[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 18-5093, 18-8003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

ALEX M. AZAR II, Secretary of Health and Human Services, *et al.*,
Defendants-Appellants.

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

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

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INTRODUCTION

Defendants have inflicted enough harm on the young women in their custody, and should not be permitted to enforce their unlawful policy while they appeal the District Court's properly-entered preliminary injunction and class certification. For the past year, Defendants have developed and implemented a policy that denies pregnant unaccompanied minors access to unbiased information about their pregnancy options; coerces them to carry their pregnancies to term; and blocks them from going to any abortion-related appointments. The named Plaintiffs, and numerous unidentified members of the class, were subjected to Defendants' policy.

The minors in Defendants' care are isolated, and often unaware of their right to obtain an abortion. Plaintiffs' counsel only learned of some of the named Plaintiffs from anonymous tips, and only learned about other minors whose abortion requests were denied by ORR months later through discovery in another case against ORR. When the named Plaintiffs found their way to Plaintiffs' counsel after being significantly delayed by Defendants' obstruction tactics, Plaintiffs' counsel sought immediate injunctive relief on their behalf, which the Court granted as to three named Plaintiffs within a matter of days (Defendants released the fourth named Plaintiff before the District Court could rule on the TRO).

Because Defendants are unlikely to succeed on the merits of their appeal and will experience no harm from the preliminary injunction, this Court should deny the stay. Moreover, granting a stay will cause minors irreparable harm: they will be subjected to Defendants' coercion, and Defendants will prevent them from obtaining abortion care. Denying the stay will serve the public interest by protecting the constitutional rights and health of pregnant unaccompanied minors. Defendants' motion for a stay should therefore be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Unaccompanied immigrant minors (or "unaccompanied children" or "UCs") come to the United States without their parents, often fleeing violence or abuse. After their initial apprehension, Defendant Office of Refugee Resettlement ("ORR") bears responsibility for their "care and custody." 8 U.S.C. § 1232(b)(1). The federal government and all of its programs are required to ensure that the best interests of UCs are protected. *See* 6 U.S.C. § 279(b)(1)(B); 8 U.S.C. § 1232(c)(2)(A).

Protecting UCs' best interests includes ensuring access to health care, including reproductive health care. Indeed, under a nationwide consent decree, the federal government is obligated to provide or arrange for, among other things, "appropriate routine medical . . . care," including specifically

"family planning services[] and emergency health care services."[1] Additionally, an ORR regulation requires all ORR-funded shelters to, among other things, provide UCs who are victims of sexual assault while in federal custody with access to reproductive healthcare. *See* 45 C.F.R. § 411.93(d). UCs have an acute need for such care, in part because many are victims of sexual assault, immediately before, during, or after their journeys to the United States. Third Amended Complaint (ECF No. 118-1) ¶ 59; Amnesty International, *Invisible Victims*, at 15 (April 2010).[2]

Nevertheless, pursuant to Defendants' policy, when a minor requests information about and/or access to abortion, Defendants employ coercive tactics, including forcing the minor to tell her parents of her pregnancy and abortion decision, even in cases where it would endanger the minor or others. *See, e.g.*, ECF No. 121-3; ECF No. 92-1; ECF No. 56-10. As Jonathan White, former Deputy Director of ORR, testified, this policy of forced notification puts minors at risk of harm. ECF No. 121-5 at 42:3-43:1.

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

[2] Available at https://fusiondotnet.files.wordpress.com/2014/09/amr410142010eng.pdf.

Defendants also require minors who indicate that they are considering abortion to receive "life-affirming" counseling from religiously affiliated anti-abortion crisis pregnancy centers on Defendants' list of "approved providers" – a list that was commissioned by Director Lloyd and created with the assistance of two national networks of anti-abortion crisis pregnancy centers. *See, e.g.*, ECF No. 121-3; ECF No. 121-16; ECF No. 121-15 at 161:6-162:10.

When a minor manages to withstand Defendants' coercion, Defendants block her from accessing abortion. Defendant Lloyd has made clear that, under ORR's policy, shelters "are not to take [minors] to get a termination, or to any appointments to prepare [them] for a termination, without consent from the Director, which cannot happen without written and notarized consent of her parents, and will not necessarily follow." ECF No. 121-3. Defendant Lloyd has admitted he has not approved any abortion, even when the young woman was pregnant as a result of a rape and was suicidal. *See id.*, ECF No. 121-15 at 64:19-21; 65:6-22.

