafficking Victims Protection Act directs HHS to ensure that unaccompanied immigrant minors are "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A).

26. Most unaccompanied immigrant minors who are referred to ORR are eventually released from custody to parents or sponsors who live in the United States. Such minors are often held in short-term facilities or shelters while they await release to their parents or sponsors. A significant number of unaccompanied immigrant minors are not released to parents or sponsors, and spend longer periods of time in custody. For some minors, ORR cannot identify an individual who can serve as a viable sponsor. Young people who are expected to be in the government's custody for an extended period or those who have special needs are sometimes transferred to group homes or a foster family. For others, ORR may determine that the minor should be placed in a more restrictive custodial setting. Young people who are flight risks, for example, are held in jail-like facilities with limited, if any, freedom.

Unaccompanied Immigrant Minors Are Legally Entitled to Receive Access to Reproductive Health Care

27. Unaccompanied immigrant minors have an acute need for reproductive health care, which is both time-sensitive and is necessary over the course of their time in federal custody. For example, a high number of these young women are victims of sexual assault. Some of these women will need access to emergency contraception, and some will need access to abortion. Any female aged 10 or older must undergo a pregnancy test within 48 hours of

admission to an ORR-funded facility. This is the point at which many young women first learn they are pregnant. Many unaccompanied minors need pregnancy prevention services and/or access to abortion during their short or long periods in ORR custody.

28. 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 *Flores v. Reno* Settlement Agreement, 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."

29. Additionally, in response to its obligations under the Prison Rape Elimination Act and the Violence Against Women Reauthorization Act of 2013, ORR issued a regulation requiring all ORR-funded care provider facilities to, among other things, provide unaccompanied immigrant minors who are victims of sexual assault with access to reproductive healthcare. The regulation states, in relevant part, that grantees providing care to unaccompanied immigrant minors who have experienced sexual abuse while in federal custody must ensure "unimpeded access to emergency medical treatment, crisis intervention services, emergency contraception, and sexually transmitted infections prophylaxis." 45 C.F.R. § 411.92(a). The regulation further provides that grantees must ensure that a young person subject to sexual abuse is offered a pregnancy test, and "[i]f pregnancy results from an instance of sexual abuse, [the] care provider facility must ensure that the victim receives timely and comprehensive information about all lawful pregnancy-related medical services." *Id.* § 411.93(d). Grantees were required to comply with this regulation by June 24, 2015.

30. Upon information and belief, unaccompanied immigrant minors face significant barriers to obtaining services not provided by the government and/or its grantees. For example, even if a teen can leave the shelter, she still may not be able to obtain access to abortion or contraceptives without assistance because she likely speaks little or no English; she may have no support system, other than that provided by the federal program; she may have no means of

transportation to the doctor's office; and she may have little or no financial resources. If she is not informed that contraceptives and abortions are available in the United States, she may not even know that these options exist, given that many of these young people come from countries where abortion is illegal.

Defendants' Interference With, Obstruction, or Prohibition On Unaccompanied Immigrant Minors' Access to Abortion

31. Defendants are wielding an unconstitutional veto power over unaccompanied immigrant minors' access to abortion. In March 2017, ORR revised its policies to prohibit all federally funded shelters from taking "any action that facilitates" abortion access for unaccompanied minors in their care without "direction and approval from the Director of ORR." This includes scheduling appointments with medical providers, ensuring access to non-directive options counseling, ensuring access to court to seek a judicial bypass in lieu of parental consent, and providing access to the abortion itself.

32. In an email to all ORR staff, then-Acting Director of ORR Ken Tota summarized the policy: "Grantees are prohibited from taking any actions in [requests for abortion] without . . . signed authorization from the Director of ORR."

33. Defendants have exercised their unconstitutional veto power to deny J.D. access to abortion. After Plaintiff's counsel's intervention, Defendants permitted J.D. to seek a judicial bypass in lieu of parental consent required by Texas law. J.D. secured that court order with the assistance of an attorney ad litem and a guardian ad litem, Plaintiff Garza. J.D. had an appointment scheduled with a health center for options counseling (the first step in the process of obtaining an abortion under Texas law), but Defendants told the ad litems, Plaintiff's counsel, and the shelter that Defendants prohibited J.D. to be transported by her ad litems to the health

center. Defendants also made clear that J.D. would be prohibited from obtaining the abortion itself.

34. The judicial bypass order obtained for J.D. is still valid. Plaintiff Garza is ready and able to transport J.D. to all appointments necessary for the abortion, including the state-mandated options counseling sessions and the medical procedure itself.

