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# Obstruction of Reproductive Justice: Office of Refugee Resettlement's Unconstitutional Abortion Policy for Minors

Laura E. Winterberger

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# Obstruction of Reproductive Justice: Office of Refugee Resettlement’s Unconstitutional Abortion Policy for Minors

Laura E. Winterberger\*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	490
II.	REPRODUCTIVE RIGHTS AND ACCESS TO ABORTION.....	493
	A. <i>Reproductive Autonomy</i> .....	494
	B. <i>Access to Abortion in Government Custody</i> .....	496
III.	MEDICAL RIGHTS IN THE CONTEXT OF IMMIGRATION.....	498
	A. <i>Immigration Framework for Constitutionally Protected Rights</i> .....	499
	B. <i>Government Treatment of Unaccompanied Minors</i> .....	502
	C. <i>Human Right to Health</i> .....	503
IV.	ORR’S NON-FACILITATION POLICY IMPOSES AN UNDUE BURDEN ON DETAINED MINORS’ RIGHT TO ACCESS ABORTION.....	504
	A. <i>Women in Federal Custody</i> .....	504
	B. <i>ORR Policy</i> .....	505
V.	A SIMPLE SOLUTION: PROVIDING TRANSPORTATION FOR UNACCOMPANIED MINORS TO ABORTION FACILITIES.....	509
VI.	CONCLUSION.....	511

*“No one should be shamed for making the right decision for themselves. I would not tell any other girl in my situation what they should do. That decision is hers and hers alone. . . . This is my life, my decision. I want a better future. I want justice.”*

*—Jane Doe, denied her right to choose an abortion while in federal immigration custody<sup>1</sup>*

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1. *After a Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, ACLU (Oct.

## I. INTRODUCTION

Seeking a better life, 17-year-old Jane Doe arrived at the Texas border after fleeing from her abusive parents<sup>2</sup> in her home country in Central America.<sup>3</sup> The United States Customs and Border Protection (CBP) detained her and sent her to a detention shelter overseen by the Office of Refugee Resettlement (ORR).<sup>4</sup> Following a routine medical examination, Jane Doe was informed she was pregnant.<sup>5</sup> She made the considered and conscious decision to have an abortion and made her wishes known to staff.<sup>6</sup> Jane Doe not only obtained a court order declaring her legally competent to make such a decision for herself (required for minors under Texas law in lieu of parental consent), but she also managed to raise the funds to pay for an abortion and transportation to a clinic.<sup>7</sup> In other words, ORR simply needed to consent to her temporary release so that she could obtain an abortion from an outside facility.<sup>8</sup> Nevertheless, ORR refused to facilitate her transportation to an abortion clinic and instead forced her to attend religious, pro-life counseling.<sup>9</sup>

With the help of the American Civil Liberties Union (ACLU), Jane Doe took her case to the D.C. District Court and finally won a temporary restraining order against ORR officials.<sup>10</sup> Following an appeal by the government, the D.C. Circuit Court ordered ORR to transport Jane Doe to an abortion clinic or allow her to be

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25, 2017), <https://www.aclu.org/news/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion> (on file with *The University of the Pacific Law Review*).

2. Brigitte Amiri, *Access to Abortion for Young Immigrants in Government Custody*, ACLU (Apr. 3, 2018, 9:30 AM), <https://www.aclu.org/blog/reproductive-freedom/abortion/access-abortion-young-immigrants-government>

-custody (on file with *The University of the Pacific Law Review*) (“Jane came to this country . . . without her parents, who abused her in her home country. . .”).

3. Bill Chappell, *‘Jane Doe’ Immigrant Has Abortion in Texas, After Battle with Trump Administration*, NPR (Oct. 25, 2017, 11:24 AM), <https://www.npr.org/sections/thetwo-way/2017/10/25/560013894/jane-doe-has-abortion-in-texas-after-battle-with-trump-administration> (on file with *The University of the Pacific Law Review*); Mark Joseph Stern, *Undocumented Minor Jane Doe Finally Obtains Abortion: “This Is My Life, My Decision. I Want a Better Future,”* THE SLATEST (Oct. 25, 2017, 11:52 AM), [http://www.slate.com/blogs/the\\_slatest/2017/10/25/jane\\_doe\\_undocumented\\_minor\\_obtains\\_abortion.html](http://www.slate.com/blogs/the_slatest/2017/10/25/jane_doe_undocumented_minor_obtains_abortion.html) (on file with *The University of the Pacific Law Review*).

4. Renuka Rayasam, *Trump Official Halts Abortions Among Undocumented, Pregnant Teens*, POLITICO (Oct. 16, 2017, 7:05 PM), <https://www.politico.com/story/2017/10/16/undocumented-pregnant-girl-trump-abortion-texas-243844> (on file with *The University of the Pacific Law Review*).

5. Application for Stay Pending Appeal at 7, *Hargan v. Garza* (2017) (No. 17A655).

6. *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (Millett, J., concurring).

7. Chappell, *supra* note 3.

8. *Garza*, 874 F.3d at 736 (Millett, J., concurring).

9. Brigitte Amiri, *Jane Doe’s Ordeal Illustrates the Trump Administration’s Threat to All Women’s Reproductive Rights*, ACLU (Oct. 26, 2017, 5:30 PM), <https://www.aclu.org/blog/reproductive-freedom/abortion/jane-does-ordeal-illustrates-trump-administrations-threat-all> (on file with *The University of the Pacific Law Review*).

10. *Garza*, 874 F.3d at 736.

transported to a clinic immediately.<sup>11</sup> The decision came just in time because Texas law does not permit abortion after 20 weeks, and Jane Doe obtained her procedure when she was more than 15 weeks pregnant.<sup>12</sup> Afterward, she commented: “I made my decision and that is between me and God. Through all of this, I have never changed my mind.”<sup>13</sup>

Jane Doe is one of multiple girls affected by the new administration’s “non-facilitation” policy of refusing unaccompanied minors access to abortions.<sup>14</sup> In Fiscal Year 2017, ORR received 40,810 unaccompanied minor referrals from the Department of Homeland Security (DHS).<sup>15</sup> Girls make up nearly one third of the children in ORR custody and the majority (77%) of these minors are between fifteen and seventeen years old.<sup>16</sup>

Women in the United States have a constitutionally protected right to obtain an abortion.<sup>17</sup> This right attaches regardless of a person’s nationality, immigration status, or age.<sup>18</sup> It is, however, limited when the person seeking an abortion is a minor due to her presumably limited decision-making capacity.<sup>19</sup> The right is also limited, as many other rights are, when the person seeking an abortion is detained in government custody.<sup>20</sup> In these two realms, the government may erect certain obstacles to obtaining an abortion by balancing the person’s right to choose an abortion against parental rights or against penological interests.<sup>21</sup> Nevertheless, a woman’s right to choose abortion is a fundamental

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11. *Id.*

12. Stern, *supra* note 3.

13. *Id.*

14. Stacy Sullivan, *Jane Doe Wants an Abortion but the Government Is Hell Bent on Stopping Her*, ACLU (Oct. 19, 2017), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/jane-doe-wants-abortion-government-hell-bent> (on file with *The University of the Pacific Law Review*) (noting that the director himself, Scott Lloyd, former senior policy advisor for the anti-abortion charity Knights of Columbus, has personally visited girls to coerce them to carry their pregnancies to term); Stacy Sullivan, *Second Legal Battle Over Abortion Rights for Immigrant Teens Takes Unexpected Turns*, ACLU (Dec. 20, 2017, 12:45 PM), <https://www.aclu.org/blog/reproductive-freedom/abortion/second-legal-battle-over-abortion-rights-immigrant-teens-takes> (on file with *The University of the Pacific Law Review*).

15. OFFICE OF REFUGEE RESETTLEMENT: UNACCOMPANIED ALIEN CHILDREN PROGRAM FACTS AND DATA (Jan. 22, 2018), available at <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (on file with *The University of the Pacific Law Review*).