After four young women who were subjected to Defendants' policy of coercion and obstruction sought TROs – three were granted, and Defendants released the other before the lower court could rule – the District Court

certified a class of all pregnant minors in Defendants' legal custody and preliminarily enjoined Defendants' policy.

ARGUMENT

Defendants cannot carry their "heavy burden" of justifying a stay of the District Court's Order. *Williams v. Zbaraz*, 442 U.S. 1309, 1311-12 (1979). "A stay is not a matter of right" but rather is an "exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations and citations omitted). Courts assess four factors: (1) whether the moving party "has made a strong showing that [it] is likely to succeed on the merits"; (2) whether it "will be irreparably injured absent a stay"; (3) whether a stay "will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Id*. at 425-26, 434. The first two factors are the most critical. *Id.* at 434. Here, *all* factors militate *against* granting a stay.

I. The Government Has Not Made a Strong Showing of Success on the Merits.

A. Defendants Are Unlikely to Succeed on Their Appeal of the Court's Class Certification Order.[3]

[3] Plaintiffs agree that class certification is "bound up" with the preliminary injunction, although they disagree that certification under Rule 23(f) is appropriate given that the District Court's decision is not "manifestly erroneous." *In re Brewer*, 863 F.3d 861, 875 (D.C. Cir. 2017).

1. Defendants Have Not Shown that Their Mootness Arguments Will Prevail on Appeal.

Defendants argue that class certification was improper because Plaintiffs' class representatives' claims are moot. As a threshold matter, that argument ignores all but *one* of Plaintiffs' claims: the right to access abortion while in ORR custody. Gov't Mot. at 6. Defendants cannot dispute that at the time the class was certified representatives Ms. Doe and Ms. Roe had live claims, such as their informational privacy claim.[4]

In any event, the District Court properly found that the class claim for abortion access falls under the "inherently transitory" exception to mootness. The Supreme Court has repeatedly recognized that there are "cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *accord U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975). "In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (quotation marks omitted).

[4] The District Court's amended order (ECF No. 136) recognizes that Ms. Moe and Ms. Poe are not class representatives.

The District Court properly focused on two features of Plaintiffs' claims. First, the claims are from "unaccompanied minors in ORR custody, a transitory population" whose members remain in custody for a period that is "uncertain and unpredictable." Mem. Opinion at 18 ("Opinion"), ECF No. 126. Second, the claims seeking access to abortion are "necessarily time limited" such that "there may be circumstances in which a court is required to rule on emergency requests for injunctive relief in a shorter timeframe than it could feasibly rule on a class certification motion." *Id.* at 19.

Defendants' authorities do not demonstrate otherwise. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013), concerned conditional certification of a "collective action" under the Fair Labor Standards Act and therefore is inapplicable in "Rule 23-land," *DL v. District of Columbia*, 860 F.3d 713, 722 (D.C. Cir. 2017). Further, Defendants mischaracterize *Genesis Healthcare* as stating that a class action can proceed after the plaintiffs' claims become moot "only when" mootness occurs "'after the class has been duly certified.'" Gov't Mot. at 6-7. The quoted statement merely describes the facts of *Sosna*, but the Court did not limit the universe of mootness exceptions to the situation presented in *Sosna*; the word "only" is Defendants' addition. Indeed, the "inherently transitory" exception to mootness that the District Court applied is a separate doctrine from *Sosna*

that operates independently and does not apply "only when" mootness postdates certification. *See, e.g.*, *Cty. of Riverside*, 500 U.S. at 52 ("That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction."). Defendants' reliance on *Kremens v. Bartley*, 431 U.S. 119 (1977), is likewise misplaced: *Kremens* did not even mention the "inherently transitory" rule.

Defendants also argue that the "inherently transitory" doctrine cannot apply because class certification was "pending for months." Gov't Mot. at 7. But "transitoriness" is measured by how long the *merits* are pending, not the motion for class certification. *See, e.g.*, *Cty. of Riverside*, 500 U.S. at 52. Here, the District Court was unable to certify a class in the short time period in which the individual Plaintiffs sought access abortion. *See* ECF Nos. 5, 20; ECF Nos. 63, 73; ECF Nos. 105, 114 (Plaintiffs' TROs were pending for 7 days or less). These short time periods fall comfortably within the range of cases applying the "inherently transitory" exception. *See Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013) (claims that would be live for a "length . . . impossible to predict"); *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 183 (D.D.C. 2015) (claims that would be live for "weeks or months"); *DL v. District of Columbia*, 302 F.R.D. 1, 20 (D.D.C.

