[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