16. *Id.*

17. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

18. Alexandria Walden, *Abortion Rights for ICE Detainees: Evaluating Constitutional Challenges to Restrictions on the Right to Abortion for Women in ICE Detention*, 43 U.S.F. L. REV. 979, 982, 990 (2009); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”)

19. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979); *Planned Parenthood of Cent. Mo.*, 428 U.S. at 74.

20. *Doe v. Arpaio*, 150 P.3d 1258, 1259 (Ariz. App. 2007).

21. *Bellotti*, 443 U.S. at 634; *Arpaio*, 150 P.3d at 1259.

right.<sup>22</sup> The factor of age and the circumstances of detention may limit the right, but they do not eliminate it.<sup>23</sup>

Courts have recognized that detained non-citizens have a Fifth Amendment Due Process right to receive adequate medical care.<sup>24</sup> Minors who are “civilly” detained in immigration facilities are similarly situated to women and girls, both citizen and non-citizen, who are held in state pre-trial criminal detention or held by the Federal Bureau of Prisons.<sup>25</sup> As such, minors detained in immigration facilities are entitled to the same access to medical care and abortion.<sup>26</sup> Moreover, adult women in the custody of Immigration and Customs Enforcement (ICE) are provided transportation to an abortion facility as a matter of policy.<sup>27</sup> When a detained, unaccompanied minor complies with state abortion law, the detention facility should permit her to leave to obtain an abortion, just as all incarcerated women are allowed to do, regardless of immigration status or age.<sup>28</sup>

This Comment argues that girls in immigration detention facilities are entitled to the same constitutional right to an abortion that other females in the United States have.<sup>29</sup> This right is meaningless when a person’s access to an abortion is unduly burdened.<sup>30</sup> Therefore, minors who are in immigration custody should be provided the same access to abortion as women and juveniles detained in federal prisons.<sup>31</sup> Every female in the United States has a right to an abortion, regardless of her age or immigration status.<sup>32</sup>

Part II provides background on reproductive rights and abortion access in the

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22. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

23. *Bellotti*, 443 U.S. at 642; *Arpaio*, 150 P.3d at 1259.

24. *Vaz v. Skinner*, 634 Fed. App’x 778, 781 (11th Cir. 2015) (acknowledging petitioner’s ability to seek redress for inadequate medical care while in immigration custody, though ultimately affirming the denial of the petition); *Cesar v. Achim*, 542 F. Supp. 2d 897 (E.D. Wis. 2008).

25. *Walden*, *supra* note 18, at 1012; *Dahlan v. Dept. of Homeland Sec.*, 215 Fed. App’x 97, 100 (3d Cir. 2007) (asserting that the “District Court properly analyzed Dahlan’s situation as an immigration detainee to be comparable to that of a pretrial detainee” and that “[a]bsent a showing of express intent to punish, the determination [of a due process violation] will normally turn on whether the conditions have an alternative purpose and whether the conditions appear excessive in relation to that purpose.”).

26. *Id.*; *Arpaio*, 150 P.3d at 1259 (holding that “requiring a court order to transport an inmate to receive an abortion [does not] serve[] a legitimate penological interest.”).

27. 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (REV. 2016), available at <https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf> (on file with *The University of the Pacific Law Review*).

28. *See infra* Part IV.

29. *See infra* Part III.

30. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (“We conclude that . . . [e]ach [contested provision] places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution.”) (internal citations omitted).

31. *See infra* Parts IV–VI.

32. *See infra* Parts II–III.

United States.<sup>33</sup> Part III reviews the framework for determining the constitutional rights of non-citizens.<sup>34</sup> Part IV discusses the changes to the DHS policy of providing detained minors access to abortion in addition to recent lawsuits challenging this policy, and explains why the new non-facilitation policy poses an undue burden to unaccompanied minors' right to an abortion.<sup>35</sup>

Part V addresses the concerns that allowing detained non-citizens to have an abortion will prompt a wave of pregnant migrant women seeking abortion asylum at the border and will further burden detention facilities.<sup>36</sup> Part VI concludes that detained, non-citizen women (adults and minors) have a fundamental right to abortion before viability.<sup>37</sup> A policy that imposes undue burdens on that right, such as requiring parental consent instead of a court order, mandating religious-based anti-abortion counseling, or refusing to transport a detainee to an abortion facility, is unconstitutional.<sup>38</sup>

## II. REPRODUCTIVE RIGHTS AND ACCESS TO ABORTION

Women and girls in the United States have a constitutional right to decide whether or not to terminate a pregnancy.<sup>39</sup> This right stems from the unenumerated right to personal privacy, which the Supreme Court recognized in *Roe v. Wade*.<sup>40</sup> Since *Roe*, lawmakers have ceaselessly chipped away at women's reproductive autonomy, erecting creative obstacles to abortion access.<sup>41</sup> Subsection A discusses reproductive autonomy as a privacy right,<sup>42</sup> while

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33. *See infra* Part II.

34. *See infra* Part III.

35. *See infra* Part IV.

36. *See infra* Part V.

37. *See infra* Part VI.

38. *See infra* Part VI.

39. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("It must be stated at the outset and with clarity that [one of] *Roe*'s essential holding[s], [which] we reaffirm . . . is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."); *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) ("The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.").

40. *Roe*, 410 U.S. at 152.

41. *Bellotti*, 443 U.S. at 651 (examining a Massachusetts statute requiring a pregnant minor first to notify her parents, then if neither parent consents, allow her to seek a judicial authorization, which could be withheld even if she were found to be mature and competent); *Planned Parenthood of S.E. Pa.*, 505 U.S. at 844 (examining a Pennsylvania law requiring, among other things, that women be provided with certain information at least 24 hours before they could receive an abortion and that married women must provide spousal notification).

42. *See infra* Part II.A.

Subsection B considers impediments to accessing abortion specific to minors and females held in government custody.<sup>43</sup>

### A. Reproductive Autonomy

Reproductive autonomy has eluded women in the United States since the first wave of immigration to America.<sup>44</sup> Although in colonial America abortion was legal as a way of restoring the regular menstrual cycle, women who bore children out of wedlock were punished with “fines, whipping, and public shaming,”<sup>45</sup> thus the choice to have an abortion was not entirely their own.<sup>46</sup> At the turn of the 19th century, with a surge in immigration from Eastern European countries, eugenicists encouraged the reproduction of “fit” women—defined as white, native-born, middle class, and without mental disabilities—while pushing through legislation to forcibly sterilize women who were “unfit.”<sup>47</sup> As recently as 2010, California sterilized female inmates without their full and informed consent after they had given birth.<sup>48</sup>

Institutionalized women are particularly vulnerable to usurpation of their reproductive autonomy, as are minors.<sup>49</sup> Since 1973, the Supreme Court has repeatedly affirmed a woman’s right to abortion, but it has also upheld increasingly severe restrictions on the right to choose.<sup>50</sup> The medical decision-making rights of minors are limited by the requirement of parental consent for many medical procedures.<sup>51</sup>

In *Bellotti v. Baird*, the Court distanced itself from the medical reasoning that drove the decision in *Roe v. Wade* a mere six years earlier, focusing instead on

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43. See *infra* Part II.B.

44. N.E.H. Hull & Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* 15 (2d ed. 2010) (describing the history of abortion law and practice during colonial times); *Roe*, 410 U.S. at 132–42.

45. Hull & Hoffer, *supra* note 44, at 15.

46. *Id.*

47. REBECCA M. KLUCHIN & JANET GOLDEN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980 2 (2009).

48. Abby Ohlheiser, *California Prisons Were Illegally Sterilizing Female Inmates*, THE ATLANTIC (Jul. 7, 2013), <https://www.theatlantic.com/national/archive/2013/07/california-prisons-were-illegally-sterilizing-female-inmates/313591/> (on file with *The University of the Pacific Law Review*).

49. KLUCHIN & GOLDEN, *supra* note 47, at 2, 7; J. SHOSHANNA EHRLICH, WHO DECIDES?: THE ABORTION RIGHTS OF TEENS 33 (2006) [hereinafter WHO DECIDES?].

