[SCHEDULED FOR ORAL ARGUMENT SEPTEMBER 26, 2018]

No. 18-5093

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

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

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

BRIEF FOR APPELLEES

Brigitte Amiri
Meagan Burrows
Jennifer Dalven
Lindsey Kaley
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2633
Fax (212) 549-2652
bamiri@aclu.org
mburrows@aclu.org
jdalven@aclu.org
lkaley@aclu.org

Arthur B. Spitzer (D.C. Bar No. 235960)
Scott Michelman (D.C. Bar No. 1006945)

Shana Knizhnik (D.C. Bar No. 1020840)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Tel. 202-457-0800
Fax 202-457-0805
aspitzer@acludc.org
smichelman@acludc.org
sknizhnik@acludc.org

Daniel Mach (D.C. Bar No. 461652)
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
Tel. (202) 675-2330
dmach@aclu.org

Elizabeth Gill
American Civil Liberties Union Foundation
of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel. (415) 621-2493
Fax (415) 255-8437
egill@aclunc.org

Melissa Goodman
American Civil Liberties Union Foundation
of Southern California
1313 West 8th Street
Los Angeles, California 90017
Tel. (213) 977-9500
Fax (213) 977-5299
mgoodman@aclusocal.org

Mishan Wroe
Riley Safer Holmes & Cancila LLP
456 Montgomery Street, 16th Floor
San Francisco, CA 94104
Tel. (415) 275-8522
mwroe@rshc-law.com

Counsel for Plaintiffs-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants:

Amici curiae filed in Support of Plaintiffs-Appellees in *Garza v. Hargan*, No. 17-5236 (D.C. Cir. 2017):

State of New York

State of Connecticut

State of Pennsylvania

State of Massachusetts

State of Oregon

District of Columbia

State of California

State of Delaware

State of Hawaii

State of Illinois

State of Iowa

State of Maine

State of Vermont

State of Washington

Rulings

References to the rulings at issue appear in the Brief for Appellants. This case was previously on appeal in this Court, and except for the following, the relevant citations are included in the Brief for Appellants:

Garza v. Hargan, No. 17-5326, 2017 WL 4707287 (D.C. Cir. Oct. 19, 2017).

Garza v. Hargan, No. 17-5326, 2017 WL 9854552 (D.C. Cir. Oct. 20, 2017).

Garza v. Hargan, No. 17-5326, 2017 WL 9854555 (D.C. Cir. Oct. 20, 2017) (dissenting opinion).

Related Cases

References to related cases appear in the Brief for Appellants.

Dated: July 30, 2018

s/Brigitte Amiri
Brigitte Amiri
Counsel for Plaintiffs-Appellees

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

TABLE OF CONTENTS

GLOSSARY

BOP: Bureau of Prisons

CPC: Crisis pregnancy center

ICE: Immigration and Customs Enforcement

ORR: Office of Refugee Resettlement

UC: Unaccompanied child

UAC: Unaccompanied alien child

STATEMENT OF THE ISSUES

1. Whether the district court properly certified the class under the well-established "inherently transitory" exception to mootness?

2. Whether the district court abused its discretion by defining the class as all pregnant unaccompanied immigrant minors in Defendants' custody, given that there are hundreds of pregnant minors in Defendants' custody who—like the class representatives—are subject to Defendants' challenged policy, and joinder of such a transitory and geographically dispersed population would be impracticable?

3. Whether the district court abused its discretion by granting a preliminary injunction prohibiting the government from obstructing class members' access to abortion, and prohibiting the government from revealing to anyone a minor's pregnancy and abortion decision?

STATUTES AND REGULATIONS

Except for the statutes and regulations included in the attached addendum, all applicable statutes and regulations are contained in the Brief for Appellants.

INTRODUCTION

Each year, thousands of unaccompanied immigrant minors come into Defendants' custody after fleeing their home countries, often due to abuse or violence. Hundreds of these minors discover they are pregnant, especially given the high rate of sexual assault when coming across the border. In 2017,

Defendants adopted a policy that included tactics to pressure minors considering abortion to instead carry their pregnancies to term, including by withholding information about abortion, forcing minors to visit anti-abortion religiously affiliated crisis pregnancy centers ("CPCs"), and forcing minors to disclose (or themselves disclosing) the minors' pregnancies and abortion decisions to their parents and sponsors. When those coercive tactics failed, Defendants completely blocked minors from accessing abortion.

Faced with this policy, after weeks of delay and obstruction, several minors sought urgent relief in the district court. With the clock ticking on their right to have a legal abortion, and the delay causing irreparable harm in terms of increased health risks associated with the abortion, the district court quickly granted temporary restraining orders to these minors within a matter of days.

The district court properly understood that, given Defendants' policy, this scenario would continue to repeat itself. As a result, the district court certified a class of pregnant unaccompanied minors and granted preliminary relief. Although the class representatives had obtained abortions and left ORR's custody by the time of the district court's ruling, the district court properly found that the well-established "inherently transitory" exception to mootness applied because of the short periods of time the class members are in government custody, and the need for quick emergency relief for individual minors seeking time-sensitive abortions.

The district court properly found that Plaintiffs met all the Rule 23 factors, given that there are hundreds of pregnant minors in Defendants' custody each year who—like the named Plaintiffs—would be subject to Defendants' policy, and that individual joinder of the members of such a transitory and geographically dispersed population would be impracticable.

The district court also properly preliminarily enjoined Defendants from obstructing and interfering with class members' access to abortion, finding that Plaintiffs were likely to succeed based on well-established Supreme Court precedent holding that the government may not ban abortion prior to viability. Similarly, the district court properly held that Plaintiffs are likely to succeed on their claim that the government violates the Constitution when it reveals minors' pregnancies and abortion decisions to their parents, sponsors, and anti-abortion CPCs. The district court also properly found that the other preliminary injunction factors weigh in Plaintiffs' favor. Absent an injunction, class members will suffer irreparable harm by being pushed further into their pregnancies against their will or being forced to carry to term. Defendants will experience no harm, given that they have no legitimate interest in preventing class members from obtaining abortions. And the preliminary injunction serves the public interest by protecting the constitutional rights and health of unaccompanied minors.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY FRAMEWORK AND HISTORY OF THE UNACCOMPANIED MINORS PROGRAM

Unaccompanied immigrant minors (or "unaccompanied children" or "UCs") come to the United States without their parents, often fleeing violence or abuse. Unaccompanied immigrant minors are under eighteen years old, have no legal immigration status, and have no parent or legal guardian in the United States who is able to provide care. *See* 6 U.S.C. § 279(g)(2). The Office of Refugee Resettlement ("ORR") bears responsibility for the "care and custody of all unaccompanied [] children," 8 U.S.C. § 1232(b)(1), and is required to ensure that the best interests of the unaccompanied immigrant minors are protected, *see* 6 U.S.C. § 279(b)(1)(B); 8 U.S.C. § 1232(c)(2)(A).

Protecting the minors' best interests includes ensuring access to health care, including reproductive health care. Indeed, under a nationwide consent decree, the federal government is legally obligated to provide or arrange for "appropriate routine medical . . . care," including, specifically, "family planning services[] and emergency health care services." *See Flores v. Reno*, CV-85-4544-RJK (C.D. Cal. Jan. 17, 1997) ("*Flores* agreement"), Ex. 1, "Minimum Standards for Licensed

Programs," at 15.[1] Additionally, an ORR regulation requires all ORR-funded shelters to provide UCs who are victims of sexual assault while in federal custody with access to reproductive health care. *See* 45 C.F.R. § 411.93(d). Moreover, Defendants' internal guidelines require ORR, through its care providers and other health care professionals, to provide "routine . . . medical care . . . [f]amily planning services, including . . . comprehensive information about and access to medical reproductive health services and emergency contraception." ORR Policy Guide: Alien Children Entering the United States Unaccompanied, Medical Services, 3.4.[2] These sources recognize the obvious: Unaccompanied immigrant minors have an acute need for reproductive health care, especially given that many are victims of sexual assault immediately before, during, or after their journeys. Government-Appellants' Appendix GAAPPX000179 ¶ 59;[3] Amnesty

[1] Available at *https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf*.

[2] Available at *https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.4*.

[3] Because of its self-identifying pagination system, Government-Appellants' Appendix will hereafter be cited simply by page number, *e.g.*, GAAPPX000###.

International, *Invisible Victims* 15 (Apr. 2010) (reporting that as many as 60% of women and girls are raped during their journey to the United States).[4]

II. DEFENDANTS' POLICY

In March 2017, Defendants implemented a new policy under which they withhold information from minors about their pregnancy options, and when a minor requests information about and/or access to abortion, Defendants employ coercive tactics aimed at pressuring her to withdraw her request, including forcing her to tell her parents of her pregnancy and abortion decision, even in cases where it would endanger the minor or others. *See, e.g.*, Plaintiffs-Appellees' Appendix PAAPPX000012–15; PAAPPX000016–23; PAAPPX000024–27.[5] Defendants also require minors considering abortion to receive "life-affirming" counseling from religiously affiliated anti-abortion CPCs on Defendants' list of "approved providers"—a list that was commissioned by ORR Director Lloyd and created with the assistance of two national networks of anti-abortion CPCs. *See, e.g.*, PAAPPX000024–27; PAAPPX000070–72; GAAPPX000231–32 (161:6–162:10). CPCs are categorically opposed to abortion, do not provide information about pregnancy options in a neutral way, and many provide factually inaccurate

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

[5] Because of its self-identifying pagination system, Plaintiffs-Appellees' Appendix will hereafter be cited simply by page number, *e.g.*, PAAPPX000###.

information.[6] Furthermore, under Defendants' policy, if a minor manages to withstand Defendants' coercion, and persists in seeking an abortion, Defendants simply block her outright. Defendants have instructed shelters at which these minors reside not to allow them to attend any abortion related appointments, PAAPPX000024–27, and Defendant Lloyd admitted he has never allowed a minor to access abortion, even one who was pregnant as a result of a rape and was suicidal. *See* GAAPPX000207 (64:19–21; 65:6–22).

ORR's policy stands in sharp contrast to the policies governing Bureau of Prisons ("BOP") and Immigration and Customs Enforcement ("ICE") detention. In recognition of the constitutional right to abortion, these agencies affirmatively arrange for abortions for women in their custody. *See* ICE Guidelines, Detention Standard 4.4, Medical Care, at 307–08 (ICE "shall arrange for transportation [to an abortion provider] at no cost" to the detainee);[7] 28 C.F.R. § 551.23(c) (if a federal inmate decides to have an abortion "the Clinical Director shall arrange for an abortion to take place").

[6] *See* Bryant, A.G., et al., "Crisis Pregnancy Center Websites: Information, Misinformation and Disinformation," 90 *Contraception* 601 (Dec. 2014).

[7] Available at *https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf*.