2013) (claims live for up to two years), *aff'd on other grounds*, 860 F.3d 713 (D.C. Cir. 2017).

Defendants also argue that the "inherently transitory" exception cannot apply where claims become moot by court-ordered relief rather than "statutory deadlines or time limits that passed of their own accord." Gov't Mot. at 7. However, neither this Court nor the Supreme Court has ever imposed such a limitation. Defendants point to *Genesis Healthcare*, 596 U.S. at 77, but that case speaks in terms of litigation having "run its course" without the slightest hint that the reason for that condition matters. Were Defendants' novel distinction valid, it would "punish Plaintiffs for seeking relief in response to urgent needs." Opinion at 19. Defendants' argument finds support in neither precedent nor logic.

2. The District Court Properly Held That Plaintiffs Satisfy the Commonality and Typicality Requirements of Rule 23(a).

The District Court, following well-settled law, correctly held that Plaintiffs meet the commonality and typicality requirements.[5] ECF No. 126 at 11-15. Indeed, those factors are easily met where, as here, there is a uniform policy or practice that affects all class members. *DL*, 713 F.3d at

[5] Defendants do not dispute that Plaintiffs meet the numerosity requirement of Rule 23(a), given that "ORR has approximately 30 pregnant UACs enter its care and custody on a monthly basis." Gov't Mot., Ex. A, ¶ 12.

(D.C. Cir. 2013); *see also Wal-Mart Stores v. Dukes*, 564 U.S. 338, 353 (2011).

Defendants have a uniform policy of ensuring that UCs continue their pregnancies while in government custody. *See supra* at 5-6. As part of this policy, Defendants employ a common set of coercive tactics – including forced visits to crisis pregnancy centers and mandatory parental notification – to steer pregnant UCs away from abortion, and, if those tactics fail, they block access to any abortion-related care. *Id*. All pregnant minors in ORR custody are subject to this policy, regardless of what pregnancy outcome they may ultimately choose. Class members also suffer "common harms, susceptible to common proof, and curable by a single injunction." *DL*, 860 F.3d at 724 (internal citations omitted). Moreover, the class representatives' and other class members' claims "are based on the same legal theory." *Nat'l Veterans Legal Servs. Program v. United States*, 235 F. Supp. 3d 32, 40 (D.D.C. 2017).

Defendants do not seriously dispute that Plaintiffs challenge a uniform policy. Instead, they point to irrelevant potential factual differences between class members (such as their age, length of pregnancy, state of residence, and whether ORR can release them from custody). Gov't Mot. at 13-14. None of those facts has any bearing on the central common question in this

case: whether Defendant's uniform anti-abortion policy is constitutional. Even if factual distinctions had some bearing on this case – which they do not – commonality and typicality are not destroyed merely by factual variations. *See Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987); *see also DL*, 860 F.3d at 725-26; *R.I.L-R.*, 80 F. Supp. 3d at 181-82.

Defendants also incorrectly claim that *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), announced a general rule disfavoring class actions in due process cases. Gov't Mot. at 14. In fact, the Court merely remanded the case for further consideration of class status given the specific facts and claims in that case, noting that what process is due is often flexible and fact-based. *Jennings*, 138 S. Ct. at 852. Additionally, that case involved procedural due process, rather than (as here) substantive due process.

That many pregnant UCs decide to carry to term, Gov't Mot. at 15, is irrelevant and does not make Doe or Roe's claims atypical. Defendants' policy affects all pregnant UCs by steering their pregnancy decisions in coercive ways, denying them unbiased information, disclosing their decisions to third parties, and ultimately taking the power to determine the

outcomes of their pregnancies out of their hands and placing it, unconstitutionally, into the hands of Defendant Lloyd.[6]

3. The District Court Properly Found the Class Representatives Are Adequate.

The District Court likewise properly exercised its discretion in finding the class representatives adequate, as they "have no conflicts of interest with the class and are capable of vigorously prosecuting class interests." Opinion at 19-20 (citing *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575-76 (D.C. Cir. 1997)). The government contests this finding by raising speculative and unsupported concerns about the "vigorousness" with which Ms. Doe and Ms. Roe will represent the class, and by positing that "changed minds" and/or divergent "positions on abortion" between the representatives and some class members will somehow create conflicts of interest. Gov't Mot. at 8-12. Neither contention is valid.