50. *Roe v. Wade*, 410 U.S. 113, 153 (1973); see generally *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 52 (1976); *Maher v. Roe*, 432 U.S. 464, 475–76 (1977); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989); *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 886–87, 899 (1992) (reaffirming the central holding of *Roe*, while upholding a “particularly burdensome” 24-hour waiting period and a parental consent requirement with an adequate judicial bypass procedure); *Stenberg v. Carhart*, 530 U.S. 914, 946–47 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

51. WHO DECIDES?, *supra* note 49, at 33.

the Court's jurisprudence surrounding children's constitutional rights.<sup>52</sup> *Bellotti* concluded that a Massachusetts statute requiring parental consent to an abortion for mothers under 18 years of age was unconstitutional because it did not provide an alternative procedure in lieu of parental consent.<sup>53</sup> *Roe* relied on the protected relationship between doctors and patients to find a fundamental privacy right that the court did not limit by age or capacity.<sup>54</sup> *Bellotti* eschewed the traditional framework of dealing with children's medical decisions, which had recognized various exceptions to the parental consent requirement that transferred decision-making authority to the minor or a third party.<sup>55</sup> Instead of applying that framework to the abortion question, the Court ignored teens' decision-making capacity.<sup>56</sup> The Court gave preference to the parent's interest in governing the life of his or her daughter,<sup>57</sup> as it had done before, recognizing the fundamental right of privacy concerning parents and childrearing.<sup>58</sup> The Court also recognized that requiring girls to obtain parental consent would deter many of them from exercising their choice and declared there must be a "judicial bypass" option allowing girls to seek declaration of their decision-making capacity by a judge—without having to notify their parents.<sup>59</sup>

The Court's essential finding was that the law cannot presume that a minor who wants to have an abortion has the decision-making capacity to consent to such a procedure.<sup>60</sup> Conversely, this holding stands for the proposition that a minor who wants to carry her pregnancy to term is presumed to have the decision-making capacity to consent to giving birth and probably motherhood.<sup>61</sup> Thus, all minors in the United States, regardless of immigration status, face the contradictory assumption that they are too immature to decide to terminate a pregnancy, but mature enough to decide to give birth and become a parent.<sup>62</sup>

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52. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); WHO DECIDES?, *supra* note 49, at 49–50.

53. *Bellotti*, 443 U.S. at 643.

54. *Roe*, 410 U.S. at 163–66; J. Shoshanna Ehrlich, *Journey Through the Courts: Minors, Abortion and the Quest for Reproductive Fairness*, 10 YALE J. L. & FEMINISM 1, 3 (1998) (“[T]he *Roe* Court spoke in terms of all women—it drew no distinction based upon age or capacity.”).

55. WHO DECIDES?, *supra* note 49, at 45, 62.

56. *Id.* at 59.

57. *Bellotti*, 443 U.S. at 637; WHO DECIDES?, *supra* note 49, at 46, 49–50.

58. *Wis. v. Yoder*, 406 U.S. 205, 242–46 (1972) (Douglas, J., dissenting) (“It is the future of the student, not the future of the parents, that is imperiled by today’s decision. . . . It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.”).

59. *Bellotti*, 443 U.S. at 647 (“[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.”); *see also* WHO DECIDES?, *supra* note 49, at 49–50.

60. *Bellotti*, 443 U.S. at 643–44; WHO DECIDES?, *supra* note 49, at 63–66.

61. WHO DECIDES?, *supra* note 49, at 63–66.

62. *Cf. id.*



*B. Access to Abortion in Government Custody*

ORR is applying the same illogical restriction on Jane Doe; she is at once too young to decide to have an abortion, yet sufficiently mature to carry her pregnancy to term and be a mother.<sup>63</sup> Jane Doe is not the only target of the new administration's abortion policy for unaccompanied minors in federal custody.<sup>64</sup> Children who were fleeing violence and gang recruitment in Central America overwhelmed the immigration system in 2014, and they have continued to arrive at the border seeking refuge.<sup>65</sup> During the first quarter of 2017, "at least 113,828 immigrants were locked up in 180 different facilities nationwide—a 10 percent increase over that period in 2016."<sup>66</sup>

Many of the women who flee violence in their home countries have experienced sexual abuse at home or during their long journey to the United States.<sup>67</sup> Unfortunately, the sexual assault does not stop once they arrive and many are abused either by their fellow-detainees or by immigration officers who are supposed to protect them.<sup>68</sup> The government's own inadequate supervision and medical treatment of these women may be the very cause of their unintended pregnancy, resulting in the need for an abortion.<sup>69</sup>

There is no direct precedent concerning a non-citizen minor's right to adequate health care while in immigration custody.<sup>70</sup> However, circuit courts have found that in pretrial detention, while an individual is not protected by the

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63. Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 5, *Garza v. Hargan* (Oct. 13, 2017) (No. 1:17-cv-02122-TSC) [hereinafter Plaintiff's Memorandum].

64. Amiri, *supra* note 9; Lise Olsen, *Private Prisons Boom in Texas and Across America Under Trump's Immigration Crackdown*, HOUSTON CHRON. (Aug. 19, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Private-prisons-boom-in-Texas-and-across-America-11944652.php> (on file with *The University of the Pacific Law Review*).

65. Olsen, *supra* note 64.

66. *Id.*

67. U.S. IMMIGRATION AND CUSTOMS ENF'T ADVISORY COMM. ON FAM. RESIDENTIAL CTRS., REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 116 (Oct. 7, 2016), available at <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf> (on file with *The University of the Pacific Law Review*); Sarah Stillman, *When Deportation Is a Death Sentence*, THE NEW YORKER (Jan. 15, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> (on file with *The University of the Pacific Law Review*).

68. *Sexual Abuse in Immigration Detention*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/sexual-abuse-immigration-detention-0> (last visited Jan. 30, 2019) (on file with *The University of the Pacific Law Review*); *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, HUMAN RIGHTS WATCH (Mar. 17, 2009), <https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states> [hereinafter *Detained and Dismissed*] (on file with *The University of the Pacific Law Review*).

69. *Id.*

70. *But see* Plaintiff's Memorandum, *supra* note 63, at 3 ("The *Flores* agreement is a nationwide consent decree that requires the government to provide or arrange for, among other things, 'appropriate routine medical . . . care,' including specifically 'family planning services[] and emergency health care services.'").

Eighth Amendment because she has not been convicted and sentenced, “the due process rights of a pre-trial detainee are at least as great as the Eighth Amendment protection available to a convicted prisoner.”<sup>71</sup> Those pretrial detention rights include the right to adequate medical care.<sup>72</sup>

Although it involved neither an undocumented immigrant nor a minor, the abortion case *Doe v. Arpaio*, in which a 19-year-old inmate sought a declaratory judgment and an injunction against Maricopa County Sheriff Joe Arpaio, is nevertheless instructive.<sup>73</sup> The Sheriff, according to an unwritten County policy that prohibited the off-site transfer of inmates for elective medical procedures, refused to provide transportation for Doe to obtain a first-trimester abortion.<sup>74</sup> Jane Doe was prepared to pay for the abortion procedure itself and any related security and transportation costs, but the Sheriff demanded she produce a court order to compel the transportation.<sup>75</sup>

Because of the penological setting of the case, the Arizona Court of Appeals relied in part on the standard articulated by the United States Supreme Court in *Turner v. Safley* to ask whether the prison regulation was “reasonably related to legitimate penological interests,” which would excuse the impingement on the inmate’s constitutional right to an abortion.<sup>76</sup> The penological interests asserted were the safety and security of inmates and others, the conservation of government resources, the limitation of the County’s exposure to liability, and the concern that prison officials not violate Arizona law.<sup>77</sup> Ultimately, the court found the policy was an “exaggerated response” to the penological concerns and “not reasonably related to the County’s professed neutral objectives.”<sup>78</sup>

It may be argued that because ORR holds unaccompanied minors in detention, it is entitled to the deferential *Turner* standard.<sup>79</sup> But as the Supreme Court has repeatedly stated, immigration proceedings are civil in nature, so there

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71. *Higgins v. Corr. Med. Services of Ill., Inc.*, 178 F.3d 508, 511 (7th Cir. 1999); *Evans v. St. Lucie Cty. Jail*, 448 Fed. App’x 971, 973 (11th Cir. 2011) (“[Plaintiff’s] claims arise under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment. . . . We note, however, that ‘the standard for providing basic human needs to those incarcerated or in detention is the same under both [provisions of the Constitution].’”) (internal citations omitted).