III. PARTIES AND PROCEDURAL BACKGROUND

A. Plaintiff Jane Doe

This case began when Plaintiff Jane Doe was subjected to the government's policy, and commenced the instant action seeking a TRO, class certification of all pregnant unaccompanied minors, and a preliminary injunction as to the class. *See* GAAPPX000001–17; GAAPPX000020–22; GAAPPX000023–25; GAAPPX000033–46. Ms. Doe was 17 years old, suffered abuse by her parents, and came to the United States without them. GAAPPX000018–19 ¶¶ 2–3. She was apprehended and placed into federal custody. *Id*. ¶ 4. While she was residing at a shelter in Texas, she learned that she was pregnant, and she requested access to abortion. *Id*. ¶¶ 4, 5.

Rather than allowing her to access abortion, Defendants—based on their new policy—forced Ms. Doe to visit a religious, anti-abortion CPC. *Id*. ¶ 13. Defendants also contacted Ms. Doe's mother in her home country and told her about Ms. Doe's pregnancy, over Ms. Doe's objections. *Id*. ¶ 15. Because Texas requires either parental consent or a judicial order for minors seeking abortion, Ms. Doe went to a state court in Texas with a court-appointed guardian ad litem and attorney ad litem. *Id*. ¶ 7. She obtained a judicial bypass of her state's parental consent requirement, which allowed her to consent to the abortion on her own. *Id*. ¶ 6. Nevertheless, Defendants refused to transport Ms. Doe, or allow her to be

transported by anyone, to the health center for state-mandated pre-abortion counseling or for the abortion itself. *Id*. ¶¶ 9–11.

On October 13, 2017, Ms. Doe moved for a temporary restraining order/preliminary injunction, GAAPPX000020–25, and on October 18, she moved for class certification, GAAPPX000033–46. On October 18, the district court granted her application for a TRO, ordering the government not to block her abortion. GAAPPX000047–48 ¶¶ 1–2. The government asked this Court for a stay, and in response this Court vacated the district court's order. PAAPPX000073–74. The panel's decision largely relied on the government's representation that it was looking for a sponsor for Ms. Doe, and ordered the district court to allow the government eleven days to secure a sponsor and release her. *Id*. Judge Millett dissented. PAAPPX000075–84.

Ms. Doe obtained rehearing *en banc*, and the full Court denied the stay "substantially for the reasons" in Judge Millett's dissent. PAAPPX000085–87. The district court then issued a revised TRO, PAAPPX000009–11, and Jane Doe obtained her abortion on October 25. The government never found a sponsor for Ms. Doe before she turned eighteen in mid-January 2018 and was released from government custody. *See* Defs.' Opp. To Pls.' Renewed Mot. For Class Certification & Prelim. Inj., ECF No. 124 at 2. If not for court intervention, Ms.

Doe would have been forced to carry her pregnancy to term and give birth against her will.

Shortly after Ms. Doe obtained her abortion, the government filed a petition for certiorari. On June 1, 2018, the Supreme Court issued a *per curiam* decision granting certiorari, vacating this Court's *en banc* order, and remanding the case to this Court "with instructions to direct the District Court to dismiss the relevant individual claim for injunctive relief as moot." PAAPPX000146–50.

B. Plaintiff Jane Roe

Plaintiff Jane Roe was added to the case, individually and as a class representative, on December 15, 2017. GAAPPX000079–82. Ms. Roe came to the United States without her parents. GAAPPX000092–93 ¶ 2. On November 21, 2017, she discovered she was pregnant during a medical examination while in federal custody. *Id*. ¶ 5. She asked her doctor and her shelter for an abortion, and requested to terminate her pregnancy by taking medications. *Id*. ¶ 5. But Defendants' obstruction pushed her further into her pregnancy, past the point at which medication abortion is available. *Id*. ¶ 7. Ms. Roe still wanted an abortion, but Defendants refused to allow her to obtain one. Defendants required Ms. Roe's sister (with whom she had lived before leaving for the United States) and potential sponsor to be notified of her abortion request. PAAPPX000065–69.

After the government obstructed her abortion access for over three weeks, Ms. Roe sought emergency relief on December 15, 2017. GAAPPX000083–91. The district court granted Ms. Roe relief on December 18, 2017, GAAPPX000098–102, and Defendants appealed. However, the next day, Defendants claimed that Ms. Roe was 19 years old and transferred her to ICE custody. PAAPPX000129–32. ICE then released her on her own recognizance, at which point she obtained an abortion.[8] *Id.* Defendants withdrew their appeal. *Id.*

C. Plaintiff Jane Poe

Plaintiff Jane Poe came to the United States without her parents, and is residing in a private, federally funded shelter. GAAPPX000094–95 ¶¶ 3, 4. Ms. Poe was raped in her home country and became pregnant. PAAPPX000016. In November 2017 she requested an abortion. GAAPPX000094–95 ¶¶ 4, 5. Defendants instructed the shelter that either Ms. Poe must tell her mother and potential sponsor about her pregnancy, or the shelter must do so. PAAPPX000062. As result, Ms. Poe told them, and they threatened to physically abuse her if she had an abortion. PAAPPX000017. Based on these threats, Ms. Poe temporarily withdrew her request for abortion. *Id*. She became suicidal. PAAPPX000059. She eventually renewed her request to access abortion. PAAPPX000017.

[8] Ms. Roe maintains that she was 17, not 19, years old.

Despite the circumstances surrounding Ms. Poe's pregnancy, her threats of self-harm, and the threats of abuse, Defendant Lloyd denied her request for an abortion. PAAPPX000020–23. His denial was not based on Ms. Poe's "best interest," but on his belief that abortion is "the ultimate destruction of another human being." PAAPPX000022. Lloyd opined that ORR is "being asked to participate in killing a human being in our care. I cannot direct the program to proceed in this manner. . . . We have to choose, and we ought to choose [to] protect life rather than to destroy it." PAAPPX000023. His denial was issued on December 17, more than two weeks after Ms. Poe's initial request. PAAPPX000020. On December 15, 2017, Ms. Poe sought emergency relief from the district court, which was granted on December 18, 2017. GAAPPX000083–91; GAAPPX000098–102. Ms. Poe is still in Defendants' custody. If not for court intervention, Defendants would have forced Ms. Poe to carry her pregnancy to term and give birth against her will.

D. Plaintiff Jane Moe

Plaintiff Jane Moe came to the United States on her own, was detained by the federal government, and resided in a private, federally funded shelter. GAAPPX000159–60 ¶¶ 3, 4. She decided to have an abortion. *Id.* ¶ 5. For two weeks, she asked the shelter for access to abortion. *Id.* ¶ 6. On January 11, 2018, Ms. Moe sought emergency relief from the district court. GAAPPX000150–58.

Three days later, before the district court could rule, Defendants placed her with a sponsor. GAAPPX000165–67.

IV. THE DISTRICT COURT'S CLASS CERTIFICATION AND PRELIMINARY INJUNCTION ORDER

Having granted three requests for TROs, each within three to five days of receiving the motions, the district court issued an order on March 30, 2018, certifying a class of all pregnant unaccompanied minors in Defendants' custody and granting a preliminary injunction. GAAPPX000266–67. The district court found that ORR had a policy of prohibiting federally funded shelters "from taking any action that facilitates an abortion without direction and approval from the Director of ORR." GAAPPX000239 (citing ECF No. 5-4). The district court also found that the policy required minors seeking abortions to obtain "counseling" from a CPC on a pre-approved list, "plus signed, notarized declaration of consent" from the minor's parents. GAAPPX000240 (citing ECF Nos. 5-10 at 3; 5-9 at 2).

The district court determined that Plaintiffs had satisfied all of Rule 23's requirements. GAAPPX000256–58. With respect to numerosity, the district court found that ORR's own documents "provide[] a reasonable basis to believe that over 100 pregnant minors are currently in ORR custody or will be in ORR custody in the foreseeable future." GAAPPX000247. The district court also found "joinder impractical, especially given that the proposed class members are undocumented minors who are geographically dispersed and who are not at

liberty—financially or otherwise—to move or act at will inside the United States." GAAPPX000248.

Regarding the commonality and typicality requirements, the court found that ORR was implementing "a uniform policy or practice that affects all class members," and that class members were suffering "a unified injury." GAAPPX000249–50. "Accordingly, Plaintiffs present a common question—the constitutionality of ORR's general policy regarding reproductive options—that is capable of classwide resolution." GAAPPX000250. The district court rejected Defendants' argument that individual factual variations among class members should bar certification because they do not "diminish any of the key common circumstances that form the basis of the central question in this case," *i.e.*, "whether ORR's policies and/or practices regarding the reproductive decisions of pregnant UCs violate their constitutional rights." *Id.*

Finally, the court determined that the named representatives were capable of adequately protecting class interests through qualified counsel. GAAPPX000252–57. The court rejected Defendants' assertion that the class representatives would be inadequate because they had either already obtained their abortions or left ORR custody. First, the court found that the named Plaintiffs retained claims arising out of Defendants' forced disclosure policy that the court would still be able to address by granting declaratory and injunctive relief. GAAPPX000254. Second, the court

held that the inherently transitory exception to mootness would apply because both the Plaintiffs' individual claims and the class claims were inherently transitory. GAAPPX000255–56.

On the preliminary injunction, the court held that Plaintiffs were likely to succeed on the merits of their claims because "ORR effectively retains an absolute veto over the reproductive decision of any young woman in its custody," and "nullifies a UC's right to make her own reproductive choices." GAAPPX000260–61. This "quintessential undue burden" infringed on UC's constitutional rights in violation of "the standard and principles announced in *Casey* and reaffirmed in *Whole Woman's Health*." *Id*.

The court rejected the government's argument that it was being required to "facilitate" abortions as "divorced from any commonsense understanding of that term" because "the government is not required to promote, transport, pay for, or otherwise further a UC's decision to have an abortion" but is instead being asked only not to "'interfere or make things harder' by adopting a policy and practice to 'categorically blockade exercise of [UCs'] constitutional right'" to access abortion. GAAPPX000262–63.

Similarly, the court found that neither of the government's alternative "options"—namely, voluntary departure or release to a sponsor—"mitigates the undue burden that ORR's policy imposes on the young women in its custody."

GAAPPX000263. First, the court held that by "condition[ing] the exercise of UCs' constitutional rights on their willingness to relinquish any claim that may entitle them to remain in the United States . . . likely constitutes a substantial obstacle to a UC's exercise of her rights—especially when voluntary departure could mean exposing herself to the risk of further abuse." GAAPPX000263. Second, the court found that the government's sponsorship argument continued to ignore two key facts: "(1) that locating a sponsor is typically a lengthy, complex process involving multiple stages, over which the UC has no control; and (2) that ORR makes the final decision of whether to approve a particular sponsor." GAAPPX000264. The district court also found the other preliminary injunction factors weighed in favor of Plaintiffs, particularly the irreparable harm caused by Defendants' policy, including delaying access to abortion, which increases the health risks associated with the procedure, or "the permanent inability to obtain [an] abortion." GAAPPX000264–65.

V. APPELLATE PROCEEDINGS

On April 9, 2018, the government appealed and sought a stay pending appeal. On June 4, this Court denied the stay in most respects, finding that the government had not satisfied the "stringent requirements" for a stay. PAAPPX000133–35. The panel granted a stay only for instances where a class member provides non-coerced consent to disclosure, or where the class member

needs emergency medical care and is incapacitated such that she is unable to inform a medical care provider herself. PAAPPX000134. But the district court—pursuant to agreement of the parties—had already amended its order on April 16, 2018, to incorporate an exception into the non-disclosure provision if the minor "provides non-coerced consent . . . or needs emergency medical care and is incapacitated such that she is unable to inform a medical care provider herself." *See* GAAPPX000274–75 ¶ 2.

