[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17- XXXX

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

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, JANE ROE on behalf of herself and others similarly situated; and JANE POE,
Plaintiffs-Appellees,

v.

ERIC D. HARGAN, *et al.*,
Defendants-Appellants.

APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The government seeks an emergency stay pending appeal of the district court's December 18, 2017 temporary restraining order ("TRO"), which requires the U.S. Department of Health and Human Services ("HHS") Office of Refugee Resettlement ("ORR") to immediately take various steps to enable Jane Roe ("Ms. Roe"), a minor, to have an abortion, which could occur at any time. *Garza v. Hargan*, Docket No. 17-02122 (D.D.C.), Docket Entry 70 (December 18, 2017 TRO) (Attached as Exhibit ("Ex.") 1).[1] In light of the time constraints present in this case, and the fact that the *en banc* court of appeals affirmed a temporary restraining order with respect to a different respondent at an earlier stage of this case, the government is simultaneously seeking relief from the Supreme Court.

The government respectfully submits that this Court should enter such a stay, because the district court's order effectively grants Ms. Roe permanent relief. An abortion is very likely to occur imminently. The record indicates that Ms. Roe is approximately 10 weeks pregnant, and a stay would allow this Court and the Supreme Court the opportunity to consider on an expedited basis whether the government should be compelled to facilitate Ms. Roe's abortion, without

[1] Ms. Doe's guardian ad litem also moved to add another unaccompanied minor in HHS custody, Jane Poe, as a named plaintiff. Ms. Poe also sought a TRO. Because of the differing circumstances surrounding Ms. Poe's case, the government does not seek a stay of the TRO as it relates to Ms. Poe.

foreclosing Ms. Roe's ability to obtain an abortion under state law. At a minimum, the government respectfully requests a short stay of two weeks because a sponsor has been identified for Ms. Roe and the government needs to complete the expedited process of vetting that sponsor. If the sponsor is approved, the government would release Ms. Roe to the sponsor, mooting her claim to injunctive relief. In all events, the government asks for an administrative stay while this Court considers this request. Without such a stay, this Court's review likely will be thwarted, as the district court has issued an emergency order that could be effectuated at any moment. The district court stayed its order for 24 hours, and that stay expires at 6:05 p.m. on December 19, 2017.

This case concerns the question whether the government must facilitate an abortion procedure that is not necessary to preserve the life or health of an unaccompanied minor who unlawfully entered the country and thus is in the government's custody. Under this Court's decision in *Garza*, the answer to that question in the circumstances presented by Ms. Roe is no.[2]

First, Ms. Roe has not demonstrated a likelihood of success on her claim for injunctive relief. Ms. Roe contends that as in the case of Jane Doe (another plaintiff in the instant case who has previously appeared as an appellee before this

[2] The government also believes *Garza* is wrongly decided, but understands it is binding precedent in this Court.

Court in an appeal from an earlier TRO), the government is "once again violating binding Supreme Court precedent here by . . . exercising their veto power over Ms. Roe's . . . constitutionally protected abortion decisions by refusing to allow them to access an abortion." *Garza v. Hargan*, No. 17-02122 (D.D.C.), Docket Entry 63-1 (Plaintiffs' Memorandum in Support of TRO) (Attached as Ex. 2) at 5. However, this Court in *Garza* never held that any period during which HHS can seek sponsorship is *per se* unconstitutional. As Judge Millett wrote for the *en banc* court, the fact-bound issue in Ms. Doe's case was that the government did not argue the delay there was "the type of short-term burden that could plausibly pass muster under Supreme Court precedent to bar an abortion[,]" implying that a short delay in certain circumstances would not impose such a burden. *Garza v. Hargan*, 874 F.3d 735, 739 (D.C. Cir. October 24, 2017) (*en banc*). And the *en banc* court acknowledged that in some circumstances, the government does not impose an undue burden because the alien should return to her home country. *Id.* at 740. Moreover, unlike in Ms. Doe's case where she obtained a judicial bypass from a Texas state court, there has been no judicial determination that Ms. Roe, a 17 year old minor, is sufficiently mature to make her abortion decision. The facts presented here therefore are distinguishable and do not similarly establish a likelihood of success on the merits.

