UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated; JANE ROE on behalf of herself and others similarly situated; and JANE POE,	)	
Plaintiffs,	)	No. 17-cv-02122-TSC
v.	)	
ERIC D. HARGAN, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL BRIEFING FOR MOTION TO SEAL

Pursuant to Local Rule 5.1(h), Defendants respectfully request the Court maintain the seal on the lodged exhibit filed under ECF No. 72, and to file a version document with redactions based on deliberative process privilege. Defendants are attaching a proposed redacted version of that document that is otherwise consistent with their Motion to Seal. *See* Attachment A.

LEGAL BACKGROUND

Parts of the document Plaintiffs seek to publicly file are predecisional and deliberative, and are therefore protected from such disclosure. *See Judicial Watch, Inc. v. United States DOD*, 847 F.3d 735, 739 (D.C. Cir. 2017). The deliberative process privilege is rooted in "the commonsense notion that agencies craft better rules when their employees can spell out in writing the pitfalls as well as strengths of policy options, coupled with the understanding that employees would be chilled from such rigorous deliberation if they feared it might become public." *Id.*

"Documents are predecisional if they are generated before the adoption of an agency policy, and deliberative if they reflect the give-and-take of the consultative process." *Id.* (internal

quotation marks and citations omitted). "Predecisional documents are those 'prepared in order to assist an agency decisionmaker in arriving at his decision[.]'" *Solers v. IRS*, 827 F.3d 323, 329 (4h Cir. 2016) (*quoting Renegotiation Bd. v. Grunman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). A policy document is covered under the deliberative process privilege unless "an agency adopts the document as its own[,]" which requires "an express choice to use a deliberative document as a source of agency guidance." *Judicial Watch, Inc.*, 847 F.3d at 739. "[A]n agency does not adopt or incorporate by reference a pre-decisional memorandum where it only adopts the memorandum's conclusions." *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005). Finally, "[t]he deliberative process privilege does not shield . . . material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

ARGUMENT

Defendants do not seek to seal the entire document. Upon further review, Defendants agree with Plaintiffs that the Office of Refugee Resettlement (ORR) Director's Note to File on pages five through eight of the document constitute the final adjudication of the decision-maker, and thus, does not fall within the exemption. Defendants also agree that the signatures reflecting the Director's decision constitute the Director's final decision.

Nevertheless, Defendants continue to claim that the Deputy Director's recommendation on pages one through four—up until the signatures of the Director—reflect precisely the kind of "give-and take of the consultative process" that is exempt from public disclosure. *Judicial Watch, Inc.*, 847 F.3d at 739. ORR's Deputy Director made an internal recommendation based on an assessment of multiple factors. That recommendation was made to ORR's Director, who after

consideration, made a final determination. The Deputy Director's recommendation is therefore by definition the kind of "[p]redecisional document[] prepared in order to assist an agency decisionmaker [the ORR Director] in arriving at his decision" that is immune from public disclosure. *Solers*, 827 F.3d at 329.

Moreover, the facts contained in the Deputy Director's recommendation cannot be separated out and publicly disclosed because they are "inextricably intertwined" with ORR's internal deliberations. *City of Virginia Beach*, 995 F.2d at 1253. It is well-established that factual information may be protected "if the manner of selecting or presenting those facts would reveal the deliberative process." *Hamilton Securities Group Inc. v. Department of Housing and Urban Development*, 106 F. Supp. 2d 23, 33 (D.D.C. 2000); *see Cobell v. Norton*, 213 F.R.D. 1, 6 (D.D.C. 2003) (citing several D.C. Circuit cases). In the landmark case of *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63 (D.C. Cir. 1974), for example, the D.C. Circuit held that mere summaries of evidence developed at a hearing fell within Exemption Five of FOIA on deliberative process privilege grounds. There, subordinate agency officials prepared a summary of the evidence from an adjudication at the behest of the higher-ranking official. *Id.* at 67-68. The higher-ranking official then went on to publish his own lengthy decision. *Id.* The D.C. Circuit observed the subordinates "here were exercising their judgment as to what record evidence would be important to the Administrator in making his decision. Even if they cited portions of the evidence verbatim, the [subordinates] were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the impertinent is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection." *Id.* at 68. The Court compared this use of subordinates to prepare a summary to "winnow down the evidence [] as similar in many