SUMMARY OF THE ARGUMENT

1. The district court properly held that that the challenge to Defendants' policy may proceed as a class action under the well-established "inherently transitory" exception to mootness. Contrary to Defendants' arguments, this case is nearly indistinguishable from Supreme Court cases, and cases from courts in this Circuit, applying the inherently transitory exception. As in those cases, the class representatives' claims were live only for a fleeting period—several days at most—during which time the district court was unable to act on the class certification motion. The inherently transitory exception was established precisely for this type of case: where all class members will have live claims for only a short or uncertain time.

2. The district court did not abuse its discretion in certifying a class of all pregnant minors in Defendants' custody. The district court properly held that the

class representatives are adequate. Their interest did not change upon their release from Defendants' custody any more than the interests of class representatives in other inherently transitory cases—in fact they retain an interest in non-disclosure of their abortions. And there is no evidence to support Defendants' contention that there is a conflict between the class representatives and the class simply because some class members will not pursue abortion. To the contrary, Plaintiffs seek only relief that allows all class members to keep their pregnancy information confidential if they wish, and to be allowed to access abortion information and abortion if they so choose. Further, because Defendants' policy applies uniformly, the typicality and commonality requirements are easily satisfied, and any factual variations among the minors' circumstances are irrelevant. Finally, Plaintiffs easily meet the numerosity requirement: There are hundreds of pregnant minors in Defendants' custody each year. Even if only the number of abortion requests were considered—eighteen in the last fiscal year—numerosity is still present because joinder is impractical given the marginalization, isolation, and geographic dispersion of these minors.

3. The district court also did not abuse its discretion by preliminarily enjoining Defendants from obstructing Plaintiffs' access to abortion and neutral options counseling, and from revealing minors' pregnancy and abortion decisions to others. The Supreme Court has held for more than forty-five years that the

government may not impose a ban on abortion prior to viability, like the one Defendants impose for minors in their custody. In the circumstance of Jane Doe, Defendants' policy delayed her abortion for almost a month, and would have forced her to have a child against her will but for the court's intervention. Similarly, Jane Poe, who is still in Defendants' custody, would have been forced to carry to term a pregnancy caused by rape, and forced to give birth. Furthermore, contrary to Defendants' claims, neither sponsorship nor voluntary departure are realistic or legally sufficient options. These processes are not options for many minors, and even if they are, they can take weeks or months to effectuate, pushing minors further into their pregnancies against their will. Defendants' policy of forced revelation of a minor's pregnancy and abortion decision is equally unconstitutional. No court has held that *all* minors must be forced to notify their parents of their abortion decision without an alternative mechanism to ensure that minors—particularly those who are abused—are able to obtain care confidentially.

Given the stakes in this case, the district court easily found that minors are irreparably harmed by the policy, and that a preliminary injunction serves the public interest. Conversely, Defendants suffer no harm from the injunction because they cannot legitimately force people in their custody to carry their pregnancies against their will.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING A CLASS OF ALL PREGNANT MINORS IN ORR CUSTODY.

A. The District Court Properly Found That This Case Is Not Moot.

1. The District Court Properly Found This Case Is Not Moot Because Plaintiffs' Claims Are Inherently Transitory.

Defendants do not dispute what Supreme Court precedent makes clear: Even where a class representative's individual claims become moot prior to class certification, a class action will survive if it involves claims that "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991); *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). Instead, Defendants maintain that the district court erred in applying the "inherently transitory" exception in this case, on the grounds that (1) the court "likely could have" ruled on Plaintiffs' motion before the named Plaintiffs obtained an abortion or were released from ORR custody, and (2) the court could re-certify the class while another yet-unidentified member of the class has a live claim for abortion access. Defs.' Br. 24–26. Defendants' arguments are undermined by the record and premised upon a misunderstanding of the law.

Defendants' first contention is belied by the record. All four Plaintiffs obtained individual relief within extremely short time spans during which the district court was unable to certify the class. Jane Doe obtained an abortion pursuant to a court order seven days after filing for class certification. *See* GAAPPX000033–46; PAAPPX000009–11. Jane Poe obtained an abortion five days after filing for a TRO. *See* GAAPPX000083–91; GAAPPX00098–102. Jane Roe and Jane Moe were released from government custody within four and three days, respectively, of filing their TROs. *See* GAAPPX000083–91; PAAPPX000129–32; GAAPPX000150–158; GAAPPX000163–64.

Contrary to Defendants' claim, the fact that the court was able "act on an expedited basis" on individual applications for emergency relief does not "preclude[] the application of the 'inherently transitory' exception here." Defs.' Br. 25. Whether a court can rule quickly on a succession of near-identical individual TROs is irrelevant; what matters for the "inherently transitory" test is whether the court will have "enough time to rule on a motion for *class certification* before the proposed representative's individual interest expires." *Geraghty*, 445 U.S. at 399 (emphasis added). Here, it clearly did not. Indeed, the "inherently transitory" exception was created precisely for this type of case: where individual plaintiffs' claims do not remain live long enough for the district court to rule on class certification. *See, e.g.*, *McLaughlin*, 500 U.S. at 47, 51–52 (exception applied

where claims could be live for as long as seven days); *Salazar v. King*, 822 F.3d 61, 74 (2d Cir. 2016) (applying exception where plaintiffs' claims were live for, on average, three months). If the claims in this case do not fall within the exception, it is difficult to imagine what claims might.

Defendants misrepresent the law in arguing that the "inherently transitory" exception cannot apply because there is no "meaningful uncertainty" about the point at which an abortion becomes unlawful under various state laws. Defs.' Br. 25. Defendants arrive at the wrong answer because they are asking the wrong question. As the Supreme Court has made clear, the relevant question as to "transitoriness" is not whether there is uncertainty as to the point at which the claim would theoretically "expire[] in the ordinary course," Defs.' Br. 24, but is instead whether it is uncertain that the merits of any individual plaintiff's claim *will remain live before the court* long enough for the court to certify a class. *McLaughlin*, 500 U.S. at 52; *see also Unan v. Lyon*, 853 F.3d 279, 287 (6th Cir. 2017). Accordingly, courts have applied the exception in cases where the length of time that any individual plaintiff will experience the injury giving rise to the claim is either relatively short or "cannot be ascertained at the outset." *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *see also Wilson v. Gordon*, 822 F.3d 934, 945–47 (6th Cir. 2016) (explaining that the exception applies both to claims of limited duration and claims of "inherently uncertain duration").

For example, in *Gerstein*, a case with strikingly similar facts, the Supreme Court held that the "inherently transitory" exception applied because the harm giving rise to the plaintiffs' claim (*i.e.*, pretrial custody) was "by nature temporary" and its length could not "be ascertained at the outset"—indeed, it could "be ended at any time" by a number of factors, including "release on recognizance, dismissal of charge, or a guilty plea, as well as by acquittal or conviction after trial." 420 U.S. at 110 n.11. Similarly, *Wilson*, *Olson* and *Zurak*, cited by Defendants, Defs.' Br. 24–25, make clear that the applicability of the exception hinges on whether the "injury [is] so transitory"—because it is of short duration or because it is simply "uncertain how long [it] . . . will persist"—that it would "likely evade review by becoming moot before the district court can rule on class certification." *Wilson*, 822 F.3d at 945–47; *Zurak v. Regan*, 550 F.2d 86, 91–92 (2d Cir. 1977) (applying the exception where there was a "significant possibility" that "[b]ecause of the relatively short [60–90 day] periods of incarceration involved and the possibility of conditional release" the harm could not "be redressed while any possible plaintiff is still an inmate"); *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (explaining that "[w]hile the ultimate length of confinement does affect the applicability of the 'inherently transitory' exception, the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class").

Here, the district court identified two reasons why "'[i]t [is] by no means certain'" that *any* pregnant unaccompanied minor will remain both pregnant and in ORR custody "long enough for a district court to certify the class." *Geraghty*, 445 U.S. at 399. First, because Plaintiffs' claim concerns abortion access, it is "necessarily time limited" as, "with the passage of time, the risk that [a minor] will no longer be afforded a choice—along with the associated health risks—increase." GAAPPX000256. Accordingly, "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.*

Second, the Plaintiff class is comprised of unaccompanied minors, a fluid or "transitory population whose membership is not fixed at any given time." GAAPPX000255. Just as in *Gerstein*, unaccompanied minors' stay in ORR custody is "by nature temporary" and could "be ended at any time" by a number of factors, including release to sponsors, turning 18 years old, or being deported. 420 U.S. at 110 n.11. Indeed, Defendants' statistics show that the average length of stay in custody in FY 2017 was 41 days[9]—far less than the "short" 60–90 day period that supported the application of the inherently transitory exception in *Zurak*, 550 F.2d at 91–92. In other words, because the length of time that each

[9] *See Facts and Data, General Statistics*, ORR (last updated June 25, 2018) *available at* https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#lengthofstay.

individual unaccompanied minor will remain in Defendants' custody is "uncertain and unpredictable," it is impossible to ensure that any given class representative "will remain in custody long enough for the court to rule on class certification." GAAPPX000255; *see also DL v. D.C.*, 302 F.R.D. 1, 20, *aff'd*, 860 F.3d 713 (D.C. Cir. 2017) ("The inherently transitory exception to mootness [applies] in 'any situation where composition of the claimant population is fluid, but the population as a whole retains a continuing live claim.'") (quoting 1 William B. Rubenstein et al., *Newberg on Class Actions* § 2:13 (5th ed. 2011)).

Meanwhile, Defendants' uniform policy applies to *all* pregnant minors. *Supra* 6–7. As such, it *is* certain that other class members will suffer the same alleged harm. GAAPPX000256 (noting that while the individual Plaintiffs obtained relief, "the claims of numerous potential class members remain unaddressed"); *infra* 53–55. This rationale undergirded the Supreme Court's application of the inherently transitory exception in *Gerstein*, 420 U.S. at 110 n.11 (applying exception because "the constant existence of a class of persons suffering the deprivation is certain"), and amply supports the district court's decision to do the same here.

As to Defendants' second contention that it is unnecessary to apply the exception because, "[w]ere another plaintiff to come forward," the district court would "likely" have "ample time" to re-certify the class before the plaintiff's

"pregnancy reached viability," Defs.' Br. 26, there is no reason to think that the district court would be able to certify a class while that future plaintiff had live claims when it was unable to do so during the four separate occasions when the named Plaintiffs' claims were live. Furthermore, Defendants both misinterpret and take out of context the district court's statement that "the proposed class likely includes a number of pregnant UCs who will remain in custody long enough for the court to rule on class certification." Defs.' Br. 25. First, this contention ignores the fact that each named Plaintiff required relief within days to avoid being pushed further into her pregnancy. Second, Defendants ignore the remainder of the sentence, in which the district court noted the uncertainty that any particular pregnant minor would actually be able to make it to court. As the court explained, "while the proposed class likely includes a number of pregnant UCs who will remain in custody long enough for the court to rule on class certification, Plaintiffs have no way to ensure that any particular class representative will be one of that number." GAAPPX000255. Thus, rather than undermine its conclusion, the court's observation highlights the important distinction between a class member's time in custody and a class member's time before the court with live claims. As explained above, it is the latter period that is relevant for the "inherently transitory" doctrine.