Second, Ms. Roe cannot establish irreparable injury. Ms. Roe's sponsorship process is near completion, as a potential sponsor has already been identified, who "is a family member, a U.S. citizen, and [who] has submitted an application[,]" and who is only awaiting an expedited background check, with an estimated completion time of two weeks. *Garza v. Hargan*, No. 17-02122 (D.D.C.), Docket Entry 66-1 (White Declaration) (Attached as Ex. 3) at ¶ 4. It is undisputed that Ms. Roe has several weeks remaining pre-viability in which an abortion would be legally permissible, so it is unnecessary for her to obtain emergency judicial relief this week to vindicate the right to abortion that she invokes. Given these facts, and Ms. Roe's ability to seek voluntary departure or a qualified sponsor, the government is not forcing Ms. Roe to carry her pregnancy to term against her will. Granting immediate relief would disrupt the status quo and would irreversibly harm the government's interests without an opportunity for a full adjudication on the merits.

Finally, the balance of hardships and public interest weigh strongly against the relief that Ms. Roe has requested. The government has strong and constitutionally legitimate interests in promoting its interest in life, in refusing to facilitate abortion, and in not providing incentives for pregnant minors to illegally cross the border to obtain elective abortions while in federal custody. Those interests would be irreparably undercut if Ms. Roe was granted the relief she seeks.

RELEVANT PROCEDURAL HISTORY

On October 13, 2017, Plaintiff, Jane Doe and her guardian filed with the U.S. District Court, District of Columbia, this suit as a putative class action on behalf of herself and "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant." *Garza v. Hargan*, Docket No. 17-02122 (D.D.C.), Docket Entry 1 (Complaint) (Attached as Ex. 4) at ¶ 47. Ms. Doe also filed a request for a TRO and preliminary injunction releasing Ms. Doe to obtain abortion counseling and an abortion if she so elected, and on October 18, 2017, the Court granted the request for a TRO as to Ms. Doe. *Garza v. Hargan*, Docket No. 17-02122 (D.D.C.), Docket Entry 20 (October 18, 2017 TRO) (Attached as Ex. 5). The government appealed and initially obtained a stay of the TRO from a panel of the U.S. Court of Appeals for the D.C. Circuit. *Garza v. Hargan*, 2017 WL 4707112 (D.C. Cir. October 19, 2017). However, subsequently, the D.C. Circuit, *en banc*, dissolved the stay, reaffirming the injunction, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. October 24, 2017) (*en banc*) (recalling mandate). Following and in compliance with this Court's Order of October 24, 2017, the government authorized the shelter caring for Ms. Doe to transport her to the abortion provider scheduled by her attorneys. *See* Jackie

Wang, "Unauthorized immigrant minor 'Jane Doe' has abortion after back-and-forth court battle," Dallas Morning News, https://www.dallasnews.com/business/health-care/2017/10/25/undocumented-teen-texas-abortion (last updated Oct. 25, 2017). On October 25, 2017, Ms. Doe underwent an abortion, terminating her pregnancy. *Id.*

On December 15, 2017, Ms. Doe's guardian ad litem moved to amend her complaint to add Ms. Roe as a plaintiff and named representative in this case. *Garza v. Hargan*, Docket No. 17-02122 (D.D.C.), Docket Entry 61-1 (Proposed Amended Complaint) (Attached as Ex. 6) and (Motion to Amend) Docket Entry 61. Ms. Roe also simultaneously sought a TRO ordering HHS to facilitate her efforts to obtain an abortion, relying heavily on the district court's earlier order concerning Ms. Doe. Plaintiffs' Memorandum in Support of TRO at 5 (Ex. 2). The government opposed the TRO. The government submitted a declaration from ORR's Deputy Director for Children's Programs, explaining that Ms. Roe has identified a potential sponsor, who has already submitted an application, and that the vetting process could be completed in as little as two weeks. White Decl. at ¶ 4 (Ex. 3). The government argued that those circumstances, among others, distinguished Ms. Roe's case from Ms. Doe's, for whom a sponsor had not been identified. The government requested that, if the Court issued a TRO, it stay its ruling pending appeal, stay its ruling for two weeks as to Ms. Doe, or, at a

minimum, for 24 hours to permit the government to seek emergency relief from the D.C. Circuit and this Court. On December 18, 2017, the U.S. District Court, District of Columbia, granted Plaintiffs', Jane Roe's and Jane Poe's, application for a TRO ordering the government immediately to facilitate each minor's efforts to obtain an abortion. December 18, 2017 and declined to issue any stay. December 18, 2017 TRO (Ex. 1).