35. Upon information and belief, Defendants have instructed the shelter in which J.D. resides to prohibit J.D. from leaving the facility to access abortion, and has told the shelter that if they allow her access, they will revoke the shelter's government grant. But for that instruction, the shelter is willing to allow Plaintiff Garza to transport J.D. to the abortion facility.

36. Upon information and belief, Stephen Wagner and/or Scott Lloyd personally authorized ORR to block J.D.'s access to abortion.

37. Defendants have also interfered with abortion access for other minors. In fact, the Director of ORR, Scott Lloyd, has taken the position that "[g]rantees should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling."

38. Defendants' actions toward J.D. are consistent with their policy, which has been enforced against other young women as well.

39. For example, in March 2017, another unaccompanied minor at a federally funded shelter in Texas decided to have an abortion. After obtaining a judicial bypass and receiving counseling, she started the medical abortion regimen for terminating a pregnancy. This regimen begins with a dose of mifepristone, followed by a dose of misoprostol within 48 hours later. After the minor took the mifepristone, ORR intervened, and forced her to go to an "emergency room of a local hospital in order to determine the health status of [her] and her unborn child."

The Acting Director of ORR, Ken Tota, directed ORR as follows: "[i]f steps can be taken to preserve the life of . . . her unborn child, those steps should be taken." Eventually, after the intervention of other advocates, ORR allowed the minor to complete the medication abortion and take the second dose of pills.

40. Furthermore, Defendant ORR Director, Scott Lloyd, has personally contacted one or more unaccompanied immigrant minors who was pregnant and seeking abortion, and discussed with them their decision to have an abortion. Upon information and belief, Defendant Lloyd is trying to use his position of power to coerce minors to carry their pregnancies to term.

41. ORR has also created a nationwide list of "Trusted Providers in HHS Cities," which is predominately comprised of anti-abortion crisis pregnancy centers.

42. Crisis pregnancy centers ("CPCs") are categorically opposed to abortion, and generally do not provide information about pregnancy options in a neutral way. Many are also religiously affiliated, and proselytize to women.

43. Defendants forced J.D. to visit one of these centers for "counseling," forcing her to share her most private personal and medical information to an entity that is hostile to her decision to have an abortion.

44. Defendants have also required other minors to be counseled by crisis pregnancy centers, both before and after the abortion, including at the explicit direction of Defendant ORR Director Scott Lloyd.

45. Defendants have also unconstitutionally forced unaccompanied immigrant minors to tell their parents and/or immigration sponsors about their abortion decision, or Defendants themselves have told minors' family members or sponsors about the minors' pregnancy and/or abortion decision, against the express wishes of the minor, both before and after the abortion.

46. Defendants told J.D.'s mother about J.D.'s pregnancy – over J.D.'s objections – and are trying to force J.D. to also tell her mother she is pregnant and seeking an abortion. In another minor's case, Defendant Lloyd explicitly required "the grantee or the federal field staff [to] notify her parents of the termination," even after she had obtained a judicial bypass to be allowed to access abortion without her parents' involvement or knowledge.

CLASS ALLEGATIONS

47. Pursuant to Federal Rule of Civil Procedure 23(b)(1) and (b)(2), Plaintiff Rochelle Garza brings this action as a class on her behalf of J.D., and on behalf of all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit.

48. The class is so numerous that joinder is impracticable. In any given year, there are hundreds of pregnant unaccompanied minors in defendants' custody. Joinder is inherently impractical because the number of unnamed, future class members who will be pregnant while in ORR custody is unknown and unknowable, especially given the transient nature of the unaccompanied minors population and the temporal limitations of pregnancy. The young people affected by ORR's abortion restriction policy are geographically dispersed across the country. Proposed class members are highly unlikely to file individual suits on their own behalf given the practical, legal, linguistic, monetary, and fear-based barriers that prevent their ability to access independent counsel to challenge ORR's abortion restrictions.

49. The claims of the Plaintiff Class members share common issues of law, including but not limited to whether: i) ORR's policy of exercising a veto power over a UC's abortion access; ii) HHS's policy of requiring a forced visit to an anti-abortion crisis pregnancy center;

and iii) disclosing – or forcing the minor to disclose - to parents or immigration sponsor her abortion decision violate the Constitution.

50. The claims of the Plaintiff Class members share common issues of fact, including but not limited to the implementation of Defendants' policy and practice of obstructing or preventing of access to abortion in the various ways detailed above.

51. The claims of J.D. are typical of the claims of members of the Plaintiff Class.

52. The named Plaintiff will fairly and adequately protect the interests of the Plaintiff Class. The named Plaintiff has no interest that is now or may be potentially antagonistic to the interests of the Plaintiff Class. The attorneys representing the named Plaintiff are experienced civil rights attorneys and are considered able practitioners in federal constitutional litigation. These attorneys should be appointed as class counsel.