Defendants' argument only confirms that an exception to mootness is necessary here: Followed to its logical conclusion, the only way in which a class could be certified is if more pregnant minors endure the irreparable harm of continuing their pregnancies (with the associated risks) against their will and delay obtaining urgent relief until a court issues a certification order. As the district court recognized, the government's position "would punish Plaintiffs for seeking relief in response to urgent needs, and would effectively condition access to justice for many pregnant UCs on their willingness or ability to brave escalating risks to their health and future." GAAPPX000256.

2. Even If the Inherently Transitory Exception Did Not Apply, This Case Would Not Be Moot.

In repeatedly asserting that this *case* is moot, Defendants ignore that Ms. Doe and Ms. Roe both continue to have live claims with respect to Defendants' forced disclosure policies. Indeed, Defendants are in possession of sensitive information that they could disclose, and have disclosed, to third parties. Ms. Doe and Ms. Roe, although released from custody, are currently involved in immigration proceedings, and the government could reveal Ms. Doe and Ms. Roe's abortion decisions in that context.

Moreover, Ms. Poe remains in ORR custody to this day, and thus continues to face the risk that Defendants will resume their "challenged conduct" and violate her right to informational privacy by telling others about her pregnancy and

abortion decision without her consent. *See* GAAPPX000254 n.4. Accordingly, as the district court found, Ms. Poe's claims are not moot, as there remains a "reasonable expectation that the wrong will be repeated" as to her and it is possible "for the court to grant [] effectual relief,'" to her by declaring the challenged policy unconstitutional and permanently enjoining its application. GAAPPX000254 (quoting *Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316, 321 (D.C. Cir. 2009)).

B. The District Court Did Not Abuse Its Discretion in Determining That the Class Certification Requirements of Rule 23 Are Satisfied.

A plaintiff whose suit meets Rule 23's requirements has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). The "suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Id.*

Defendants' arguments against certification are largely based on one central contention: that factual differences among class members preclude certification. *See* Defs.' Br. 30–35. But the factual differences to which Defendants point are irrelevant. Plaintiffs challenge Defendants' *uniform* policy of (1) withholding information about abortion, (2) pressuring minors to continue their pregnancies,

and (3) banning abortion entirely. *All* pregnant minors are subject to this policy, irrespective of their age, country of origin, stage of pregnancy, duration in ORR custody, and immigration claims. Defs.' Br. 2. Even those who do not request abortions are harmed by having non-biased information withheld from them, and by being chilled from requesting the care in the first instance. In other words, the "unified injury" that *all* pregnant minors share as a result of Defendants' policy is not limited to abortion access—it is a broader violation of all pregnant minors' "rights to privacy and reproductive *choice*," GAAPPX000250 (emphasis added), and is one that could be remedied by "a single injunction or declaratory judgment . . . notwithstanding the fact that class members may make different choices." GAAPPX000258 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011)). Indeed, the Rule 23 class action was designed to protect against the chaotic, ad hoc procedure that Defendants advocate for here, and to save the district court from reviewing near-identical emergency claims for relief on a fire-drill basis. *See, e.g.*, *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984).

1. The District Court Did Not Abuse Its Discretion in Finding the Class Representatives and the Class Counsel to Be Adequate.

The district court 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." GAAPPX000256–57. The government contends that the adequacy of Ms. Doe's and Ms. Roe's representation is somehow affected by the mootness of their individual claims for abortion access, and that their "position[] on abortion" will somehow create conflicts of interest with other class members. Defs.' Br. 27–31. Neither contention is valid.

As to Defendants' mootness argument, this Court has recognized that "plaintiffs with moot claims may adequately represent a class" when the inherently transitory exception applies. *DL v. D.C.*, 860 F.3d 713, 726 (D.C. Cir. 2017) (citing *Geraghty*, 445 U.S. at 407). The cases upon which Defendants rely, Defs.' Br. 28, all predate the Supreme Court's articulation of the "inherently transitory" rule in *Sosna*, and are therefore inapplicable. In addition, two of the cases involved challenges to actions the government had ceased, *Hall v. Beals*, 396 U.S. 45, 48–50 (1969), or never applied to the named plaintiff to begin with, *Long v. D.C.*, 469 F.2d 927, 929–30 (D.C. Cir. 1972). Defendants' similar claim that the class representatives were only "briefly involved with this case," Defs.' Br. 28–29, is also meritless. Indeed, 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. Moreover, the government's factually disputed claim about Ms. Roe's age, Defs.' Br. 28, is irrelevant; even assuming, *arguendo*, that the government is correct, it does not

change the adequacy analysis because she was harmed by the government's abortion ban, just like the class members she represents.

Regardless, neither this Court nor the Supreme Court has ever required a specific length of involvement or a particular set of magic words to establish adequacy—rather, both have focused on the lack of apparent conflicting interests and the plaintiffs' commitment to vigorously prosecute the case through class counsel. *See Sosna*, 419 U.S. at 403; *DL*, 860 F.3d at 726. With respect to the former, contrary to Defendants' claim, *see* Defs.' Br. 30, Ms. Doe's and Ms. Roe's interests in no way conflict with those of class members who may oppose or do not seek abortions. Ms. Doe and Ms. Roe seek to protect the rights of all pregnant minors to make their own decisions free from government coercion and obstruction, whether they ultimately "*choose* to carry a pregnancy to term [or] to terminate it." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992). And the district court's order does not, as Defendants absurdly intimate, Defs.' Br. 29, require minors to choose abortion. Rather, it enjoins *the government* from "interfering with or obstructing any class member's access to" *all* "pregnancy-related care," not merely abortion, to protect their right to choose. GAAPPX000274–75 ¶ 1; *Casey*, 505 U.S. at 851, 855 (defining the right as protecting a woman's decision to choose "whether to bear and beget a child" and explaining that *Roe* requires judicial assessment of laws affecting "the exercise of

the choice"). Moreover, contrary to the government's assertion that Ms. Doe and Ms. Roe "spoke only of furthering their own immediate interests in obtaining abortions," Defs.' Br. 29, each declared their desire to be a class representative. *See* GAAPPX000027 ¶ 18; GAAPPX000093 ¶ 11.

Defendants do not argue that the district court abused its discretion in finding that class counsel are qualified to "vigorously prosecute" this case, and the district court's finding on this front is amply supported by the record of vigorous litigation to date, the court's first-hand observation of Plaintiffs' counsel, and counsels' documented expertise in class actions and constitutional impact litigation. *See, e.g.*, GAAPPX000253 n.3; ECF Nos. 18-1, 18-2, 18-3.

2. The District Court Did Not Abuse Its Discretion in Finding That Plaintiffs Satisfied Commonality and Typicality.

The district court correctly held that Plaintiffs meet Rule 23's commonality and typicality requirements—factors easily met where the conduct at issue is Defendants' "uniform policy or practice." GAAPPX000249–50; *supra* 6–7; *DL v. D.C.*, 713 F.3d 120, 128 (D.C. Cir. 2013). As explained above, because Defendants' uniform policy applies to *all* pregnant minors in ORR custody, *all* pregnant minors share the same "injury"—namely, "the inability to make a choice," free from government coercion and obstruction, as to whether to continue their pregnancies and "with whom to share information regarding their reproductive decisions"—"regardless of whether individual members might choose

different courses of action." GAAPPX000258; *supra* 29. In other words, the class representatives and all pregnant minors suffer "common harms, susceptible to common proof," *DL*, 860 F.3d at 724 (internal citations omitted), that are capable of being remedied through a "classwide resolution," *Wal-Mart Stores*, 564 U.S. at 350.

Defendants do not seriously dispute that Plaintiffs challenge a uniform policy. *See, e.g.*, Defs.' Br. 35, 46 (referring to the "policy"). Instead, they point to irrelevant factual differences between the named plaintiffs and the class members (such as their age, length of pregnancy, state of residence, whether—and how quickly—ORR can release them from custody, and whether they are pursuing immigration relief). Defs.' Br. 31–34. But none of those facts "diminish any of the key common circumstances that form the basis of the central question": whether Defendants' uniform policy of commandeering minors' reproductive decisions is constitutional, GAAPPX000250, and therefore do not preclude a "classwide resolution" of the case, *Wal-Mart Stores*, 564 U.S. at 350. Moreover, even if the minor factual distinctions cited by Defendants were of some relevance in this case—which they are not—this Court has held that commonality and typicality are "not destroyed merely by factual variations." *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987); *see also DL*, 860 F.3d at 725–26. Finally, Defendants' claim that *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), announced a

general rule disfavoring class actions in due process cases, Defs.' Br. 34, is simply not true. Not only did that case involve procedural due process, rather than substantive due process, the *Jennings* 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. That holding has no bearing here.

3. The District Court Did Not Abuse Its Discretion in Finding Plaintiffs Satisfied the Numerosity Requirement.

Unable to escape their admission that "ORR has approximately 30 pregnant UACs enter its care and custody on a monthly basis," GAAPPX000270 ¶ 12, Defendants do not argue that the class as currently defined fails numerosity. Defs.' Br. 34. Instead, they attempt to superimpose their flawed commonality arguments onto the numerosity analysis by restrictively re-defining the class to include only those minors who request abortions while in ORR care. Defs.' Br. 34–35.

However, as already explained, the evidence shows that *all* pregnant minors are subject to and injured by Defendants' policy because it prevents them from obtaining information about their pregnancy options, and from "freely *choos[ing]* whether to terminate [their pregnancies,] and with whom to share information regarding their reproductive decisions." GAAPPX000258 (emphasis in original); *see also Casey*, 505 U.S. at 851, 855, 859.

Regardless, even accepting Defendants' unduly restrictive class definition would not negate the numerosity of the class. As Defendants acknowledge, Defs.' Br. 35, "[t]here is no specific threshold that must be surpassed in order to satisfy the numerosity requirement; rather, the determination 'requires examination of the specific facts of each case and imposes no absolute limitations.'" *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 37 (D.D.C. 2007) (quoting *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318 (1980)). Here, Defendants admit that at least eighteen pregnant minors requested abortions in Fiscal Year 2017.[10] Defs.' Br. 36. This number is certainly under-inclusive, given the chilling effect that Defendants' policy has on minors' even making such requests. And, more importantly, as the district court's analysis reflects, the joinder of even eighteen plaintiffs under these circumstances would remain impracticable because of the geographically dispersed and isolated nature of the unaccompanied minor population in general. GAAPPX000248.