RELEVANT STATUTORY AND FACTUAL BACKGROUND

1. When an unaccompanied alien minor enters the United States, HHS is normally responsible for the minor's care and custody pending completion of immigration proceedings. *See* 8 U.S.C. 1232(b)(1). HHS exercises this responsibility through ORR, which contracts with various private entities that operate shelters and detention centers for these minors. *See generally*, ORR, HHS, Children Entering the United States Unaccompanied: Section 1 (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1.

Generally, a minor has the immediate opportunity to identify an adult sponsor in the United States to whom the minor can be released, with preference given to the minor's relatives within the United States (if any), though non-relatives can qualify to be sponsors. *See* 8 U.S.C. 1232(c)(3); ORR, HHS, Children Entering the United States Unaccompanied: Section 2 (Jan. 30, 2015),

https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2. HHS promptly pursues that opportunity and works with the minor and her family to help consider and identify potential sponsors. *See id.*

Once a prospective sponsor applies, HHS determines whether the applicant is "capable of providing for the child's physical and mental well-being," which must "include verification of the [applicant's] identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." 8 U.S.C. 1232(c)(3)(A). HHS also may, and in some cases must, conduct a home study. 8 U.S.C. 1232(c)(3)(B). If no suitable sponsor is found, and the minor does not voluntarily depart the country, *see* 8 U.S.C. 1229c; 8 C.F.R. 1240.26, the minor normally remains in an HHS-contracted shelter or other facility until the age of 18.

2. Ms. Roe is a 17 year old unaccompanied minor in the custody of ORR who learned she was pregnant during a medical examination on November 21, 2017. *Garza v. Hargan*, Docket No. 17-02122 (D.D.C.), Docket Entry 63-2 (Jane Roe Decl.) (Attached as Ex. 7) ¶ 5. She is "approximately 10 weeks pregnant." *Id.* at ¶ 7. Shortly upon her arrival into ORR custody, Ms. Roe "identified a potential sponsor" who "is a family member, and U.S. citizen, and [who] has submitted an application." White Decl. at ¶ 4 (Ex. 3). ORR acknowledges that "[a]lthough additional documents, fingerprint results, and a home study are required, expedited

completion of the background check and vetting process is possible, and could be possibly completed in two weeks." *Id.* Moreover, "ORR has not notified [Ms. Roe's] parents of her pregnancy and does not plan to notify them." *Id.* ORR has not made a final determination on whether she would be released to obtain an abortion, largely in light of the prospects of her sponsorship process nor has she indicated that anyone is willing to assist her in scheduling or paying for an abortion absent assistance from ORR and its grantee.

ARGUMENT

This Court should grant a stay pending appeal of the district court's TRO requiring HHS to affirmatively facilitate the elective abortion of Ms. Roe who is in federal custody only because she illegally entered this country and refuses to seek voluntary departure. At the very least, this Court should enter a two week stay to allow a limited window of time for the sponsorship process to conclude given that Ms. Roe is early in her pregnancy and the sponsorship process is estimated to be completed in two weeks.[3]

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;

[3] This "[C]ourt has jurisdiction over this appeal because the district court's temporary restraining order was more akin to preliminary injunctive relief and is therefore appealable under 28 U.S.C. § 1292(a)(1)." *Garza v. Hargan*, 874 F.3d at 736, n.1 (citing *Sampson v. Murray*, 415 U.S. 61, 86 n.58, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974)).

whether the 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 because even under this Court's Garza decision, the circumstances presented by Ms. Roe do not call for immediate injunctive relief.