72. *Id.*

73. 150 P.3d 1258, 1259 (Ariz. App. 2007).

74. *Id.*

75. *Id.*

76. *Id.* at 1262–63; *Turner v. Safley*, 482 U.S. 78, 89–91 (1987) (The “Turner Test” considers the following factors: “(1) whether there is a ‘valid, rational connection’ between the prison regulation and the legitimate neutral governmental objective advanced as its justification; (2) whether the inmates have an alternative means of exercising the restricted right; (3) the impact of accommodation of the right on prison resources; and (4) whether alternatives to the policy exist that would accommodate the inmates’ rights at de minimis cost to penological interests.”).

77. *Arpaio*, 150 P.3d at 1263.

78. *Id.* at 1267.

79. *Walden*, *supra* note 18, at 995.

is no need to apply a penological standard to ORR's actions.<sup>80</sup> Although unaccompanied minors are similarly confined to federal detention centers, their privacy right should not be subject to "the more deferential *Turner* reasonable-relationship test" because of judicial characterization of immigration detention as civil detention, and not a form of punishment.<sup>81</sup> The concerns are magnified by the lengthy detention of undocumented immigrants and the relatively short time frame for making abortion decisions.<sup>82</sup>

ORR policy should instead be adjudged based on the *Casey* undue burden test.<sup>83</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court shrunk the zone of privacy it had previously recognized for women in *Roe v. Wade*, while simultaneously strengthening the state's interests in promoting women's health and fetal life.<sup>84</sup> The Court held that if a law burdening abortion was enacted for "a valid purpose"—i.e., a purpose "not designed to strike at the right itself"—it was not constitutionally objectionable if the law had an "incidental effect of making it more difficult or more expensive to procure an abortion."<sup>85</sup> Such a law burdening a woman's right to choose an abortion is not an unconstitutional violation of her right to due process unless it imposes an "undue burden on a woman's ability to make this decision."<sup>86</sup> The Court stated that a state regulation unconstitutionally imposes an undue burden when it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.<sup>87</sup>

### III. MEDICAL RIGHTS IN THE CONTEXT OF IMMIGRATION

Additional questions arise when the person seeking an abortion is not only under government supervision, but civilly detained by immigration authorities.<sup>88</sup>

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80. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."). *Cf. Fong Yue Ting v. U.S.*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that often times most severe and cruel.").

81. *But see* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 *UCLA L. REV.* 1346, 1352 (2014) ("[D]eportation is considered nothing more than a physical manifestation of the nation's sovereign prerogative to dictate the terms by which it admits noncitizens and allows them to remain within its borders.").

82. Plaintiff's Memorandum, *supra* note 63, at 15.

83. *See infra* Part IV.

84. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

85. *Id.* at 874.

86. *Id.*

87. *Id.*

88. *See infra* Part III.A.

Non-citizens by their very nature are not entitled to the full rights and privileges that inhere to U.S. citizenship.<sup>89</sup> However, as explained below, non-citizens have a right to due process, and a woman's right to abortion is protected by her right to due process.<sup>90</sup>

*A. Immigration Framework for Constitutionally Protected Rights*

There are two major impediments to protecting immigrants' rights: judicial deference to plenary federal immigration power and the characterization of deportation proceedings as a civil matter.<sup>91</sup> Although courts have repeatedly used the doctrine of plenary power to afford great deference to the government in the realm of immigration law, they have also acknowledged that non-citizens are entitled to due process under the law while in removal proceedings.<sup>92</sup> Here, a liberty interest is denied when a woman is refused access to an abortion.<sup>93</sup> In this instance, access to abortion is so heavily burdened that the right is effectively eclipsed.<sup>94</sup>

The Supreme Court has long portrayed deportation as a civil proceeding.<sup>95</sup> For that reason, several constitutional rights typically guaranteed in criminal cases have been denied to non-citizens in removal proceedings.<sup>96</sup> However, detained female immigrants confront the same obstacles in accessing abortion that incarcerated women in the United States frequently encounter.<sup>97</sup> The fundamental right to abortion should not be altered by the fact that immigration proceedings are construed as civil when the practical effect of a woman's incarceration makes her a hostage subject to the decision of the agency holding her in detention.<sup>98</sup>

Children who arrive alone at the border face additional impediments to exercising their rights, in part due to their age, language skills, and cultural

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89. *But see Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1445 (1983) [hereinafter *Developments in the Law*] ("When the federal government or a state government threatens a fundamental right of an undocumented alien, courts generally accord her the same protections that they would a legally present alien.").

90. *See infra* Part III.A.

91. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 134–35 (6th ed. 2015).

92. *Id.*

93. Plaintiff's Memorandum, *supra* note 63, at 9, 12.

94. *Id.*

95. García Hernández, *supra* note 81, at 1351.

96. *Id.* at 1356, 1389; *Developments in the Law*, *supra* note 89, at 1389.

97. Walden, *supra* note 18, at 1012; *Doe v. Arpaio*, 150 P.3d 1258, 1259 (Ariz. App. 2007).

98. *See* García Hernández, *supra* note 81, at 1414 (arguing that the characterizations of immigration law as a civil procedure and immigration detention as civil detention have never been honestly explained by the courts and that the distinctions are used as an excuse to combat the war on drugs more expediently).

understandings.<sup>99</sup> In response to public outcry over the inhumane detention and treatment of a growing number of children who arrived at the southern border without documentation, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act to organize the processing and detention of the unaccompanied minors.<sup>100</sup> The Act defined an “unaccompanied alien child” as:

a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or guardian in the United States is available to provide care and physical custody.<sup>101</sup>

The Department of Health and Human Services is responsible for the “care and custody” of the statutorily-defined minors (unless the child is from Canada or Mexico, is not a victim of trafficking, and is competent to withdraw her application for admission).<sup>102</sup> Importantly, the statute requires that the minors be placed in “the *least restrictive setting* that is in the best interest of the child.”<sup>103</sup>

The new administration’s policy of making every immigrant found to be unlawfully present in the United States a deportation priority (abandoning previous prosecutorial discretion guidelines) compounds an already overburdened court system that will soon “implode,” according to retired Immigration Judge John Gossart.<sup>104</sup> Thus, violations of fundamental constitutional rights appear inevitable,<sup>105</sup> especially given the administration’s twin aims of targeting government-funded healthcare (abortion access in particular) and undocumented immigrants.<sup>106</sup>

The DHS convened a special investigation in 2016 to assess the various issues involved with family detention centers.<sup>107</sup> The Advisory Committee on

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99. Patrick D. Murphree, *For the Least of These Brothers and Sisters of Mine: Providing Mental Health Care to Undocumented Immigrant Children*, 15 SEATTLE J. SOC. JUST. 65, 75–76 (2016).

100. LEGOMSKY & RODRIGUEZ, *supra* note 91, at 1159.

101. 6 U.S.C. § 279(g)(2).

102. LEGOMSKY & RODRIGUEZ, *supra* note 91, at 1159–60.

103. 8 U.S.C. § 1232 (c)(2)(A) (emphasis added).

104. *Retired Immigration Judge: The Courts Will Implode Under New Rules*, MATTER OF FACT WITH SOLEDAD O’BRIEN (Feb. 25, 2017), <http://matteroffact.tv/retired-immigration-judge-courts-will-implode-new-rules/> (on file with *The University of the Pacific Law Review*) (regarding the effect of the recent DHS memo on the immigration judiciary: “Our courts are dysfunctional, I think they would implode. Due process, as we know it, fundamental fairness, can’t be adhered to with all the pressure on the judges to hear these cases as expeditiously as possible and resolve them.”).