[6] The government outrageously suggests that the minor's factual circumstances are important given the so-called "agenda" of the class representatives, implying that they and their lawyers seek to push UCs to terminate their pregnancies. Gov't Mot. at 14. In fact, the class representatives and counsel seek to ensure that every pregnant minor in ORR custody can exercise her constitutional right to decide for herself, free from coercion, whether to become a parent. Similarly, the government's inappropriate and offensive personal attack on Ms. Garza is irrelevant for many reasons. As the government was forced to acknowledge, the Texas Attorney General's baseless inquiry into Ms. Garza's conduct has been closed with no finding of wrongdoing.

As this Court has recognized, "plaintiffs with moot claims may adequately represent a class." *DL*, 860 F.3d at 726 (citing *Geraghty*, 445 U.S. at 407). Defendants' authorities, *Hall v. Beals*, 396 U.S. 45 (1969), *Long v. Dist. of Columbia*, 469 F.2d 927 (D.C. Cir. 1972), and *Spriggs v. Wilson*, 467 F.2d 382 (D.C. Cir. 1972), are distinguishable and long out of date. None discussed whether the claims were "inherently transitory"; in fact, they all predate the Supreme Court's articulation in *Sosna* of the "inherently transitory" rule. Two of the cases involved claims in which the challenged government policy or practice no longer existed, *Hall*, 396 U.S. at 48-50, or never applied to the named plaintiff to begin with, *Long*, 469 F.2d at 929-30.

Defendants also complain that the class representatives were only "briefly involved with this case," and that their declarations lack explicit statements that they will vigorously pursue class claims. Gov't Mot. at 9. But the length of involvement cannot be the measure of class representatives' commitment; if it were, no representatives would *ever* be appropriate in cases involving "inherently transitory" claims. And neither this Court nor the Supreme Court has ever required a specific length of involvement or a particular set of magic words to establish that a proposed class representative will vigorously pursue the class's interests. Rather, both

this Court in *DL* and the Supreme Court in *Sosna* focused on the demonstrated commitment of the named plaintiffs through the course of litigation, and the lack of apparent conflicting interests. *See Sosna*, 419 U.S. at 403; *DL*, 860 F.3d at 726. Moreover, contrary to the government's assertion that Ms. Doe and Ms. Roe "spoke only of their own immediate interests in obtaining abortions," each declared their desire to be a class representative for similarly situated individuals. *See* ECF Nos. 5-2, 63-2, 105-2.

Furthermore, the government's factually disputed claim about Ms. Roe's age is irrelevant. She was harmed by the government's abortion-ban, just like the class members she represents.

Nor do the class representatives have conflicts of interest with class members who "do not want an abortion, may strongly oppose abortions, and [] support ORR's challenged conduct here." Gov't Mot. at 11. UCs who choose not to exercise their right to an abortion are not harmed in any way by being class members; thus, there is no conflict between their decisions and the class members. To the contrary, the government is enjoined from "interfering with or obstructing any class member's access to" all "pregnancy-related care," not merely abortion. Dist. Ct. Order, ECF No. 127 ("Order"), at 1.

B. Defendants Have Not Made a Strong Showing That They Will Succeed on Their Appeal of the Preliminary Injunction.

1. Defendants Are Unlikely to Succeed on Appeal of the Order Blocking Them From Obstructing or Interfering With Abortion Access.

Defendants' argument that they are entitled to ban abortion for UCs is, as the District Court recognized, flatly wrong under well-established and recent Supreme Court precedent. *See* Opinion at 23 (citing, e.g., *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). If the government were allowed to block UCs' access to abortion it could do the same for others in government custody – a position that has already been rejected. *See, e.g.*, *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). Indeed, Defendants cannot square their extreme policy for UCs with other governmental policies for adult women in ICE detention and the Bureau of Prisons. *See* ICE Guidelines, Detention Standard 4.4, Medical Care, *available at* https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf.; 28 C.F.R. § 551.23(c).