Defendants' assertion that each individual minor who suffers harm as a result of Defendants' policy can "readily [] join[]" this action, Defs.' Br. 19, is fantastical. Prior to the district court's order, Plaintiffs' counsel experienced

[10] Given that part of the challenged policy involves coercing minors into carrying pregnancies to term and—when this fails—preventing them from obtaining abortion care while in Defendants' custody, Defendants cannot arbitrarily exclude from the class count the five UCs whom they claim rescinded their requests and the two who were released from their custody.

serious difficulty in locating putative class members; absent classwide relief, individual minors would inevitably fail to find counsel and suffer irreparable harm. Indeed, the Deputy Director of ORR testified in February 2017 about several minors who made abortion requests, and who were subjected to Defendants' policy, but were unknown to Plaintiffs' counsel. *See* ECF No. 129-2, 116:17–117:20; 136:11–17. This further supports the impracticability of joinder here. *See Council of & for the Blind of Del. Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1544 (D.C. Cir. 1983) ("indicia of impracticability" include geographic dispersion of and difficulty locating class members and that "[j]oinder of unknown individuals . . . is inherently impracticable.").

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION.

A. The District Court Did Not Abuse its Discretion By Holding That Plaintiffs Are Likely to Succeed on the Merits.

1. The Government's Policy Violates the Fifth Amendment Rights of Class Members.

The district court properly held that the Constitution prohibits Defendants from banning abortion for unaccompanied immigrant minors in Defendants' custody. *See* GAAPPX000259–60 (citing, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *Casey*, 505 U.S. 833). Defendants refuse to allow a minor to go to a health care facility for the purpose of having an abortion. Defendants' policy thus represents the ultimate government-imposed

obstacle—a complete veto over a woman's decision—and is plainly unconstitutional under Supreme Court precedent. As the Supreme Court held, "regardless of whether exceptions are made for particular circumstances, [the government] may not prohibit any woman from making the ultimate decision to terminate her pregnancy prior to viability." *Casey*, 505 U.S. at 879 (reaffirming the "central holding of *Roe v. Wade*").

Seeking to avoid this clear precedent, Defendants make two arguments. First, they try to recast their policy as designed to avoid "facilitating" abortion. Defs.' Br. 40. Second, they claim that the policy is not a complete abortion ban because some minors might be released to a sponsor or could "voluntarily depart" to their home country. *Id.* Both of these arguments are belied by both the facts and the law.

As to the "facilitation" argument, the preliminary injunction only enjoins Defendants "from interfering with or obstructing any class member's access to" judicial bypass proceedings, appointments relating to pregnancy dating, pregnancy options and abortion counseling, abortions, or other pregnancy related care. GAAPPX000266–67 ¶ 1. As Judge Millett recognized "there is nothing for [the government] to facilitate." PAAPPX000078. Rather, Defendants need only step aside, stop blocking the doors, and allow minors to attend abortion-related appointments.

Perhaps in recognition that the preliminary injunction does not require Defendants to transport class members to the abortion, Defendants seem to have dropped their arguments on that score. Defs.' Br. 40. Indeed, Defendants admit that minors may be transported by shelter staff, by any volunteer who has undergone a background check, or by any attorney of record. GAAPPX000028–32 ¶¶ 18, 19. Therefore, Defendants' argument that the government would need to devote staff resources to "maintain[] appropriate custody over the child during her absence," Defs.' Br. 40, is nonsensical. To the extent that Defendants maintain that "government funds would be expended" if the *shelter* were to transport the minor, they fail to provide any support for that contention. Although private shelters receive government grants to care for unaccompanied minors, there is no evidence suggesting that government funds are their only funding source, or that the government must pay more to a shelter for transporting a minor for an abortion. The latter would be especially hard to prove given that if a minor carries her pregnancy to term she needs to be transported multiple times for prenatal care and childbirth.

Defendants' claim that government resources would need to be expended for paperwork related to the procedure, Defs.' Br. 41, does not fare any better. The paperwork "requirement" is a requirement of Defendants' own creation, and they could easily dispense with it. Furthermore, as Defendants admit, there is no such

required paperwork while the injunction is in place. PAAPPX000077–78; PAAPPX000095–96.

Furthermore, Defendants claim that they need to expend resources on "evaluat[ing] the propriety of [a minor's] proposed procedure," Defs.' Br. 41, but this misapprehends the constitutional limits of their authority over a woman's reproductive choices: ORR has *no* proper role in determining the "propriety" of abortion for anyone. If state law requires parental involvement, and it cannot be obtained or the minor does not wish to involve her parents, a state court, not ORR, will determine whether the minor can consent on her own based on her maturity or based on her best interests.

Defendants also argue that they should be permitted to ban a minor from having an abortion because they would be required to monitor her health before and after the abortion. Defs.' Br. 41. But such care does not "facilitate" an abortion; in any event, Defendants are already required to provide such care under existing legal obligations, including ORR's internal guidelines and the *Flores* settlement agreement. *See supra* 4–5.

Accordingly, the resources Defendants claim they would need to "expend" are either *de minimis* or nonexistent. This case is thus distinguishable from the cases on which Defendants rely, which raise the question of whether Medicaid must cover abortion. *See* Defs' Br. 39 (citing *Harris v. McRae*, 448 U.S. 297

(1980); *Maher v. Roe*, 432 U.S. 464 (1977)). The Supreme Court held that the government may refuse to pay for abortions in the Medicaid program, holding that the refusal "'imposed no restriction on access to abortions that was not already there.'" *Harris*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 474). Instead, the Court held, the government simply decided to fund one choice—childbirth—but not the other. *Id*. Moreover, in both cases, the Court stressed that its holding "signal[ed] no retreat from *Roe* or the cases applying it," *Maher*, 432 U.S. at 475, and distinguished between "'direct state interference with a protected activity and state encouragement of an alternative activity,'" *Harris*, 448 U.S. at 315 (quoting *Maher*, 432 U.S. at 475).

Defendants' reliance on *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), Defs.' Br. 39, fails for the same reason. In that case, the Court upheld Missouri's prohibition on providing abortions in public hospitals because the Court held that it "leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all." *Webster*, 492 U.S. at 509. Like the *Maher* and *Harris* Courts, the *Webster* Court noted that the law at issue was different from attempts by the state to "impose its will by the force of law." *Id*. at 510. Indeed, the *Webster* Court explicitly noted that the analysis would be different if all of the hospitals in Missouri were publicly funded, and therefore abortion would be unavailable in any hospital. *Id*. at 510 n.8. The situation here is

even clearer given that class members are completely barred from obtaining abortions.

Moreover, even if the preliminary injunction required Defendants to have some *de minimis* level of involvement, case law and the government's own policies recognize that such involvement is required if women in their custody would otherwise be unable to access abortion. For example, every court to have considered the question has held the right to abortion survives incarceration. *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). This is so despite the fact that enabling an incarcerated woman to leave jail or prison to obtain an abortion may require the government to complete paper work, devote staff resources to "maintain[] appropriate custody over the woman," make arrangements with the abortion facility, and transport the woman. Thus, even assuming, *arguendo*, that there were costs associated with ensuring abortion access for class members, courts have recognized that "the cost of protecting a constitutional right cannot justify its total denial." *Id.* at 337 (internal citations and quotations omitted). The federal government has implicitly recognized as much in other contexts. Indeed, the federal government's policies enable women in the custody of the BOP and ICE to have abortions because otherwise abortion would become "'*entirely* unavailable.'" Defs.' Br. 41 (quoting *Crawford*, 514 F.3d at 796). Defendants try to distinguish

adult women in prison and ICE custody from unaccompanied immigrant minors by claiming that the adults do not have the prospect of being released to a sponsor or the ability to return voluntarily to their home country. Defs.' Br. 42. But as discussed below, these alleged options do not alter the result here. Moreover, as a factual matter, Defendants are simply wrong that adults cannot seek voluntary departure. *See* 8 U.S.C. § 1229c.

Defendants' second argument, that a minor may obtain an abortion once she has left government custody after being released to a sponsor or "voluntarily" returned to her home country, does not affect the conclusion that Defendants' ban on abortion for minors in their custody is unconstitutional. The Eighth Circuit rejected a similar argument in *Crawford*. In that case, the state argued that prisoners seeking abortion could have exercised their right to abortion *prior* to incarceration. *Crawford*, 514 F.3d at 796–97. The *Crawford* court disagreed, observing that the state "points to no authority, and we find none, indicating the Supreme Court has determined a right may be entirely eliminated during incarceration, simply because the right could have been exercised before imprisonment." *Id.* at 797. The same principle applies here. The government cannot ban abortion for those in its custody and claim that the person can simply wait to leave government custody to obtain an abortion. As the Supreme Court has made clear, "the abortion decision is one that simply cannot be postponed, or it

will be made by default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

Furthermore, as to the voluntary departure "option," the district court correctly held that 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 to seek asylum. GAAPPX000263–64. In response, Defendants argue that "there is no constitutional right" to press an immigration claim. Defs.' Br. 42. But that analysis is backwards. Defendants do not deny that Plaintiffs have a constitutional right to abortion, and it is that right that is penalized. For example, as the Court in *Harris* explained, although there is no "right" to Medicaid benefits, the government would unconstitutionally penalize the right to abortion if it withheld Medicaid benefits from a woman who "exercised her constitutionally protected freedom to terminate her pregnancy." 448 U.S. at 317 n.19; *see also Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down residency requirement for welfare assistance because it penalized the constitutional right to travel). Defendants counter that not all minors have asylum claims or defenses to deportation. Defs.' Br. 43. But many likely do. Defendants admit that these minors often "leave their

home countries to join family already in the United States, escape abuse, persecution or exploitation in the home country."[11]

Moreover, even if the government could constitutionally force a young person to give up meritorious claims for asylum or other forms of immigration relief as a condition of obtaining an abortion—which it cannot—the voluntary departure process is not a realistic alternative. The voluntary departure process is largely outside the minor's control, and can take months. In the first instance, the government has discretion to decide whether to allow someone to seek voluntarily departure, and only once someone is in removal proceedings can she request voluntary departure from an immigration judge. 8 U.S.C. § 1229c(a)(1); *id*. at § 1229c(b)(1); *id.* at § 1232(a)(5)(D). The immigration judge has discretion to grant voluntary removal only in certain instances, and only after holding a hearing. *See, e.g.*, 8 C.F.R. § 1240.26. It is well established that immigration courts are facing significant backlogs. *See, e.g.*, *Immigration Court Backlog Jumps While Case Proceedings Slow*, TRAC Immigration (June 8, 2017).[12] By way of example, Jane Doe entered the United States in September 2017, but by the time of the Court of Appeals argument on October 20, 2017—where the government was urging

[11] ORR, *Administration for Children and Families Factsheet* (2016), *available at* https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Office%20of%20Refugee%20Resettlement%20Resources.pdf.

[12] Available at http://trac.syr.edu/immigration/reports/516/.

voluntary departure—she had not even been placed in removal proceedings, let alone had a hearing with an immigration judge; meanwhile, she had already been seeking an abortion for four weeks. *See* PAAPPX000094–95 & n.3. Thus, while going through this process, a minor will be pushed further into her pregnancy against her will, with all attendant risks, likely to the point where she may lose her constitutional right to abortion altogether.