ways to a judge's use of his law clerk to sift through the report of a special master or other lengthy materials in the record." *Id.* And it concluded that "[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself. " *Id.* This Court continues to apply *Montrose* to similar cases to this day. *See Leopold v. CIA*, 89 F. Supp. 3d 12, 22 (D.D.C. 2015) (allowing agency to withhold internal study despite inclusion of factual material because they "reflected a point of view—namely, what agency personnel thought important enough to bring to senior officials' attention in light of their understanding of the policy issues").

The Court should continue to apply *Montrose* in this case. Here, the Deputy Director's selection of facts are directly tied to his ultimate recommendation to the Director. He "select[ed]" which facts to present and how to "present" them based on his "point of view" as to what he "thought important enough to bring to the" Director's attention. The Director's memorandum sets forth his own view of the facts and other considerations. The facts in the Deputy's memorandum therefore cannot be parsed from his recommendation. For these reasons, the first four pages of the recommendation by the ORR Deputy Director—up to the signatures of the Director—should be redacted from public disclosure under the deliberative process privilege.

CONCLUSION

Defendants respectfully move to maintain the seal on the lodged exhibit filed under ECF No. 72 based on deliberative process privilege, and to file the proposed redacted version of that document as attached.

DATED: December 21, 2017

Respectfully submitted,

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ADMINISTRATION FOR CHILDREN & FAMILIES
Office of Refugee Resettlement | 330 C Street, S.W., Washington, DC 20201
www.acf.hhs.gov/programs/orr

TO: E. Scott Lloyd
Director
Office of Refugee Resettlement

FROM: Jonathan White
Deputy Director for Children's Programs
Office of Refugee Resettlement

DATE: December 6, 2017

SUBJECT: Use of Federal Funds to Terminate a Pregnancy for [redacted] – DECISION

[redacted]