105. Amiri, *supra* note 9.

106. *Id.*

107. REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, *supra* note 67, at

Family Residential Centers concluded that current provision of medical care to detained non-citizens and to women and children especially is inadequate and demands immediate attention.<sup>108</sup>

A woman's right to have an abortion is protected by the right to privacy.<sup>109</sup> The Due Process Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>110</sup> Because the Fifth Amendment extends this promise to all persons, citizens and non-citizens alike are entitled to protection when deprived of a right to privacy.<sup>111</sup> The denial of a woman's fundamental right to choose abortion constitutes a deprivation of liberty, triggering due process protection.<sup>112</sup> Under the *Mathews v. Eldridge* due process test, courts traditionally balance three factors to determine what process is due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>113</sup>

The individual's privacy interest in choosing whether or not to carry a pregnancy to term cannot be denied to non-citizen minors as a class unless the government has some compelling interest.<sup>114</sup> Any interest the federal government has in ensuring the welfare of the detained minor is slim when a state judge has declared she is competent to determine her own best interest regarding her pregnancy.<sup>115</sup> The risk of erroneous deprivation of the minor's interest is extremely high because ORR is exercising a "unilateral[] veto" over minors'

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108. *Id.*; see also *Detained and Dismissed*, *supra* note 68, at 68 (showing that this problem has existed for several years, even if it is only now demanding national attention).

109. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

110. U.S. CONST. amend. V (emphasis added); see also U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

111. *Cf.* LEGOMSKY & RODRIGUEZ, *supra* note 91, at 135; *Yick Wo v. Hopkins*, 18 U.S. 356, 369 (1886); *Wong Wing v. U.S.*, 163 U.S. 228, 234–38 (1896).

112. *Roe*, 410 U.S. at 155.

113. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

114. See Plaintiff's Memorandum, *supra* note 63, at 9.

115. *Id.*

reproductive autonomy.<sup>116</sup> This absolute and arbitrary veto is precisely what the Supreme Court has found to be unconstitutional.<sup>117</sup> Thus, a minor's privacy right clearly outweighs the government's interest in maintaining a policy of non-facilitation.<sup>118</sup>

### B. Government Treatment of Unaccompanied Minors

The outlook for the federal government recognizing the constitutional rights of female immigrants to have an abortion is bleak, given the new administration's harsh treatment of immigrants in other respects.<sup>119</sup> Unaccompanied minors faced increased vitriol and legal obstacles from former Attorney General Jeff Sessions.<sup>120</sup> In 2017, Sessions warned a gathering of law enforcement officials that unaccompanied minors have taken advantage of the immigration system and often turn out to be "wolves in sheep's clothing," implying they are often gang members themselves instead of the victims of gang violence they claim to be.<sup>121</sup>

The government is fighting unaccompanied minors on several fronts.<sup>122</sup> For over two decades, the treatment of minors in immigration custody was governed by the "Flores Settlement."<sup>123</sup> The settlement set the minimum acceptable standards for how detention facilities handled the detention and release of children.<sup>124</sup> A class of minors in federal custody sued the government to enforce

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116. *Garza v. Hagan*, No. 17-CV-02122 (TSC), 2017 WL 6462270, at \*2 (D.C. Cir. Dec. 18, 2017), *appeal dismissed*, No. 17-5276, 2017 WL 6522466 (D.C. Cir. Dec. 20, 2017).

117. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

118. Plaintiff's Memorandum, *supra* note 63, at 10.

119. See Veronica Stracqualursi, *Chief of Staff Kelly Suggests Undocumented Immigrants Who Didn't Sign up for DACA Were 'Too Afraid' or 'Too Lazy'*, CNN (Feb. 6, 2018, 7:17 AM), <https://www.cnn.com/2018/02/06/politics/john-kelly-daca-deadline/index.html> (on file with *The University of the Pacific Law Review*) (relaying White House Chief of Staff John Kelly's recent comments that Dreamers who qualified for DACA, but did not apply "needed to get off the couch," and that while "some would say were too afraid to sign up, others would say were too lazy to get off their asses, but they didn't sign up."); see also Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2017), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-count-ries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html?hpid=hp\\_hp-top-table-main-trump-immigration-protections%3Ahomepage%2Ft&utm\\_term=.fc1f51d4784](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-count-ries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?hpid=hp_hp-top-table-main-trump-immigration-protections%3Ahomepage%2Ft&utm_term=.fc1f51d4784) (on file with *The University of the Pacific Law Review*).

120. Lauren Dezenski, *Sessions: Many Unaccompanied Minors Are 'Wolves in Sheep's Clothing'*, POLITICO (Sept. 21, 2017, 6:19 PM), <https://www.politico.com/story/2017/09/21/jeff-sessions-border-unaccompanied-minors-wolves-242991> (on file with *The University of the Pacific Law Review*).

121. *Id.*

122. See generally *Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017).

123. *Id.*; IMMIGRANT LEGAL RES. CTR., PRACTICE ALERT ON FLORES V. SESSIONS: NINTH CIRCUIT HOLDS THAT ALL DETAINED CHILDREN HAVE THE RIGHT TO A BOND HEARING (Jul. 2017), available at [https://www.ilrc.org/sites/default/files/resources/flores\\_v.\\_sessions\\_practice\\_alert\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/flores_v._sessions_practice_alert_final.pdf) [hereinafter PRACTICE ALERT ON FLORES V. SESSIONS] (on file with *The University of the Pacific Law Review*).

124. *Id.*

the consent decree.<sup>125</sup> They alleged the government had breached the consent decree by instead following a “no-release” policy for Central American migrants and detaining children in unlicensed facilities.<sup>126</sup> The government argued that because the former Immigration and Naturalization Services (INS) was restructured since the Flores Settlement, and the responsibility for unaccompanied minors has transferred to ORR, the Flores Settlement no longer afforded children the same procedural protections.<sup>127</sup>

But in July 2017, the Ninth Circuit reaffirmed the continuing validity of the Flores Settlement and secured the right of unaccompanied minors to have a bond redetermination hearing before an Immigration Judge.<sup>128</sup> This victory for unaccompanied minors in ORR detention bolsters their claim to reproductive justice and rights.<sup>129</sup> Because ORR under Scott Lloyd’s direction is unlikely to change its policy, the unaccompanied minors who live in fear in detention centers across the country must rely on the courts to protect their basic and fundamental rights.<sup>130</sup>

### *C. Human Right to Health*

The right to “the enjoyment of the highest attainable standard of physical and mental health” appears in the World Health Organization’s 1946 Constitution and in the 1948 Universal Declaration of Human Rights.<sup>131</sup> Since at least 2007, Human Rights Watch (HRW) has documented the lack of adequate health care provided to people detained by immigration authorities.<sup>132</sup> The organization continues to report that “[m]edical care in the detention system, today, however, remains jail-like, decentralized, and dysfunctional.”<sup>133</sup>

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125. *Flores*, 862 F.3d at 864.

126. *Id.*

127. *Id.* at 867.

128. *Id.* at 881; PRACTICE ALERT ON *FLORES V. SESSIONS*, *supra* note 123.

129. *See generally Flores*, 862 F.3d at 863.

130. *See* Bernie Pazanowski & Perry Cooper, *Trump Policy Against Immigrant Teen Abortions Put on Hold*, BLOOMBERG BNA (Apr. 2, 2018), <https://news.bloomberglaw.com/us-law-week/trump-policy-against-immigrant-teen-abortions-put-on-hold-1?context=article-related> (on file with *The University of the Pacific Law Review*) (noting after District Judge Tanya Chutkan issued a preliminary injunction on March 30, 2018, “[t]he Trump Administration’s policy of refusing to facilitate abortions for unaccompanied immigrant teenagers held in government facilities has been put on hold.”).