I. Ms. Roe Has Failed to Demonstrate a Likelihood of Success on the Merits of Her Fifth Amendment Undue-Burden Claim

Under the framework of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the government may pursue its interest in protecting life before fetal viability provided it does not do so in a manner that imposes an undue burden on the mother. After viability, the government may regulate or even proscribe abortion. *Id*. at 879. The government does not violate the rights outlined in *Casey* by declining to facilitate an abortion in circumstances like those Ms. Roe presents here. Importantly, Ms. Roe's claim that ORR's policies violate the Fifth Amendment—and instead that the Constitution in every factual circumstance requires the type of facilitation that would enable them to enter the United States for an elective abortion—is incorrect. First, under this Court's *en banc* decision in *Garza*, the Ms. Roe's case is distinguishable and no undue burden has been imposed by the Government. Second, while we understand this Court is bound by *Garza*, we preserve the argument that *Garza* was wrongly decided for purposes of review by the Supreme Court.

A. Under *Garza*, Ms. Roe Has Not Shown an Undue Burden

Applying the *Garza* decision, Ms. Roe has shown that the government has imposed an undue burden. Judge Millett, for the *en banc* court, recognized that the ability to find a sponsor in a timely manner played an important role in determining whether there was a right to court ordered facilitation of the abortion by the government. *See Garza*, 874 F.3d at 738-39 ("centerpiece of the panel order" is the expeditious search for a sponsor and accepting that it is possible some "type[s] of short-term burden . . . could plausibly pass muster under Supreme Court precedent"); *see id. at 739* (identifying five factual issues relating to promptly finding a sponsor that may be relevant to the right to court-ordered relief). In weighing these factors, what most troubled the *en banc* court in Ms. Doe's case was that the government did not allege that "there was any prospect of finding a sponsor at all," particularly "since no family member has been approved as a sponsor" or that "a non-family member could be identified, vetted, and take custody of J.D. within [the requested] eleven days." *Id.* Adding to that factor was the long period of time that had passed since Ms. Doe made the decision to obtain an abortion and the length of the sponsorship search. *See id*. at 739, 741 ("J.D. is already into the second trimester of her pregnancy" and while "sponsorship . . .

might be more optimal in the policy sense" for a child to make a difficult decision, the search for a sponsor had lasted "almost seven weeks" without a sponsor). This combination of factors, the Court held, rendered any further delay an undue burden.

In contrast, Ms. Roe has already "identified a potential sponsor" who "is a family member, and U.S. citizen, and [who] has submitted an application" to sponsor her. White Decl. at ¶ 4 (Ex. 4). Moreover, ORR has acknowledged that "expedited completion of the background check and vetting process is possible, and could possibly be completed in two weeks." *Id.* And she is only ten weeks pregnant, meaning that there is time to complete the sponsorship process. In these circumstances, the government does not impose an undue burden in awaiting the completion of the sponsorship process to avoid the need to facilitate the termination of Ms. Roe's pregnancy.

Moreover, unlike in Ms. Doe's case where she obtained a judicial bypass from a Texas state court, there has been no similar determination that Ms. Roe, a 17 year old minor, is sufficiently mature to make her abortion decision. *See Bellotti*, 443 U.S. at 635. And Ms. Doe does not have a guardian *ad litem* to assure the Court that her interests are being pursued in this litigation. *See* Fed. R. Civ. P. 17(b) & (c). While Ms. Roe is in a State that does not require a judicial bypass, ORR's mission of protecting the interests of the child is required as a matter of

federal law, and some determination is needed to address this issue beyond that child's own independent decision. 6 U.S.C. § 279(b)(1)(A), (B) (stating that ORR's Director is responsible for "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child," and for "implementing policies with respect to the care and placement of unaccompanied alien children."). The Supreme Court has held that "[t]o promote the State's profound interest in potential life, throughout the pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated so long as their purpose is to persuade the woman to choose childbirth over abortion." *Casey*, 505 U.S. at 878. Given that Ms. Roe has not appeared before a state judge or other impartial body that can ensure her decisions are informed, the existence of an informed choice cannot be presumed, and the short interim presented by the agency decision-making process is not an undue burden.