53. Defendants have acted, have threatened to act, and will act on grounds generally applicable to the Plaintiff Class, thereby making final injunctive and declaratory relief appropriate to the class as a whole. The Plaintiff Class may therefore be properly certified under Fed. R. Civ. P. 23(b)(2).

54. Prosecution of separate actions by individual members of the Plaintiff Class would create the risk of inconsistent or varying adjudications and would establish incompatible standards of conduct for individual members of the Plaintiff Class. The Plaintiff Class may therefore be properly certified under Fed. R. Civ. P. 23(b)(1).

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
FIFTH AMENDMENT RIGHT TO PRIVACY AND LIBERTY
(PLAINTIFF J.D. AND CLASS AGAINST DEFENDANTS)

55. Defendants violate unaccompanied immigrant minors' right to privacy guaranteed by the Fifth Amendment by wielding a veto power over their abortion decisions, and obstructing, interfering with, or blocking access to abortion, including by forcing minors to visit crisis pregnancy centers and preventing them from going to medical facilities where they can obtain legal abortions.

56. Defendants violate the Fifth Amendment rights of unaccompanied minors by revealing, or forcing the minors to reveal, information about their pregnancy and abortions to their parents or other family members, including immigration sponsors, both before and after the abortion.

SECOND CLAIM FOR RELIEF
FREEDOM OF SPEECH
(PLAINTIFF J.D. AND CLASS AGAINST DEFENDANTS)

57. By compelling unaccompanied immigrant minors to discuss their decisions to have abortions and the circumstances surrounding those decisions with crisis pregnancy centers, and with their parents or immigration sponsors, Defendants violate the unaccompanied immigrant minors' rights against compelled speech guaranteed by the First Amendment.

THIRD CLAIM FOR RELIEF
INFORMATIONAL PRIVACY
(PLAINTIFF J.D. AND CLASS AGAINST DEFENDANTS)

58. By requiring unaccompanied immigrant minors to disclosure their identities, their pregnancies, and their decisions to seek or have an abortion, to a crisis pregnancy center, parents, and/or immigration sponsors, Defendants violate the minors' rights to informational privacy guaranteed by the Fifth Amendment.

FOURTH CLAIM FOR RELIEF
FIRST AMENDMENT – ESTABLISHMENT CLAUSE

(PLAINTIFF J.D. AND CLASS AGAINST DEFENDANTS)

59. Defendants violate the Establishment Clause by requiring unaccompanied immigrant minors to obtain counseling at crisis pregnancy centers that are often religiously affiliated, and that proselytize the unaccompanied immigrant minors who are forced to go there.

60. Defendants' actions alleged herein endorse and impose upon the class members a particular set of religious beliefs.

61. Defendants' actions alleged herein have the predominant purpose of advancing a particular set of religious beliefs.

62. Defendants' actions alleged herein have the predominant effect of advancing a particular set of religious beliefs.

63. Defendants' actions alleged herein are religiously coercive.

FIFTH CLAIM FOR RELIEF
FIFTH AMENDMENT AND *BIVENS*
(PLAINTIFF J.D. AGAINST DEFENDANTS WAGNER AND LLOYD)

64. Defendants Wagner and/or Lloyd acted intentionally and unlawfully in violating Plaintiff J.D.'s clearly established rights under the Fifth Amendment by vetoing her abortion decision and blocking her ability to obtain an abortion, and otherwise obstructing, interfering with access to abortion, including forcing J.D. to visit a crisis pregnancy center, telling J.D.'s mother about her pregnancy, and attempting to force J.D. to discuss her pregnancy and abortion decision with her mother. These defendants therefore caused J.D. to suffer injuries that can be compensated with money damages.

65. Defendants Wagner and Lloyd acted with the intention of violating J.D.'s Fifth Amendment rights, or with reckless indifference or callous disregard for J.D.'s Fifth Amendment rights, thus entitling her to punitive damages.

66. These violations are redressable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

SIXTH CLAIM FOR RELIEF
FIRST AMENDMENT AND *BIVENS*
(PLAINTIFF J.D. AGAINST DEFENDANTS WAGNER AND LLOYD)

67. Defendants Wagner and/or Lloyd acted intentionally and unlawfully in violating J.D.'s clearly established rights under the First Amendment to refrain from compelled speech by forcing J.D. to visit a crisis pregnancy center and discuss her medical decisions.

68. Defendants Wagner and Lloyd acted with reckless indifference or callous disregard for J.D.'s First Amendment rights, thus entitling her to punitive damages.