131. G.A. Res. 217 (III), Universal Declaration of Human Rights. art. 25 (Dec. 10, 1948); OFF. OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, THE RIGHT TO HEALTH FACT SHEET NO. 31 1 (June 2008).

132. *Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention*, HUMAN RIGHTS WATCH 15 (May 8, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention> (on file with *The University of the Pacific Law Review*) (explaining in 2007, HRW reported on the inadequate treatment provided to detainees diagnosed with HIV/AIDS; in 2009, HRW documented the failure of ICE to respond to women’s medical problems; in 2010, HRW revealed the harsh conditions of confinement for people with mental disabilities; and in 2016, HRW reported on the substandard medical treatment of transgender women).

133. *Id.* at 16.



On September 26, 2017, several civil rights and immigrants' rights groups filed an administrative complaint with the Department of Homeland Security, on behalf of currently and formerly pregnant women in immigration custody.<sup>134</sup> The groups allege that recent DHS actions demonstrate "a disturbing trend of ICE officials unjustifiably denying or delaying the release of pregnant women as well as their failure to provide the necessary medical care."<sup>135</sup> The mistreatment of pregnant women in immigration custody and the provision of inadequate medical care is a trend that affects women and girls in both ORR and ICE detention facilities.<sup>136</sup>

#### IV. ORR'S NON-FACILITATION POLICY IMPOSES AN UNDUE BURDEN ON DETAINED MINORS' RIGHT TO ACCESS ABORTION

In the context of the ORR's non-facilitation policy, the provision of medical care is not only inadequate, but it also imposes an undue burden on the rights of minors to access an abortion facility.<sup>137</sup>

##### A. Women in Federal Custody

Under the Obama administration, both ICE and ORR had a policy of covering the cost of abortion in the case of rape, incest, and for the health of the mother.<sup>138</sup> In all other cases of "elective" abortion, the government would provide transportation at no cost to women in immigration detention facilities.<sup>139</sup> This policy is still used by the Federal Bureau of Prisons, which "assumes all costs associated with the abortion procedure only when the life of the mother would be endangered if the fetus is carried to term, or in the case of rape or incest."<sup>140</sup> Regardless of whether or not the Bureau funds the procedure, the Bureau may cover the costs of escorting the inmate to an outside abortion facility.<sup>141</sup>

Between December 2017 and April 2018, ICE alone detained 506 pregnant

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134. ACLU ET AL., ADMINISTRATIVE COMPLAINT RE: U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S DETENTION AND TREATMENT OF PREGNANT WOMEN 1 (Sept. 26, 2017).

135. *Id.* at 5.

136. *Id.*

137. *See infra* Part IV.B.

138. Rayasam, *supra* note 4.

139. *Id.*

140. Compare FED. BUREAU OF PRISONS, FEMALE OFFENDER MANUAL (Nov. 23, 2016), available at <https://www.bop.gov/policy/progstat/5200.02.pdf> (on file with *The University of the Pacific Law Review*), with U.S. IMMIGRATIONS AND CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (2011, Rev. 2016), available at <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> (on file with *The University of the Pacific Law Review*).

141. PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, *supra* note 140.

women.<sup>142</sup> Compare that to the 292 pregnant women held in ICE custody between January and May 2017.<sup>143</sup> Another policy shift accounts for the sharp increase.<sup>144</sup> Before December 2017, ICE had a policy of not detaining pregnant women unless they posed a flight risk.<sup>145</sup> But to bring DHS in line with the mandate of Executive Order 13768, ICE announced it would dispense with the non-detention presumption and instead determine whether or not to detain pregnant women on a case-by-case basis.<sup>146</sup> Current immigration detention policy jeopardizes the reproductive autonomy of migrant women and girls.<sup>147</sup>

### *B. ORR Policy*

The unwritten ORR policy provides neither funding nor transportation to detained unaccompanied minors who request an abortion.<sup>148</sup> It also subjects girls to religious pro-life counseling, even after they have complied with the state law judicial bypass procedure.<sup>149</sup> The government defended its new non-facilitation policy on abortion when Jane Doe filed for a Temporary Restraining Order and Injunction in federal court.<sup>150</sup> Surprisingly, the Department of Justice (DOJ) did not argue in the District Court that Jane Doe had no constitutional right to an abortion.<sup>151</sup> Rather, the government proceeded on the assumption that even if she did have such a right, ORR had an overriding interest in protecting minors' best interests and was thus not creating an undue burden by refusing to provide transportation.<sup>152</sup>

ORR argues thus new policy leaves minors like Jane Doe with two simple

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142. Liz Jones, *Pregnant and Detained*, NPR (Apr. 6, 2018, 9:29 AM), <https://www.npr.org/2018/04/05/599802820/pregnant-and-detained> (on file with *The University of the Pacific Law Review*).

143. *Id.*

144. *Id.*

145. *Id.*

146. *FAQs: Identification and Monitoring of Pregnant Detainees*, U.S. IMMIGRATION AND CUSTOMS ENF'T (Mar. 29, 2018), <https://www.ice.gov/faqs-identification-and-monitoring-pregnant-detainees> (on file with *The University of the Pacific Law Review*); see also Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (mandating that immigration enforcement authorities prioritize removal of not only removable persons who have been convicted of an offense, but also those who "[h]ave been charged with any criminal offense, where such charge has not been resolved.").

147. Amiri, *supra* note 9.

148. U.S. IMMIGRATION AND CUSTOMS ENF'T, ICE DIRECTIVE 11032.3: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES (Dec. 14, 2017); *FAQs: Identification and Monitoring of Pregnant Detainees*, *supra* note 146.

149. Plaintiff's Memorandum, *supra* note 63, at 7.

150. *Garza v. Hargan Oral Argument*, C-SPAN (Oct. 20, 2017), <https://www.c-span.org/video/?436060-1/dc-circuit-court-hears-undocumented-teen-detainee-abortion-case-audio-only> [hereinafter *Oral Argument*] (on file with *The University of the Pacific Law Review*).

151. *Id.*

152. *Id.*; *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (Millett, J., concurring).

2019 / Office of Refugee Resettlement's Unconstitutional Abortion Policy for Minors

alternatives: return to their home country (from whence Jane Doe<sup>153</sup> and most girls escaped physical, emotional, or sexual abuse,<sup>154</sup> and where abortion is illegal for most girls,<sup>155</sup> including Jane Doe)<sup>156</sup> and give up on any claim they may have to remain in the United States, or be released to a sponsor who may or may not facilitate their access to an abortion, thereby defeating the purpose of the judicial bypass already granted to Jane Doe.<sup>157</sup>

Texas Attorney General Ken Paxton, who filed an amicus brief in the case, expressed the conservative view that undocumented immigrants have no “constitutional right to abortion on demand.”<sup>158</sup> He further hyperbolized that if Doe won her case, Texas may devolve into a “sanctuary state for abortions.”<sup>159</sup> The dissenting judges shared these fears and criticized the majority for recognizing “a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”<sup>160</sup>

The DOJ distinguished the situation of incarcerated women who have a constitutional right to abortion that is protected by the prison.<sup>161</sup> There is no other option for these women; they cannot simply leave prison and go to another state or country, nor can they be released to a sponsor.<sup>162</sup>

However, waiting for the assignment of a sponsor is an inadequate alternative because this can cause a significant delay.<sup>163</sup> According to ORR, the

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153. Jennifer Chou, *The Freedom to Choose: Our Fight for Jane Doe*, ACLU NEWS (ACLU of N. Cal.), Winter 2018, at 7 (“Jane Doe entered the United States without her parents, who abused her in her home country.”).

154. Valeria Luiselli, *Riding ‘The Beast’: Child Migrants Reveal Full Horror of Their Journeys to America*, THE GUARDIAN (Oct. 5, 2017), <https://www.theguardian.com/inequality/2017/oct/05/riding-the-beast-child-migrants-reveal-full-horror-of-their-journeys-to-us> (on file with *The University of the Pacific Law Review*) (noting that “80% of the women and girls who cross Mexico to get to the US border are raped on the way.”).