Defendants make three arguments against the injunction. First, Defendants argue, without citation, that "to sustain the injunction, this Court must agree that the ORR policies and procedures constitute an undue burden

in every possible circumstance." Gov't Mot. at 18. That is incorrect: abortion restrictions must be invalidated if they impose an undue burden for a *large fraction* of the women for whom the provision at issue is "'an actual rather than an irrelevant restriction.'" *Whole Woman's Health v*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895). Plaintiffs easily meet that standard here given that Defendants impose a ban on abortion for all unaccompanied minors.

Second, they claim that they are not imposing an undue burden on a UC's right to abortion because she could obtain an abortion after she is united with a sponsor. Gov't Mot. at 18-21. But the District Court found, based on undisputed evidence, that the minor controls neither the approval of a sponsor nor the timing of the sponsorship process, which, assuming she has a viable sponsor at all, can take weeks or months. Opinion at 27; *see also* Decl. of Robert Carey, ECF No. 23-1, ¶ 6. Simply because Plaintiff Moe was quickly reunified with her family, Gov't Mot. at 19-20, does not mean that Defendants' policy didn't impose an undue burden on her access to abortion. To the contrary, her abortion request languished at ORR for two weeks – while she was pushed further into her pregnancy – until she found counsel and sought a TRO. Ms. Moe's TRO filing prompted Defendants to speed up the reunification with her family member. If she had not found

counsel, her abortion request would have languished longer, and she would have been unnecessarily pushed further into her pregnancy.

Third, Defendants argue that a minor could voluntarily depart. But as the District Court held, Opinion at 26, the Constitution does not permit the government to penalize a minor for seeking to exercise her right to an abortion by forcing her to return to her home country or to sacrifice her opportunity to be reunited with family here or seek asylum. Moreover, these minors are often fleeing horrific circumstances in their home countries, as the named Plaintiffs' stories demonstrate. *See* Opinion at 26. And voluntary departure can take months and requires the discretionary decision of an immigration judge. *See* Proposed Third Amended Complaint ¶ 58 (ECF No. 118-1).

To justify the time it takes for reunifications, Defendants rely on *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). But the fact that a state's judicial bypass process may take a certain number of days does not give Defendants carte blanche to independently obstruct a minor's access to abortion for the same number of days – with the intent to deny her abortion access entirely. In any event, the Supreme Court has more recently made clear that a government-imposed delay of a length similar to the examples Defendants cite is unconstitutional. *See Whole Woman's Health*,

136 S. Ct. at 2318 (2016) (striking down abortion restriction that resulted in three-week wait time for appointments).

Defendants' final point that the District Court did not consider other miscellaneous "highly relevant" factors, Gov't Mot. at 21, is merely a rehash of their attack on class certification by pointing out irrelevant factual variations that could exist among class members. Defendants never explain why these factors are relevant to the merits nor explain how the injunction requires a minor to be allowed to access an "abortion [that] would violate state law."

2. Defendants Are Not Likely to Succeed on Appeal of the Prohibition On Revealing a Minor's Abortion Decision.

Defendants are unlikely to succeed in reversing the District Court's order preliminarily enjoining them "from forcing any class member[s] to reveal the fact of their pregnancies and/or their abortion decisions to anyone, and from revealing that fact or those decisions to anyone themselves."[7] ECF No. 136. Contrary to Defendants' assertion, Gov't Mot. at 16, Plaintiffs do not claim that Defendants violate the First Amendment prohibition on

[7] The District Court's amended order makes clear Defendants may communicate to third parties with the minor's non-coerced permission and in the event of a medical emergency in which the minor is unable to communicate this information to a medical provider herself. ECF No. 136.

compelled speech by forcing minors to tell their parents of their abortion decision. Rather, Plaintiffs made the following claims:

First, that Defendants' policy violates minors' Fifth Amendment right to keep their abortion decisions confidential from their parents. ECF No. 104 at ¶ 71 (First Claim for Relief). The Supreme Court has held that, although a state can require parental involvement for minors seeking abortions, such a requirement must also have an avenue for minors to "bypass" parental involvement. *Bellotti v. Baird*, 443 U.S 622, 647 (1979). As one court put it, if *Bellotti* means anything, "it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, *independent of parents or legal guardians*." *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

Second, that Defendants violate Plaintiffs' right to informational privacy by telling parents, sponsors, crisis pregnancy centers, and others, about minors' pregnancy and/or abortion decisions. ECF No. 104 at ¶ 73 (Third Claim For Relief). People have a right to privacy "in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). This privacy interest is heightened here, where the "personal matter" at issue – the decision to have an abortion – is highly sensitive, intimate and

emotionally charged. *See, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986), *overruled on other grounds by Casey*, 505 U.S. at 882.