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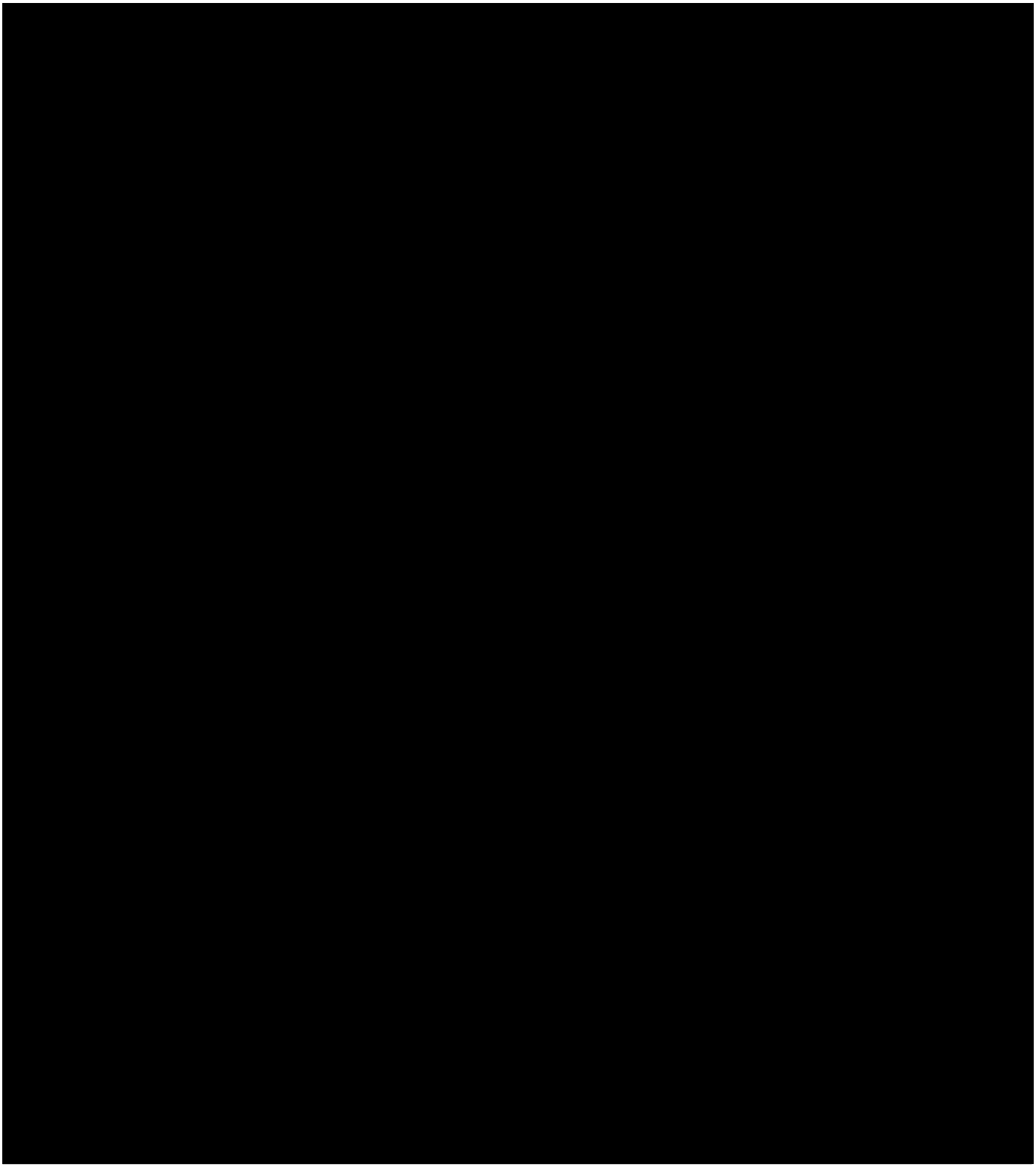

ADMINISTRATION FOR CHILDREN & FAMILIES
Office of Refugee Resettlement | 330 C Street, S.W., Washington, DC 20201
www.acf.hhs.gov/programs/orr

[redacted]

DECISION

I authorize pregnancy termination for this minor.

Approved _____ Disapproved E. Scott Lloyd Date 12/16/17

I approve the use of Federal funds to pay for a pregnancy termination for this minor. Federal funds may also be used to pay for transportation, staff time, and after-care as part of the normal course of business for any minor receiving medical care in ORR custody.

ADMINISTRATION FOR CHILDREN & FAMILIES
Office of Refugee Resettlement | 330 C Street, S.W., Washington, DC 20201
www.acf.hhs.gov/programs/orr

Approved _____ Disapproved E. Scott Lloyd 12/16/17 Date _____

Attachments: SIR
OB Clinical Notes

ADMINISTRATION FOR CHILDREN & FAMILIES
Office of Refugee Resettlement | 330 C Street, S.W., Washington, DC 20201
www.acf.hhs.gov/programs/orr

NOTE TO FILE

December 17, 2017

Scott Lloyd, Director

Background

We have in our custody an unaccompanied alien child (UAC) who is [redacted] years old and who reported that she was sexually assaulted in her home country. Based on the timeframe she provided for the sexual assault, we have reason to believe that this assault resulted in her current pregnancy. While she also reported that she had a boyfriend in her home country with whom she had intercourse, the UAC also now believes she is pregnant with the child of her attacker.

Several weeks after the assault, she made the journey to the United States where she attempted to cross the border illegally, but was apprehended at the border, and is now in our care. She originally requested an abortion upon confirmation that she was pregnant, but rescinded the request after she reported that her mother, and the [redacted] who was to serve as her sponsor, threatened to "beat" her if she did so. She renewed her request after a few days, although language difficulties and other circumstances made it unclear that she knew what she was requesting. She has had an information session that imparted information about fetal development and the abortion procedure she requests, and we can now say with a reasonable amount of certainty that she has an understanding of both. She still desires an abortion, and has on at least one occasion threatened to harm herself if she does not obtain it. Shelter staff has taken appropriate measures to mitigate that risk, and she has since made at least one statement denying that she is a threat to herself. There is no indication that the pregnancy threatens her physical health in any way.