In short, the facts presented here in Ms. Roe's case is distinguishable from Ms. Doe given that she is early in pregnancy and a sponsor has been found and can be approved in two weeks. Accordingly, she does not establish a likelihood of success on the merits.

B. The Due Process Clause Does Not Require the Government to Facilitate an Abortion, Given the Government's Legitimate Interest in Protecting Life and the Ability of an Alien to Return to Her Country of Nationality

Defendants concede that for purposes of the TRO, they are bound by the D.C. Circuit's October 24, 2017 *en banc* decision insofar as the law and the facts contained herein are indistinguishable. However, to preserve the issue, Defendants again argue that the government's refusal to facilitate an elective abortion does not impose an undue burden in violation of the Fifth Amendment. Plaintiffs' Memorandum ISO App. for TRO at 4-5 (Ex. 2). Under *Casey*, the government is entitled to pursue its legitimate interests, provided that it does not impose an "undue burden" on a woman's choice to terminate her pregnancy before viability. *Id.* at 870. Ms. Roe cannot show that an alleged ORR policy of protecting fetal life necessarily imposes such an undue burden in every application, or even a large fraction of applications, for one fundamental reason: an alien who illegally crosses the border and is detained pending a determination of whether she will be permitted to remain in the United States retains the power to withdraw her application for admission and may depart the United States to return to her home country, *cf. Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) ("An alien in Parra's position can withdraw his defense of the removal proceeding and return home to his native land, thus ending his detention immediately. He has the keys in

his pocket."), where she may presumably take the appropriate steps to exercise her right to an abortion there. Ms. Roe has not put forward any facts relating to her ability to return to their country of nationality. *See Garza*, 874 F.3d at 740 (in the case of J.D., voluntary departure "not a constitutionally adequate choice either given both the life-threatening abuse that J.D. claims a . . . and her potential claims of legal entitlement to remain in the United States").

Given these points, Ms. Roe is incorrect in claiming that the government has imposed an undue burden on her abortion decision.

II. The Remaining Factors Favor Granting a Stay

Under the district court's order, Ms. Roe could obtain an abortion with court-ordered government facilitation any moment, even today – 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.

Ms. Roe's claimed injury provides no basis for the injunctive relief that she seeks. The issue before this Court is not whether Ms. Roe will have to carry a pregnancy to full term, but rather whether she can obtain a court order enabling her to have an abortion immediately. Ms. Roe has weeks, not a few days, before viability. She has a sponsor lined up who is only awaiting a background check, which could be completed in two weeks' time. White Decl. at ¶ 4 (Ex. 3). She

need not compel the government to facilitate her right to an abortion this week to vindicate the right that she claims. Because Ms. Roe's fetus is still weeks away from viability, she will not be irreparably injured if she does not obtain effectively irreversible relief now, and the Supreme Court has noted evidence that even second trimester abortions present few complications. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016); *Gonzales*, 550 U.S. at 164.

In any event, a stay would not itself deprive Ms. Roe 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 when a suitable sponsor, which is imminent. If either of those were secured, Ms. Roe would be released from federal custody and could seek an abortion on her own. And if Ms. Roe 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. The TRO causes direct, irreparable injury to the interests of the government and the public. *Nken v. Holder*, 556 U.S. at 435. As discussed above, the government has a legitimate and significant

interest in ensuring that it does not affirmatively facilitate an abortion. That interest will be completely extinguished if the district court's TRO is not stayed. The public interest also weighs against incentivizing illegal immigration by compelling the federal government to facilitate an unaccompanied alien child's request for an elective abortion. *Cf. Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("The government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature. The balance of the hardships and the public interest, thus, weigh in favor of a stay.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter a stay pending appeal of the district court's December 18, 2017 temporary restraining order with respect to Ms. Roe. At a minimum, a stay of two weeks is warranted to provide time for the sponsorship application to be acted on by ORR. Because Ms. Roe may have an abortion at any moment pursuant to that order, Defendants respectfully request an immediate administrative stay while this motion is being considered.

DATED: December 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 18, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will deliver a copy to all counsel of record.

/s/ Sabatino F. Leo
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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 4,644 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.

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