As for the sponsorship possibility, contrary to Defendants' intimation, Defs.' Br. 3, the district court found that the minor controls neither the approval of a sponsor nor the timing of the sponsorship process. GAAPPX000263–64. Indeed, the undisputed evidence shows that even assuming the minor has a viable sponsor, it can take weeks or months for the minor to be reunited with that sponsor given the paperwork, fingerprinting, background checks, home visit, *etc*. *See* GAAPPX000263–64; *see also* PAAXX000001–8. And for some minors, like Jane Doe, there will be no viable sponsor, and they will stay in ORR custody for months until they turn eighteen or are deported. But for court intervention, Jane Doe would have been too far along to have an abortion before she was eventually released from ORR custody around her eighteenth birthday, approximately four months after she first sought abortion access. Jane Poe was in a similar situation: she is still in government custody, and would have been forced to deliver a baby if not for court intervention.

Defendants claim the sponsorship process can work quickly, pointing to Ms. Roe's and Ms. Moe's circumstances. Defs.' Br. 43–44. But, as those circumstances demonstrate, even when the sponsorship process works quickly, minors are subjected to unreasonable and unnecessary delay in seeking abortion. For example, Plaintiff Moe's abortion request languished at ORR for two weeks—while she was pushed further into her pregnancy—until she found counsel and sought a TRO. GAAPPX000159 ¶ 6. Ms. Moe's TRO filing prompted Defendants to speed up her reunification with a family member. If she had not found counsel, her abortion request would have likely languished longer. Jane Roe was delayed by Defendants' policy for over three weeks: she first requested an abortion on November 21, 2017, but her request languished until she sought a TRO on December 15, 2017. GAAPPX000092 ¶ 5. And she was never released to a sponsor; instead, Defendants claimed she was an adult and transferred her to ICE, which then released her on her own recognizance. PAAPPX000129–32. There is no way of knowing how long her release to a sponsor would actually have taken.

For all these reasons, neither the voluntary departure "option" nor the possibility that some class members may ultimately be released to a sponsor justifies the government's abortion ban or permits it to impose a delay of unknown duration (possibly weeks or months) on access to abortion. Although the government may have an interest in potential life, that interest is not without limits.

The Supreme Court has held that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. . . . And a statute . . . [that] has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877. That is precisely what the government has done here.

2. The Constitution Prohibits the Government From Revealing Minors' Abortion Decisions Over Their Objection.

Defendants' policy requires minors to tell their parents and prospective sponsors that they are seeking abortion, and if they refuse, ORR requires the shelters to notify them over the minors' objection. *See supra* 6. ORR also requires minors to visit anti-abortion CPCs, and Defendants tell the CPCs about the minors' pregnancies or require the minors to do so. *See supra* 6–7. The district court properly found that Plaintiffs were likely to succeed on their claim that these aspects of the policy are unconstitutional, and preliminarily enjoined Defendants "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." GAAPPX0000275 ¶ 2.

Defendants' policy violates minors' Fifth and First Amendment rights to keep their pregnancies and abortion decisions confidential. As to the Fifth

Amendment, 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*, 443 U.S at 647. As the Fifth Circuit has held, 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) (striking down statute that required judicial bypass court to notify the minor's parents under certain circumstances), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

Defendants nevertheless argue that they are entitled to notify (or require the minor to notify) parents, potential sponsors, and other medical care providers of the minor's abortion decision in *every* circumstance. And they argue that they are not required to have an alternative mechanism, such as a judicial bypass, available for those minors who object to such notification. Defs.' Br. 45. No court has countenanced Defendants' position. Indeed, neither the Supreme Court nor any lower court has upheld a parental notification requirement for all minors that lacked a bypass. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding parental notification law with a bypass); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (holding that a state "may not impose a parental-notice requirement without also providing a confidential, expeditious

mechanism by which mature and 'best interest' minors can avoid it"); *Ind. Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1140–41 (1983) (striking down state law requiring parents to be notified after the abortion); *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d 929, 946 (S.D. Ind. 2017) (striking down parental notification requirement that required post-bypass parental notice for some minors), *appeal argued*, No. 17-2428 (7th Cir. Jan. 5, 2018).

Contrary to Defendants' suggestion, Defs.' Br. 45–47, the harm of forced parental involvement in a minor's abortion decision is not limited to the possibility that a custodial parent might block the minor's abortion access. Indeed, Defendant ORR has admitted that Defendants' policy of forced notification puts minors at risk of harm. PAAPPX000040 (42:3–43:1). And courts have invalidated statutes that require notification even *after* an abortion because it could cause "additional trauma" and a "chilling effect" on a minor's decision to have an abortion. *See Pearson*, 716 F.2d at 1140–41; *see also Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d at 946 (finding, *inter alia*, that parental notification can lead to physical, sexual, or emotional abuse; fear of abuse that can lead to suicidal thoughts or self-abortion; or deterrence from seeking abortion altogether). The harm of forced parental notification is evidenced by the facts in this case. When Jane Poe was forced to tell her parents and sponsor that she wanted an abortion, they threatened

to beat her. PAAPPX000016–17. This threat may turn into actual abuse when and if she sees her parents again, and, in the short term, their threat led Ms. Poe briefly to change her mind about the abortion, at which point she became suicidal. *Id.* Furthermore, disclosure to Ms. Poe's sponsor and his threats of harm likely disqualified him from being her sponsor. PAAPPX000016–17.

As evidenced by Ms. Poe's situation, and contrary to Defendants' claims, Defs.' Br. 46, the government's policy contains no exception for when disclosure would endanger the minor. Accordingly, the lone case Defendants cite, *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352 (4th Cir. 1998), does not support Defendants' policy. In that case, the court upheld a parental notification statute that included an express "exception for abused minors" and that "never require[d] a minor to notify a parent with whom she does not reside or who has not undertaken to provide for her care and well-being." 155 F.3d at 375. Given these exceptions, the court held that a bypass was not constitutionally required but it recognized that, if there were any doubt, the challenged statute did in fact contain a bypass provision. *See, e.g.*, *id.* at 382 ("even assuming that this abuse exception may be inadequate . . . the abused minor is fully protected under the statute" because it includes a judicial bypass). Thus, even if *Camblos* were not an outlier and wrongly decided in saying that a bypass is not needed in parental notification

requirements, it would not save the policy here because the challenged statute in that case had explicit exceptions and contained a bypass.

In addition, Defendants violate Plaintiffs' right to informational privacy by telling parents, sponsors, CPCs, and others, about minors' pregnancy and/or abortion decisions. *See* GAAPPX000131–49 ¶ 73. People have a right to privacy "in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and the government violates that right when it discloses a person's deeply private information to others, *see, e.g., Doe v. City of N.Y.*, 15 F.3d 264 (2d Cir. 1994) (recognizing constitutional claim based on government disclosure of employees' HIV status); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994) (same, for arrestee's HIV status). Like HIV status, the "personal matter" at issue here—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, 772 (1986), *overruled on other grounds by Casey*, 505 U.S. at 882. For example, Defendants told Ms. Poe's prospective sponsor about her pregnancy and abortion decision; he then threatened her with harm. PAAPPXX000017. This threat in turn likely scuttled the prospect of release to this sponsor, and the opportunity to be reunited with a family member.

Furthermore, Defendants either tell CPCs about minors' abortion decisions, thereby violating the minors' rights to informational privacy, or they force minors

to tell the CPCs themselves, violating the minors' rights against compelled speech. GAAPPX000131–49 ¶ 72. The First Amendment protects "the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459 (2018). The only other court that has considered a similar issue held that 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 Minn., N.D., S.D. v. Daugaard*, 799 F. Supp. 2d 1048, 1054–58 (D.S.D. 2011). As that court held, women should not be forced to visit an entity that is fundamentally opposed to their abortion decision, to discuss that deeply intimate and personal decision. *Id*. at 1060.

Defendants claim that their policy is justified by unaccompanied minors' lack of support networks in the United States. Defs.' Br. 47. But nothing prohibits a young person from consulting whomever she wishes, including her family in the United States and abroad, her sponsor, her immigration attorney, her social worker at the shelter, her court-appointed guardian ad litem, or even a CPC. *See, e.g.*, PAAPPX000080. Defendants should not be permitted to invoke these minors' marginalization and vulnerability to defend their unconstitutional actions that cause these minors harm.

B. The District Court Did Not Abuse Its Discretion in Finding That Plaintiffs Would Suffer Irreparable Injury Absent Relief.

The district court correctly held that "each member of the class" will suffer irreparable harm just as the "Named Plaintiff[s]" did throughout the proceedings, including "at a minimum, increased health risks, and perhaps the permanent inability to obtain the abortion to which they are legally entitled." GAAPPX000264; *see also* PAAPPX000136–37 (Rogers, J., concurring) (finding that the preliminary injunction enables class members to avoid the harms of Defendants' unconstitutional policies, including emotional trauma, and restores their rights to privacy). Preventing a woman from exercising her constitutional right to have an abortion and requiring her to have a baby against her will is, without question, irreparable harm. *Roe v. Wade*, 410 U.S. 113 at 153 (1973) ("Maternity . . . may force upon the woman a distressful life and future. Psychological harm may be imminent."). Fortunately, because the district court quickly intervened, none of the named Plaintiffs were forced to carry to term, but they all suffered weeks of delay.[13] Defendants do not dispute that abortion is very safe, and safer than childbirth, *see, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2315 (finding that abortion is fourteen times safer than childbirth), or that each week of

[13] It is ironic that Defendants point to the district court's swift resolution of the individual TROs to claim that a preliminary injunction is not necessary, Defs.' Br. 48, when Defendants opposed those motions, and appealed some—thereby pushing Plaintiffs further into their pregnancies and causing them harm.

delay increase the risks associated with the procedure, *see, e.g.*, PAAPPX000098 n.6 (Millett, J., concurring) (citing medical sources finding that each week of delay increases the risks associated with the procedure). Since the district court issued its order, the parties are aware of several minors in Defendants' custody who sought and received abortion information, a judicial bypass of a state's parental involvement law, and/or an abortion. Absent an injunction, these minors would have been denied such care.

Furthermore, absent an injunction, class members will be prevented from keeping confidential their pregnancies and abortion decisions. As discussed *supra* 49–50, forced revelation of a minor's pregnancy can cause harm by subjecting the minor to abuse, causing her to lose her sponsor, or "chilling" her abortion decision. In addition, forcing minors to be "counseled" by a CPC, in violation of their First Amendment free speech rights, causes irreparable harm: "[A] woman who chooses to undergo an abortion [and who is forced into counseling at a CPC] will experience a high degree of degradation because she will be forced to disclose her decision to someone who is fundamentally opposed to it." *Planned Parenthood of Minn.*, 799 F. Supp. 2d at 1063. It is also well settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Since the district court issued its order, the parties are aware of several minors in

Defendants' custody who sought and received abortion information, a judicial bypass of a state's parental involvement law, and/or an abortion.

C. The District Court Did Not Abuse Its Discretion in Finding That the Balance of Harms Favors the Plaintiffs, and That the Injunction Serves the Public Interest.

The district court correctly found that "Defendants have not shown they have any legitimate interest that will be harmed by the issuance of a preliminary injunction." GAAPPX000264. Indeed, preventing UCs from effectuating their constitutional rights is simply not legitimate; government action that "has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877. Furthermore, Defendants' professed interest here is "an acutely selective form of resistance since the government acknowledges" that women in ICE or BOP custody are explicitly allowed access to abortion. PAAPPX000099 (Millett, J., concurring). This "dissonance in the government's position" undercuts their claim of harm. *Id*.