At nearly 22 weeks, the child has at least a fighting chance at survival if born.[1] The most likely method of abortion in this instance is Dilation and Evacuation abortion.[2] This particular form of abortion is one that even many abortionists find troublesome.[3] [4]

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[1] *See, e.g.* Jacqueline Howard, *Born Before 22 Weeks 'Most Premature Baby' is Now Thriving*, CNN.COM at http://www.cnn.com/2017/11/08/health/premature-baby-21-weeks-survivor-profile/index.html.

[2] Supreme Court Justice Anthony Kennedy, writing for a majority of justices, described Dilation and Evacuation abortion in the following way:

> A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. […] After sufficient dilation, a doctor inserts grasping forceps through the woman's cervix and into the uterus to grab a living fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn apart limb by limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. The process of dismembering the fetus continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Gonzales v. Carhart, 550 U.S. 124 at 135-36 (2007) (citations omitted); *see also Stenberg v. Carhart*, 530 U.S. 914 958-59 (2000) (Kennedy, A., dissenting).

[3] *See, e.g.,* Warren M. Hern, M.D., and Billie Corrigan, R.N., "What About Us? Staff Reactions to the D&E Procedure," paper presented at the Annual Meeting of the Association of Planned Parenthood Physicians, San Diego, California (October 26, 1978); George Flesh, M.D., "Why I No Longer Do Abortions: Tearing a second-trimester fetus apart simply at a mother's request is depravity that should not be permitted", Los Angeles Times (Perspective on Human Life), September 12, 1991, at http://articles.latimes.com/1991-09-12/ local/me-2729_1_human-life/2; Vincent Argent, M.D., "Why this abortion doctor wants to see time limits reduced to 16 weeks," The Telegraph, May 28, 2008, at http://www.telegraph.co.uk/news/uknews/1976846/Why-thisabortion-doctor-wants-to-see-time-limits-reduced-to-16-weeks.html.

[4] Dr. Lisa Harris, an abortionist and Assistant Professor in the Departments of Obstetrics and Gynecology and Women's Studies at the University of Michigan, captured well the human dimension of performing late-term abortions in a piece she wrote in 2008. After describing the phenomenon of aborting an 18week-old fetus while she was 18 weeks pregnant herself, admits that "there is violence in abortion, especially in second trimester procedures. Certain moments make this particularly apparent." She goes on to describe aborting a 23 week-old fetus on one floor, and then rushing to the aid of a baby born prematurely at 23 weeks, and puzzling over how it was legal for her to kill the first, but it would be a crime to kill the second. *See*, Lisa H. Harris, "Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse," 16 Reproductive Health Matters, 74-81 (2008).

To obtain the abortion, program staff would have to accompany her before, during, and after the procedure, as our statutory authorities forbid us from releasing a UAC on her own recognizance.[5]

At least one senior program staff person recommends that the program assist her in obtaining the abortion. The program awaits my authorization for this assistance to occur, which I have denied in a separate document. I am convinced that assisting with an abortion in this case is not in her best interest.

Analysis

Sexual assault is among the gravest offenses in the catalogue of offenses man can commit against his fellow man, or in this case, a teenaged young woman. Every compassionate society, including our own, seeks to provide protection against such brutality, to prosecute it vigorously, and to provide aid and comfort to its victims. The UAC program has no prosecutorial authority, but is very strong both in protecting UACs from rape and also providing comfort to those who have the tragic misfortune of experiencing such an offense against their person and their dignity.