155. *Abortion in Latin America and the Caribbean: Legal Status of Abortion*, ALAN GUTTMACHER INST. (Aug. 2017), [https://www.guttmacher.org/sites/default/files/factsheet/ib\\_aww-latin-america.pdf](https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-latin-america.pdf) (on file with *The University of the Pacific Law Review*) (explaining that in El Salvador and Honduras, abortion in any form is illegal, and in Guatemala, abortion is permitted only to save the life of the mother); OFFICE OF REFUGEE RESETTLEMENT: UNACCOMPANIED ALIEN CHILDREN PROGRAM FACTS AND DATA, *supra* note 15 (noting that half of all unaccompanied minors come from Honduras and El Salvador, while 45% are from Guatemala).

156. *Garza*, 874 F.3d at 736 (Millett, J., concurring).

157. Plaintiff’s Memorandum, *supra* note 63, at 4, 10; *Garza*, 874 F.3d at 736 (Millett, J., concurring).

158. Ken Paxton, *AG Paxton: Texas Must Not Become a Sanctuary State for Abortions*, TX. ATT’Y GEN. WEBPAGE (Oct. 10, 2017), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-texas-must-not-become-a-sanctuary-state-for-abortions> (on file with *The University of the Pacific Law Review*).

159. *Id.*

160. *Garza*, 874 F.3d at 752 (Kavanaugh, J., dissenting).

161. *Oral Argument*, *supra* note 150.

162. *Id.*

163. *See Flores v. Sessions*, 862 F.3d 863, 872 (9th Cir. 2017) (noting that “ORR currently detains unaccompanied minors for months, and even years, without providing them with any opportunity to be heard before a neutral person with authority to review the basis for the detention.”).

average length of stay for unaccompanied minors in Fiscal Year 2017 was 41 days (nearly a month and a half); a significant length of time given the urgent nature of the need to terminate a pregnancy.<sup>164</sup> Relying on a sponsor to provide access to an abortion is uncertain because the sponsor may similarly deny the minor access to abortion.<sup>165</sup> What is more, the burden of finding a sponsor is on ORR, not the pregnant minor, and any undue delay in locating an appropriate sponsor should not penalize the girl seeking a timely abortion.<sup>166</sup>

Likewise, agreeing to voluntarily depart is not an adequate remedy because in doing so the minor would be forced to give up whatever right or claim to remain in the United States she may have had.<sup>167</sup> The government is correct in distinguishing the different situations of incarcerated women who are physically and legally incapable of leaving the prison to obtain an abortion.<sup>168</sup> Nevertheless, the most important distinction is that those women had their day in court and were convicted; here, unaccompanied minors await their day in court while in ORR custody.<sup>169</sup>

Moreover, the Supreme Court clearly stated that when the government requires a minor to obtain parental consent to have an abortion, it must provide “an adequate judicial bypass procedure” as an alternative way for the minor to exercise her right to choose an abortion.<sup>170</sup> ORR raised a “substantial obstacle” by overriding a state judge’s determination of the minor’s decision-making capacity.<sup>171</sup> Furthermore, abortion is illegal in nearly all circumstances throughout Central America,<sup>172</sup> including Jane Doe’s home country.<sup>173</sup> The “option” to return home is a cruel suggestion for many women who are fleeing because their lives were at risk in their home countries.<sup>174</sup> Additionally, the DOJ failed to explain the different treatment of adult non-citizens in ICE detention, for

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164. OFFICE OF REFUGEE RESETTLEMENT: UNACCOMPANIED ALIEN CHILDREN PROGRAM FACTS AND DATA, *supra* note 15; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

165. Plaintiff’s Memorandum, *supra* note 63, at 7, 11. Cf. OFF. OF REFUGEE RESETTLEMENT, CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: AFTER CARE PLANNING (Jan. 30, 2015), *available at* <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2> (on file with *The University of the Pacific Law Review*) (explaining that ORR must provide for the “safe and timely release” of minors to sponsors without committing to any concrete deadline or timeframe).

166. *Garza v. Hargan*, 874 F.3d 735, 739 (D.C. Cir. 2017) (Millet, J., concurring).

167. Plaintiff’s Memorandum, *supra* note 63, at 15.

168. *Oral Argument*, *supra* note 150.

169. *Flores v. Sessions*, 862 F.3d 863, 872 (9th Cir. 2017) (“ORR currently detains unaccompanied minors for months, and even years, without providing them with any opportunity to be heard before a neutral person with authority to review the basis for the detention.”).

170. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

171. *Id.* at 877.

172. *Abortion in Latin America and the Caribbean Fact Sheet*, *supra* note 155.

173. Manny Fernandez, *U.S. Must Let Undocumented Teenager Get Abortion, Appeals Court Says*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/undocumented-immigrant-abortion.html> (on file with *The University of the Pacific Law Review*).

174. Stillman, *supra* note 67.

whom ICE facilitates transportation to an abortion appointment.<sup>175</sup>

After Jane Doe won her victory, at least three other minors filed suit against the government in order to get a temporary release to travel to an abortion facility.<sup>176</sup> All three won at the D.C. District Court, and though the government appealed one of the cases, it eventually dropped the appeal following the discovery that one of the girls was not properly under ORR custody because she was overage.<sup>177</sup>

Women who are imprisoned have the same right to abortion as free women.<sup>178</sup> Although the Hyde Amendment limits federal funding of abortion for both classes of women, prison officials cannot prevent an inmate from receiving an abortion.<sup>179</sup> There is no principled legal reason for denying female immigrants who are civilly detained the same constitutional rights.<sup>180</sup>

Obama's Deferred Action for Childhood Arrivals (DACA) brought many young and undocumented people out of the shadows and encouraged them to surrender their personal information to the government.<sup>181</sup> The new administration's enforcement priorities<sup>182</sup> and repeal of DACA protections,<sup>183</sup> coupled with Congress's failure to pass a bill to protect Dreamers,<sup>184</sup> give undocumented and mixed-status families ample grounds to fear placement in detention centers pending removal hearings.<sup>185</sup> Additionally, the Trump Administration is targeting immigrants in sanctuary cities, so there will undoubtedly be an increase in detained non-citizens.<sup>186</sup>

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175. *Oral Argument*, *supra* note 150.

176. *Second Legal Battle*, *supra* note 14.

177. *Id.*

178. Walden, *supra* note 18, at 996; *see also* Doe v. Arpaio, 150 P.3d 1258, 1261–62 (Ariz. App. 2007) (recognizing an incarcerated woman's right to abortion, albeit limited by "legitimate penological interests").

179. Arpaio, 150 P.3d at 1259 (holding that "requiring a court order to transport an inmate to receive an abortion [does not] serve[] a legitimate penological interest.").

180. Walden, *supra* note 18, at 1002.

181. Ted Hesson, *Dreamers Fear Deportations from DACA Data*, POLITICO (Sept. 5, 2017), <https://www.politico.com/story/2017/09/05/dreamers-fear-deportation-immigrants-242351> (on file with *The University of the Pacific Law Review*).

182. Memorandum from Secretary of Homeland Security John Kelly on the Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), *available at* [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) (on file with *The University of the Pacific Law Review*).

183. Memorandum from Acting Secretary of Homeland Security Elaine C. Duke on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), *available at* <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (on file with *The University of the Pacific Law Review*).

184. Jacob Pramuk, *Bitter Immigration Fight Is No Closer to Ending After Budget Deal Passes*, CNBC (Feb. 9, 2018, 11:21 AM), <https://www.cnbc.com/2018/02/09/congress-turns-to-immigration-daca-bill-after-government-shutdown-ends.html> (on file with *The University of the Pacific Law Review*).