Contrary to Defendants' claims, Defs.' Br. 48, the fact that Plaintiffs are immigrants does not permit Defendants to override Plaintiffs' choices. Defendants have not denied that Plaintiffs have due process rights to decide to have an abortion. Their immigration status is therefore irrelevant. This is a case about whether women already in the United States can be prohibited from accessing

abortion. For all of these reasons, the district court did not abuse its discretion by concluding that the balance of "equities tips in Plaintiffs' favor." GAAPPX000264.

Lastly, a preliminary injunction serves the public interest. As the district court found, the public interest is served when the government follows the Constitution. GAAPPX000264–65; *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Contrary to Defendants' claims, whatever responsibility ORR has for the minors in their care, they do not have the right to veto their abortion decisions, or subject them to harm by revealing their abortion decisions to others. As Judge Millett put it, Defendants are not making a "best interest" determination for minors, they are merely supplanting a minor's decision with "[their] own categorical position against abortion—which is something not even a parent" could do. PAAPPX000097 (Millett, J., concurring). Furthermore, Defendants' argument that permitting young women to access abortion will harm the public interest by "incentivizing" others to leave their home countries and come to the United States for "abortion tourism," Defs.' Br. 45, 48–49, and thereby affect foreign relations, has no support in the record and 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."[14]

CONCLUSION

For the foregoing reasons, the district court's orders certifying the Plaintiff class and issuing a preliminary injunction on behalf of the class should be affirmed.

July 30, 2018

Respectfully submitted,

/s/*Brigitte Amiri*
Brigitte Amiri
Meagan Burrows
Jennifer Dalven
Lindsey Kaley
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2633
Fax (212) 549-2652
bamiri@aclu.org
mburrows@aclu.org
jdalven@aclu.org
lkaley@aclu.org

Arthur B. Spitzer (D.C. Bar No. 235960)
Scott Michelman (D.C. Bar No. 1006945)
Shana Knizhnik (D.C. Bar No. 1020840)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005

[14] Administration for Children and Families Factsheet, *available at* https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Office%20of%20Refugee%20Resettlement%20Resources.pdf.

Tel. 202-457-0800
Fax 202-457-0805
aspitzer@acludc.org
smichelman@acludc.org
sknizhnik@acludc.org

Daniel Mach (D.C. Bar No. 461652)
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
Tel. (202) 675-2330
dmach@aclu.org

Elizabeth Gill
American Civil Liberties Union Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel. (415) 621-2493
Fax (415) 255-8437
egill@aclunc.org

Melissa Goodman
American Civil Liberties Union Foundation of Southern California
1313 West 8th Street
Los Angeles, California 90017
Tel. (213) 977-9500
Fax (213) 977-5299
mgoodman@aclusocal.org

Mishan Wroe
Riley Safer Holmes & Cancila LLP
456 Montgomery Street, 16th Floor
San Francisco, CA 94104
Tel. (415) 275-8522
mwroe@rshc-law.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,887 words, excluding the sections allowed by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). This brief complies with the typeface and type style requirements of Fed. R. App. 32(a)(5)(A) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

s/*Brigitte Amiri*
Brigitte Amiri
Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 30, I caused a copy of the foregoing Brief of Appellees to be filed with the Clerk of the Court using the Court's ECF system. Counsel for Defendants-Appellants are registered ECF users, and will be served exclusively through that system.

s/ *Brigitte Amiri*
Brigitte Amiri
Counsel for Plaintiffs-Appellees

APPELLEES' ADDENDUM OF RELEVANT STATUTES AND REGULATIONS

TABLE OF CONTENTS

8 U.S.C. § 1229c

Voluntary departure

(a) Certain conditions
(1) In general
The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.
(2) Period
(A) In general
Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.
(B) Three-year pilot program waiver
During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien--
(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive medical treatment in the United States from a physician associated with a health care facility, and submits to the Attorney General--
(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;
(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and
(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or
(ii) who--
(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.
(C) Waiver limitations
(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.
(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).
(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).
(II) Not more than two adults may be granted a waiver under subparagraph (B)(ii) in a case in which--
(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or
(bb) one such adult is age 55 or older or is physically handicapped.
(D) Report to Congress; suspension of waiver authority
(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.
(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any period in which an annual report under clause (i) is past due and has not been submitted.
(3) Bond
The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.
(4) Treatment of aliens arriving in the United States
In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the application for admission in accordance with section 1225(a)(4) of this title.
(b) At conclusion of proceedings
(1) In general
The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that--

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;
(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;
(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and
(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.
(2) Period
Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.
(3) Bond
An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.
(c) Aliens not eligible
The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.
(d) Civil penalty for failure to depart
(1) In general
Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien--
(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.
(2) Application of VAWA protections
The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.
(3) Notice of penalties
The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions
The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.
(f) Judicial review
No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b), nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

8 U.S.C. § 1232

Enhancing efforts to combat the trafficking of children

(a) Combating child trafficking at the border and ports of entry of the United States
(1) Policies and procedures
In order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.
(2) Special rules for children from contiguous countries
(A) Determinations
Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the United States shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, on a case-by-case basis, that--
(i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence;
(ii) such child does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and
(iii) the child is able to make an independent decision to withdraw the child's application for admission to the United States.
(B) Return
An immigration officer who finds an unaccompanied alien child described in subparagraph (A) at a land border or port of entry of the United States and determines that such child is inadmissible under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) may--
(i) permit such child to withdraw the child's application for admission pursuant to section 235(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1225(a)(4)); and
(ii) return such child to the child's country of nationality or country of last habitual residence.
(C) Contiguous country agreements
The Secretary of State shall negotiate agreements between the United States and countries contiguous to the United States with respect to the repatriation of children. Such agreements shall be designed to protect children from severe forms of trafficking in persons, and shall, at a minimum, provide that--

(i) no child shall be returned to the child's country of nationality or of last habitual residence unless returned to appropriate employees or officials, including child welfare officials where available, of the accepting country's government;
(ii) no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and
(iii) border personnel of the countries that are parties to such agreements are trained in the terms of such agreements.
(3) Rule for other children
The custody of unaccompanied alien children not described in paragraph (2)(A) who are apprehended at the border of the United States or at a United States port of entry shall be treated in accordance with subsection (b).
(4) Screening
Within 48 hours of the apprehension of a child who is believed to be described in paragraph (2)(A), but in any event prior to returning such child to the child's country of nationality or of last habitual residence, the child shall be screened to determine whether the child meets the criteria listed in paragraph (2)(A). If the child does not meet such criteria, or if no determination can be made within 48 hours of apprehension, the child shall immediately be transferred to the Secretary of Health and Human Services and treated in accordance with subsection (b). Nothing in this paragraph may be construed to preclude an earlier transfer of the child.
(5) Ensuring the safe repatriation of children
(A) Repatriation pilot program
To protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.
(B) Assessment of country conditions
The Secretary of Homeland Security shall consult the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.
(C) Report on repatriation of unaccompanied alien children
Not later than 18 months after December 23, 2008, and annually thereafter, the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security, shall submit a report to the Committee

on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include--
(i) the number of unaccompanied alien children ordered removed and the number of such children actually removed from the United States;
(ii) a statement of the nationalities, ages, and gender of such children;
(iii) a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot program created pursuant to subparagraph (A);
(iv) a description of the type of immigration relief sought and denied to such children;
(v) any information gathered in assessments of country and local conditions pursuant to paragraph (2); and
(vi) statistical information and other data on unaccompanied alien children as provided for in section 279(b)(1)(J) of Title 6.
(D) Placement in removal proceedings
Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be--
(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);
(ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and
(iii) provided access to counsel in accordance with subsection (c)(5).
(b) Combating child trafficking and exploitation in the United States
(1) Care and custody of unaccompanied alien children
Consistent with section 279 of Title 6, and except as otherwise provided under subsection (a), the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.
(2) Notification
Each department or agency of the Federal Government shall notify the Department of Health and Human services[1] within 48 hours upon--
(A) the apprehension or discovery of an unaccompanied alien child; or
(B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.
(3) Transfers of unaccompanied alien children.

Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

(4) Age determinations

The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.

(c) Providing safe and secure placements for children

(1) Policies and programs

The Secretary of Health and Human Services, Secretary of Homeland Security, Attorney General, and Secretary of State shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including policies and programs reflecting best practices in witness security programs.

(2) Safe and secure placements

(A) Minors in Department of Health and Human Services custody

Subject to section 279(b)(2) of Title 6, an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

(B) Aliens transferred from Department of Health and Human Services to Department of Homeland Security custody

If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider

placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.

(3) Safety and suitability assessments

(A) In general

Subject to the requirements of subparagraph (B), an unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian'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.

(B) Home studies

Before placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary. A home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of Title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.

(C) Access to information

Not later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments from appropriate Federal, State, and local law enforcement and immigration databases.

(4) Legal orientation presentations

The Secretary of Health and Human Services shall cooperate with the Executive Office for Immigration Review to ensure that custodians receive legal orientation presentations provided through the Legal Orientation Program administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian's responsibility to attempt to ensure the child's appearance at

all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.

(5) Access to counsel

The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

(6) Child advocates

(A) In general

The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children. A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child. The child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. The child advocate shall be presumed to be acting in good faith and be immune from civil liability for lawful conduct of duties as described in this provision.

(B) Appointment of child advocates

(i) Initial sites

Not later than 2 years after March 7, 2013, the Secretary of Health and Human Services shall appoint child advocates at 3 new immigration detention sites to provide independent child advocates for trafficking victims and vulnerable unaccompanied alien children.

(ii) Additional sites

Not later than 3 years after March 7, 2013, the Secretary shall appoint child advocates at not more than 3 additional immigration detention sites.

(iii) Selection of sites

Sites at which child advocate programs will be established under this subparagraph shall be located at immigration detention sites at which more than 50 children are held in immigration custody, and shall be selected sequentially, with priority given to locations with--

(I) the largest number of unaccompanied alien children; and

(II) the most vulnerable populations of unaccompanied children.