Third, that Defendants violate minors' right to compelled speech by forcing them to discuss their pregnancies anti-abortion crisis pregnancy centers. ECF No. 104 at ¶ 72 (Second Claim For Relief). The First Amendment protects "the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The only other court that has considered a similar issue has held the government violates the First Amendment by forcing people seeking abortion to visit an anti-abortion pregnancy center to discuss their abortion. *See Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1054-58 (D.S.D. 2011).

The facts here confirm the harms inherent when the government forcibly reveals a person's abortion decision to others. Defendants required Plaintiff Poe to disclose her abortion decision to her parents, who threatened to beat her if she had an abortion. ECF No. 96 at 4. They then sought to tell Ms. Poe's sponsor knowing that it would cause Ms. Poe harm. *Id*. If Defendants want to ensure that a sponsor will not retaliate against a minor

because she has had an abortion, Gov't Mot. at 17-18, the solution is simple: Defendants should not tell the sponsor that the minor has had an abortion.[8]

Defendants' argument that they must be able to tell a minor's medical provider, Gov't Mot. at 17, is equally unavailing. If a minor's abortion is relevant to her health history, she can convey that information to her health care providers, just as any other teenager could do in the confines of a confidential patient-provider relationship.

II. The Balance of Harms Favors the Plaintiffs and the Injunction Serves the Public Interest.

The District Court correctly held that Plaintiffs will suffer irreparable harm absent an injunction. Class members seeking abortions will be prevented from obtaining them, class members seeking unbiased information about abortion and about their legal options will be prevented from obtaining that, class members seeking to keep their abortion decisions confidential from parents or sponsors will be prevented from doing so. The undisputed facts irrefutably support these conclusions.

[8] Ms. Poe resided in a state where minors can consent to abortion without parental involvement. Accordingly, Defendants' alleged position – articulated for the first time in their motion for a stay in the District Court – that they do not tell a minor's parents or sponsor of her abortion decision if it is contrary to law or would cause harm to the minor, Gov't Mot. at 16-17, flies in the face of the evidence.

On the other hand, "Defendants have not shown any legitimate interest that will be harmed by the issuance of a preliminary injunction." Opinion at 27. This is true because Defendants' interest in preventing UCs from effectuating their constitutional rights is simply not legitimate. Defendants' mischaracterization of their interest as not "facilitating" abortion is wordplay, belied by the facts.

A stay would not serve the public interest. Allowing the government to violate basic, well-established constitutional rights *harms* the public interest. *See, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Defendants' claim that permitting young women to exercise their right to have an abortion will harm the public interest by "incentivizing" others to leave their home countries and come to the United States to seek an abortion is preposterous. There is no evidence that minors make the perilous trek to the United States for the purpose of having abortions. As Defendants themselves have explained, UCs "leave their home countries to join family already in the United States, escape abuse, persecution or exploitation in the home country, or to seek employment or educational opportunities in the United States."[9]

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

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay should be denied.

April 19, 2018

Respectfully submitted,

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CERTIFICATE AS TO THE PARTIES AND AMICI

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

The ruling under review in this case is the March 30, 2018 Order entered by Judge Tanya S. Chutkan, reported at ECF No. 127, which certified a class and granted Plaintiffs' motion for a class-wide injunctive relief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Circuit Rule 32, this brief includes 4, 759 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count of this word processing system in preparing this certificate.

April 19, 2018

/s Brigitte Amiri

Brigitte Amiri

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2018, the foregoing Opposition to Appellants' Motion for a Stay was electronically filed with the Clerk of the Court by using the appellate CM/ECF system. Service will be made on opposing counsel who are CM/ECF users automatically through the CM/ECF system.

/s Brigitte Amiri

Brigitte Amiri