69. These violations are redressable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in her favor and:

1. Certify this action as a class action under Federal Rule of Civil Procedure 23.

2. Declare, pursuant to 28 U.S.C. § 2201, that Defendants' actions, as set forth above, violate the Establishment and Free Speech Clauses of the First Amendment to the United States Constitution, and the Fifth Amendment right to privacy, liberty, and informational privacy;

3. Enter a Temporary Restraining Order preventing Defendants from obstructing J.D.'s access to abortion;

4. Enter a preliminary injunction as to the Plaintiff Class;

5. Enter a permanent injunction preventing Defendants from wielding a veto power over an unaccompanied minors' abortion decision, including interfering, obstructing, or blocking her abortion;

6. Enter a permanent injunction preventing Defendants from forcing unaccompanied immigrant minors from visiting crisis pregnancy centers as a condition of having an abortion or after an abortion;

7. Enter a permanent injunction preventing Defendants from revealing, or forcing unaccompanied immigrant minors to reveal, to the minors' parents or immigration sponsors information about the minors' abortion decisions, either prior to or after the abortion decisions;

8. Enter a permanent injunction preventing Defendants from retaliating against unaccompanied immigrant minors for seeking or obtaining abortions;

9. Award compensatory and punitive damages to J.D. against Defendants Wagner and Lloyd in an amount to be determined at trial;

10. Award costs and fees for this action, including attorneys' fees;

11. Award such further relief as this Court deems appropriate.

October 13, 2017

Respectfully Submitted,

/s Arthur B. Spitzer

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*Motion for admission for *pro hac vice* forthcoming

Attorneys for Plaintiff

Exhibit 5 – District Court's TRO Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, Plaintiff, v. ERIC D. HARGAN, *et al.*, Defendants.	Civil Action No. 17-cv-02122 (TSC)

TEMPORARY RESTRAINING ORDER

Upon consideration of Plaintiff's application for a temporary restraining order, and any opposition, reply, and further pleadings and arguments;

It appears to the Court 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. It is, therefore,

ORDERED that Plaintiff's application for a temporary restraining order is hereby GRANTED, and that Defendants Eric Hargan, Steven Wagner, and Scott Lloyd (along with their

respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are, for fourteen days from the date shown below, hereby:

1. Required to transport J.D.—or allow J.D. to be transported by either her guardian or attorney ad litem—**promptly and without delay** to the abortion provider closest to J.D.'s shelter in order to obtain the counseling required by state law on October 19, 2017, and to obtain the abortion procedure on October 20, 2017 and/or October 21, 2017, as dictated by the abortion providers' availability and any medical requirements. If transportation to the nearest abortion provider requires J.D. to travel past a border patrol checkpoint, Defendants are restrained from interfering with her ability to do so and are ordered to provide any documentation necessary for her to do so;
2. Temporarily restrained from interfering with or obstructing J.D.'s access to abortion counseling or an abortion;
3. Temporarily restrained from further forcing J.D. to reveal her abortion decision to anyone, or revealing it to anyone themselves;
4. Temporarily restrained from retaliating against J.D. based on her decision to have an abortion;
5. Temporarily restrained from retaliating or threatening to retaliate against the contractor that operates the shelter where J.D. currently resides for any actions it has taken or may take in facilitating J.D.'s ability to access abortion counseling and an abortion.

It is further ORDERED that Plaintiff shall not be required to furnish security for costs. Failure to comply with the terms of this Order may result in a finding of contempt.

Date: October 18, 2017

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I 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. In addition, the following counsel for appellee was served by e-mail (by consent):

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/s/ Catherine H. Dorsey
Catherine H. Dorsey

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCHELLE GARZA, as guardian Plaintiff-Appellee, v. ERIC HARGAN, Acting Secretary, Department of Health and Human Services, et al., Defendants-Appellants.	No. 17-5236

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned counsel certifies as follows:

Plaintiff-appellee is Rochelle Garza, the guardian ad litem to J.D., a minor. Plaintiff also has brought this action on behalf of a putative nationwide class of pregnant unaccompanied minors in HHS custody, but no class has yet been certified.

The defendants are Eric Hargan, the Acting Secretary of HHS (sued in his official capacity); Steven Wagner, the Acting Assistant Secretary for the Administration for Children and Families (sued in his official and personal capacities); and Scott Lloyd, the Director of the Office of Refugee Resettlement (sued in his official and personal capacities). Only the three official capacity defendants are appellants on this appeal.

In the district court, the states of Texas, Arkansas, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, and South Carolina sought leave to file an amicus brief. The district court has not yet ruled on their request. Undersigned counsel is currently unaware of any amici in this Court.

Respectfully submitted,

/s/ Catherine Dorsey

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OCTOBER 2017

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