(C) Restrictions

(i) Administrative expenses
A child advocate program may not use more that 10 percent of the Federal funds received under this section for administrative expenses.
(ii) Nonexclusivity
Nothing in this section may be construed to restrict the ability of a child advocate program under this section to apply for or obtain funding from any other source to carry out the programs described in this section.
(iii) Contribution of funds
A child advocate program selected under this section shall contribute non-Federal funds, either directly or through in-kind contributions, to the costs of the child advocate program in an amount that is not less than 25 percent of the total amount of Federal funds received by the child advocate program under this section. In-kind contributions may not exceed 40 percent of the matching requirement under this clause.
(D) Annual report to Congress
Not later than 1 year after March 7, 2013, and annually thereafter, the Secretary of Health and Human Services shall submit a report describing the activities undertaken by the Secretary to authorize the appointment of independent Child Advocates for trafficking victims and vulnerable unaccompanied alien children to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.
(E) Assessment of Child Advocate Program
(i) In general
As soon as practicable after March 7, 2013, the Comptroller General of the United States shall conduct a study regarding the effectiveness of the Child Advocate Program operated by the Secretary of Health and Human Services.
(ii) Matters to be studied
In the study required under clause (i), the Comptroller General shall--[2] collect information and analyze the following:
(I) analyze the effectiveness of existing child advocate programs in improving outcomes for trafficking victims and other vulnerable unaccompanied alien children;
(II) evaluate the implementation of child advocate programs in new sites pursuant to subparagraph (B);
(III) evaluate the extent to which eligible trafficking victims and other vulnerable unaccompanied children are receiving child advocate services and assess the possible budgetary implications of increased participation in the program;
(IV) evaluate the barriers to improving outcomes for trafficking victims and other vulnerable unaccompanied children; and

(V) make recommendations on statutory changes to improve the Child Advocate Program in relation to the matters analyzed under subclauses (I) through (IV).
(iii) GAO report
Not later than 3 years after March 7, 2013, the Comptroller General of the United States shall submit the results of the study required under this subparagraph to--
(I) the Committee on the Judiciary of the Senate;
(II) the Committee on Health, Education, Labor, and Pensions of the Senate;
(III) the Committee on the Judiciary of the House of Representatives; and
(IV) the Committee on Education and the Workforce of the House of Representatives.
(F) Authorization of appropriations
There are authorized to be appropriated to the Secretary and Human Services[3] to carry out this subsection--
(i) $1,000,000 for each of the fiscal years 2014 and 2015; and
(ii) $2,000,000 for each of the fiscal years 2016 and 2017.
(d) Permanent protection for certain at-risk children
(1) Omitted
(2) Expeditious adjudication
All applications for special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.
(3) Omitted
(4) Eligibility for assistance
(A) In general
A child who has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) and who was in the custody of the Secretary of Health and Human Services at the time a dependency order was granted for such child, was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note) at the time such dependency order was granted, or has been granted status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)),,[2] shall be eligible for placement and services under section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) until the earlier of--
(i) the date on which the child reaches the age designated in section 412(d)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1522(d)(2)(B)); or
(ii) the date on which the child is placed in a permanent adoptive home.
(B) State reimbursement
Subject to the availability of appropriations, if State foster care funds are expended on behalf of a child who is not described in subparagraph (A) and has been granted

special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), or status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)),,[2] the Federal Government shall reimburse the State in which the child resides for such expenditures by the State.

(5) State courts acting in loco parentis

A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in loco parentis, shall not be considered a legal guardian for purposes of this section or section 279 of Title 6.

(6) Transition rule

Notwithstanding any other provision of law, an alien described in section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), as amended by paragraph (1), may not be denied special immigrant status under such section after December 23, 2008 based on age if the alien was a child on the date on which the alien applied for such status.

(7) Omitted

(8) Specialized needs of unaccompanied alien children

Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.

(e) Training

The Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state and local personnel, who have substantive contact with unaccompanied alien children. Such personnel shall be trained to work with unaccompanied alien children, including identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate, including children described in subsection (a)(2).

(f) Omitted

(g) Definition of unaccompanied alien child

For purposes of this section, the term “unaccompanied alien child” has the meaning given such term in section 279(g) of Title 6.

(h) Effective date

This section--

(1) shall take effect on the date that is 90 days after December 23, 2008; and

(2) shall also apply to all aliens in the United States in pending proceedings before the Department of Homeland Security or the Executive Office for Immigration Review, or related administrative or Federal appeals, on December 23, 2008.

(i) Grants and contracts

The Secretary of Health and Human Services may award grants to, and enter into contracts with, voluntary agencies to carry out this section and section 279 of Title 6.

8 C.F.R. § 1240.26

Voluntary departure—authority of the Executive Office for Immigration Review

(a) Eligibility: general. An alien previously granted voluntary departure under section 240B of the Act, including by the Service under § 240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.
(b) Prior to completion of removal proceedings—
(1) Grant by the immigration judge.
(i) An alien may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the alien:
(A) Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;
(B) Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);
(C) Concedes removability;
(D) Waives appeal of all issues; and
(E) Has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4).
(ii) The judge may not grant voluntary departure under section 240B(a) of the Act beyond 30 days after the master calendar hearing at which the case is initially calendared for a merits hearing, except pursuant to a stipulation under paragraph (b)(2) of this section.
(iii)[1] If the alien files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately. The penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply if the alien has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. Upon the granting of voluntary departure, the immigration judge shall advise the alien of the provisions of this paragraph (b)(3)(iii).
(iv) The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(2) Stipulation. At any time prior to the completion of removal proceedings, the Service counsel may stipulate to a grant of voluntary departure under section 240B(a) of the Act.
(3) Conditions.
(i) The judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the alien has departed the United States within the time specified. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing, unless:
(A) A travel document is not necessary to return to his or her native country or to which country the alien is departing; or
(B) The document is already in the possession of the Service.
(ii) The Service may hold the passport or documentation for sufficient time to investigate its authenticity. If such documentation is not immediately available to the alien, but the immigration judge is satisfied that the alien is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation and present it to the Service. The Service in its discretion may extend the period within which the alien must provide such documentation. If the documentation is not presented within the 60-day period or any extension thereof, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect, as if in effect on the date of issuance of the immigration judge order.
(c) At the conclusion of the removal proceedings—
(1) Required findings. An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:
(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;
(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;
(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4); and
(iv) The alien has established by clear and convincing evidence that the alien has the means to depart the United States and has the intention to do so.
(2) Travel documentation. Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in

all cases presentation by the alien of a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(3) Conditions. The immigration judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. The immigration judge shall advise the alien of the conditions set forth in this paragraph (c)(3)(i)-(iii). If the immigration judge imposes conditions beyond those specifically enumerated below, the immigration judge shall advise the alien of such conditions before granting voluntary departure. Upon the conditions being set forth, the alien shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:

(i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien departs within the time specified, but in no case less than $500. Before granting voluntary departure, the immigration judge shall advise the alien of the specific amount of the bond to be set and the duty to post the bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure.

(ii) An alien who has been granted voluntary departure shall, within 30 days of filing of an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. If the alien does not provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.

(iii) Upon granting voluntary departure, the immigration judge shall advise the alien that if the alien files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the alien satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the alien may apply to the ICE Field Office

Director for the bond to be canceled, upon submission of proof of the alien's timely departure by such methods as the ICE Field Office Director may prescribe.
(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office Director may prescribe if the alien is subsequently successful in overturning or remanding the immigration judge's decision regarding removability.
(4) Provisions relating to bond. The voluntary departure bond shall be posted with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure, and the ICE Field Office Director may, at his or her discretion, hold the alien in custody until the bond is posted. Because the purpose of the voluntary departure bond is to ensure that the alien does depart from the United States, as promised, the failure to post the bond, when required, within 5 business days may be considered in evaluating whether the alien should be detained based on risk of flight, and also may be considered as a negative discretionary factor with respect to any discretionary form of relief. The alien's failure to post the required voluntary departure bond within the time required does not terminate the alien's obligation to depart within the period allowed or exempt the alien from the consequences for failure to depart voluntarily during the period allowed. However, if the alien had waived appeal of the immigration judge's decision, the alien's failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 CFR 1241.1(f), except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien:
(i) Departs the United States no later than 25 days following the failure to post bond;
(ii) Provides to DHS such evidence of his or her departure as the ICE Field Office Director may require; and
(iii) Provides evidence DHS deems sufficient that he or she remains outside of the United States.
(d) Alternate order of removal. Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.
(e) Periods of time. If voluntary departure is granted prior to the completion of removal proceedings, the immigration judge may grant a period not to exceed 120 days. If voluntary departure is granted at the conclusion of proceedings, the immigration judge may grant a period not to exceed 60 days.
(1) Motion to reopen or reconsider filed during the voluntary departure period. The filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the

period allowed for voluntary departure under this section. See paragraphs (b)(3)(iii) and (c)(3)(ii) of this section. If the alien files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure.

(2) Motion to reopen or reconsider filed after the expiration of the period allowed for voluntary departure. The filing of a motion to reopen or a motion to reconsider after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure under this section. The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect, as a consequence of the alien's prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.

(f) Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act. The filing of a motion to reopen or reconsider does not toll, stay, or extend the period allowed for voluntary departure. The filing of a petition for review has the effect of automatically terminating the grant of voluntary departure, and accordingly also does not toll, stay, or extend the period allowed for voluntary departure.

(g) Administrative Appeals. No appeal shall lie regarding the length of a period of voluntary departure (as distinguished from issues of whether to grant voluntary departure).

(h) Reinstatement of voluntary departure. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.

(i) Effect of filing a petition for review. If, prior to departing the United States, the alien files a petition for review pursuant to section 242 of the Act (8 U.S.C. 1252)

or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of his or her departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the filing of the petition for review, the alien will be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply to an alien who files a petition for review, and who remains in the United States while the petition for review is pending.

(j) Penalty for failure to depart. There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at $3,000 unless the immigration judge specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge shall advise the alien of the amount of this civil penalty at the time of granting voluntary departure.

45 C.F.R. § 411.93

Ongoing medical and mental health care for sexual abuse and sexual harassment victims and abusers

(a) Care provider facilities must offer ongoing medical and mental health evaluations and treatment to all UCs who are victimized by sexual abuse or sexual harassment while in ORR care and custody.
(b) The evaluation and treatment of such victims must include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to or placement in other care provider facilities or their release from ORR care and custody.
(c) The care provider facility must provide victims with medical and mental health services consistent with the community level of care.
(d) Care provider facilities must ensure that female UC victims of sexual abuse by a male abuser while in ORR care and custody are offered pregnancy tests, as necessary. If pregnancy results from an instance of sexual abuse, care provider facility must ensure that the victim receives timely and comprehensive information about all lawful pregnancy-related medical services and timely access to all lawful pregnancy-related medical services. In order for UCs to make informed decisions regarding medical services, including, as appropriate, medical services provided under § 411.92, care provider facilities should engage the UC in discussions with family members or attorneys of record in accordance with § 411.55 to the extent practicable and follow appropriate State laws regarding the age of consent for medical procedures.
(e) Care provider facilities must ensure that UC victims of sexual abuse that occurred while in ORR care and custody are offered tests for sexually transmitted infections as medically appropriate.
(f) Care provider facilities must ensure that UC victims are provided access to treatment services regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.
(g) The care provider facility must attempt to conduct a mental health evaluation of all known UC–on–UC abusers within seventy-two (72) hours of learning of such abuse and/or abuse history and offer treatment when deemed appropriate by mental health practitioners.

28 C.F.R. § 551.23

Bureau of Prison's Abortion Policy

(a) The inmate has the responsibility to decide either to have an abortion or to bear the child.
(b) The Warden shall offer to provide each pregnant inmate with medical, religious, and social counseling to aid her in making the decision whether to carry the pregnancy to full term or to have an elective abortion. If an inmate chooses to have an abortion, she shall sign a statement to that effect. The inmate shall sign a written statement acknowledging that she has been provided the opportunity for the counseling and information called for in this policy.
(c) Upon receipt of the inmate's written statements required by paragraph (b) of this section, ordinarily submitted through the unit manager, the Clinical Director shall arrange for an abortion to take place.