Over and above the trauma of the assault itself, a pregnancy that results from a rape is itself a continuous reminder of the attack. Women who experience pregnancy from rape must wrestle with the phenomenon of being the mother of a child whose other parent brutally terrorized and did violence to her. Certainly, it is understandable that a woman who is pregnant from the vile actions of a criminal would want to terminate her pregnancy. I do not, and am in no position to, judge anyone who has taken such an action or supported another in doing so.

But I cannot authorize our program to participate in the abortion requested here, even in this most difficult case. Here, where the pregnancy is advanced to such a late stage, we have in stark relief the reality that abortion entails, as Dr. Harris candidly admitted, violence that has the ultimate destruction of another human being as its goal.

Even supposing it was possible to justify abortion in this context, abortion does not here cure the reality that she is the victim of an assault. It also carries with it significant risk of further complicating the matter. It is possible, and perhaps likely, that this young woman would go on to experience an abortion as an additional trauma on top of the trauma she experiences as a result of her sexual assault. Although formal research on this matter appears to be sparse, those who have worked with women who have experienced abortion have compiled a catalogue of anecdotal evidence, impossible to ignore, that shows that many women go on to experience it as a devastating trauma, even in the instance of rape.[6] If the young woman was to go on to regret her abortion and experience it as a trauma, ORR will

[5] Homeland Security Act of 2002, 6 U.S.C. § 462 (b)(2)(B).

[6] *See*, *e.g.*, *Gonzales*, 550 U.S. at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."); *See also,* Hope After Abortion, at http://hopeafterabortion.com. (Brenda's Story: "Nothing was touching it — nothing was helping me put down the bottle and take control of my life. I sought mental health treatment for the trauma I experienced around the rape and the abortion, but I was still suffering, and I was still

have had a hand in causing that trauma, and I am unwilling to put this young woman or ORR in that position.

I am mindful that abortion is offered by some as a solution to a rape. In fact, some would suggest that, by declining to assist in the abortion we are in some way engaging in a form of violence against the mother, as in the notion that ORR is forcing her to carry her pregnancy to term.

I disagree. Implicit here are the dubious notions that it is possible to cure violence with further violence, and that the destruction of an unborn child's life can in some instances be acceptable as a means to an end. To decline to assist in an abortion here is to decline to participate in violence against an innocent life. She remains pregnant, but this is not the intent of our actions. Moral and criminal responsibility for the pregnancy lies with the attacker, and no one else.

Others might suggest that abortion is justified as a form of self-defense in this instance, but this gets it wrong again. The child—the one who is destroyed—is not an aggressor. The aggressor, again, was the rapist.

At bottom, this is a question of what is in the interest of the young woman and her child. How could abortion be in their best interest where other options are available, and where the child might even survive outside the womb at this stage of pregnancy? Here there is no medical reason for abortion, it will not undo or erase the memory of the violence committed against her, and it may further traumatize her. I conclude it is not her interest.

Regarding any further legal questions, I defer to the various attorneys representing our position in this and related litigation that this is a legally permissible path. There is nothing in the law or in the Constitution that requires this program to participate in providing abortion for UAC, and the Department of Justice has argued that ORR does not impose an undue burden by declining to authorize abortions that are not medically indicated.

Conclusion

The Office of Refugee Resettlement serves a large number of persons who have experienced some sort of violence. Refuge is the basis of our name and is at the core of what we provide, and we provide this to all the minors in our care, including their unborn children, every day. In this request, we are being asked to participate in killing a human being in our care. I cannot direct the program to proceed in this manner. We cannot be a place of refuge while we are at the same time a place of violence. We have to choose, and we ought to choose protect life rather than to destroy it.

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drinking. It constantly weighed on my mind that I was in a state of mortal sin — I had killed my baby.")(Georgia's Story: "I was pregnant from a date rape…. Before I had time to think about what I wanted, the abortion was over…Not a day goes by that the abortion doesn't cross my mind. It is a constant struggle trying to overcome my guilt and depression, even knowing I have been forgiven. I dread the day when I have to come face to face with my little child and explain to her why mamma took her life. But I also think I am a softer, more caring person than I might have been.")