185. Hesson, *supra* note 181.

186. Joel Rubin, *ICE Arrests Hundreds of Immigrants in 'Sanctuary Cities' Around the Nation*,

Unaccompanied minors suffer from several environmental stressors, such as poverty, racism, victimization, and physical abuse.<sup>187</sup> The physical detention of minors and the separation from their families is traumatizing and can have a significant negative impact on their health.<sup>188</sup> This makes the need to recognize a minor's right to abortion, regardless of immigration status, all the more compelling and pressing.<sup>189</sup>

The policy imposes an undue burden on minors' ability to obtain an abortion and effectively denies them the right.<sup>190</sup> Moreover, it serves no legitimate government interest when the state abortion laws are satisfied, i.e. the state has already had an opportunity to make a determination on the minor's decision-making capacity or the state presumes minors to be so capable.<sup>191</sup> The individual minor's privacy interest, however, is extremely pressing because she is physically detained and at the mercy of the federal government to facilitate her access to a safe abortion.<sup>192</sup> Children are especially vulnerable to mental and psychological health problems as a result of being detained, making their privacy interest acutely important.<sup>193</sup>

#### V. A SIMPLE SOLUTION: PROVIDING TRANSPORTATION FOR UNACCOMPANIED MINORS TO ABORTION FACILITIES

The Trump Administration has inherited a behemoth immigration enforcement apparatus and is using it to the fullest extent; not only are more immigrants being apprehended, they are being released at a much lower rate than before, leading to overcrowding and an increasing incentive to build more for-profit detention centers, paid for with taxpayer money.<sup>194</sup>

Immigration detention centers are often privately run and are costly to taxpayers.<sup>195</sup> Lawmakers have been unable to repeal a 2009 bed quota that no

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*California*, L.A. TIMES (Sept. 28, 2017, 6:00 PM), <http://www.latimes.com/local/lanow/la-me-ice-raids-sanctuary-20170928-story.html> (on file with *The University of the Pacific Law Review*).

187. Murphree, *supra* note 99, at 74.

188. REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, *supra* note 67, at 116 (noting that “[c]hildren are especially impacted; international research has found that the unique vulnerabilities of children place them especially at risk of health and development issues even if the detention is for short periods.”).

189. *Id.*

190. Plaintiff's Memorandum, *supra* note 63, at 2.

191. *Id.* at 5, 9.

192. *Id.*

193. REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, *supra* note 67, at 116 (noting that “[c]hildren are especially impacted; international research has found that the unique vulnerabilities of children place them especially at risk of health and development issues even if the detention is for short periods.”); Murphree, *supra* note 99, at 75–76.

194. Olsen, *supra* note 64.

195. T.J. Raphael & Oliver Lazarus, *Immigration Detention Quotas Cost Taxpayers Billions—A ‘Mindless Policy’ Says One Congressman*, PUB. RADIO INT'L (Aug. 2, 2017, 2:00 PM),

other law enforcement agency has, which exacerbates the cost of detention and the potential abuse of enforcement priorities.<sup>196</sup> Although Obama began phasing out federal contracts with private detention companies that abused detainees and provided substandard medical care, Trump reversed this course.<sup>197</sup>

Ensuring ORR covers the cost of transportation to abortion facilities or allows for outside arrangements to transport minors to abortion facilities is a simple and cost-effective solution.<sup>198</sup> Opponents argue that allowing this kind of precedent will generate a wave of women fleeing to the border just to have United States citizens pay for their abortion.<sup>199</sup> However, these fears are baseless and ignore the fact that ICE's policy expressly states that the agency, like its federal sister agencies, will not pay for a detainee's "elective" abortion.<sup>200</sup> Moreover, the federal government would not subsidize the cost of the abortion itself, rather it would only accommodate the transportation of the woman to the abortion facility.<sup>201</sup> Indeed, the Hyde Amendment already prohibits the use of federal funds for abortion procedures except in limited cases of rape, incest, or to save the life of the mother.<sup>202</sup>

Because the Hyde Amendment prevents taxpayer dollars from paying for abortion procedures for low-income women or women who depend on the government for health care, the potential cost to the government is miniscule.<sup>203</sup> The only expense would be transportation to and from the abortion facility, which could be a huge expense and burden to the undocumented woman or unaccompanied minor who has no support system in a country that is foreign to her.<sup>204</sup> Moreover, the policy of facilitating transportation to and from an abortion appointment is something ORR has done in the past and should be well-equipped to do again.<sup>205</sup>

The cost of providing transportation is negligible, especially considering the additional costs to the taxpayer if the minor is forced to carry the pregnancy to

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<https://www.pri.org/stories/2017-08-01/immigration-detention-quotas-cost-taxpayers-billions-mindless-policy-says-one> (on file with *The University of the Pacific Law Review*).

196. *Id.*

197. *Id.*

198. *Garza v. Hargan*, 874 F.3d 735, 740–41 (D.C. Cir. 2017) (Millett, J., concurring) (“[T]he government does not have to facilitate—make easier—J.D.’s termination of her pregnancy. It just has to not interfere or make things harder.”).

199. Paxton, *supra* note 158.

200. PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, *supra* note 140.

201. *Id.*

202. *See, e.g.*, Hyde Amendment, Pub. L. No. 94-439, Title II, § 209, 90 Stat. 1434 (1976).

203. *Hyde Amendment*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment> (last visited Jan. 30, 2019) (on file with *The University of the Pacific Law Review*).

204. Plaintiff’s Memorandum, *supra* note 63, at 16.

205. Rayasam, *supra* note 4.

term.<sup>206</sup> The cost of providing transportation to an abortion facility should not be any higher than the current cost of transportation for the girl to receive pro-life counseling.<sup>207</sup> Should the minor be detained for an extended period of time, services such as prenatal care, healthcare, and housing for the baby may be imposed on taxpayers as they are not exempted by the Hyde Amendment.<sup>208</sup> Additionally, in the case of Jane Doe, the ACLU did not request that ORR pay for transportation; rather, it requested the mere facilitation of transportation.<sup>209</sup> In other words, the potential cost to taxpayers is zero.<sup>210</sup>

On March 30, 2018, Judge Tanya Chutkan of the D.C. District Court certified a class of unaccompanied minors similarly situated to Jane Doe.<sup>211</sup> The court also granted a temporary injunction to block ORR from continuing its non-facilitation policy against minors in the Office's custody.<sup>212</sup> The government quickly filed a Motion for a Stay of the Preliminary Injunction, claiming the Judge's order prevented ORR "from carrying out its statutory and custodial responsibilities by restricting its ability to involve the minor's parents and notify authorized medical personnel as it deems necessary, and it requires ORR to facilitate abortions of unaccompanied alien children . . . in its care."<sup>213</sup>

## VI. CONCLUSION

Women, especially women who are non-native, detained, and/or minors, are constant targets of patriarchal reproductive policies.<sup>214</sup> From the eugenics of forced sterilization to the abortion ban for detained non-citizen minors, women's privacy rights and reproductive autonomy have been repeatedly violated.<sup>215</sup> Girls in removal proceedings face the loss of liberty when they are kept in detention facilities and denied access to adequate medical care.<sup>216</sup> The new policy of the Office of Refugee Resettlement that refuses to facilitate a minor's transportation to an abortion appointment effectively vetoes her choice over her reproductive

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206. Plaintiff's Memorandum, *supra* note 63, at 15, 16.

207. *Id.*

208. *Hyde Amendment*, *supra* note 203.

209. Plaintiff's Memorandum, *supra* note 63, at 16.

210. *Id.*

211. *Garza v. Hargan*, No. 17-cv-02122 (TSC), 2018 BL 113203 (D.C. Cir. Mar. 30, 2018).

212. *Id.*

213. Motion for Stay of Preliminary Injunction at 2, *Garza v. Hargan* (D.C. Cir. 2018) (No. 17-cv-02122 (TSC)); *see also* Lydia Wheeler, *Trump Admin Asks Court to Hold Order on Migrant Teens' Access to Abortion*, THE HILL (Apr. 3, 2018, 6:17 PM), <https://thehill.com/regulation/381511-trump-admin-asks-court-to-hold-order-on-migrant-teens-access-to-abortion> (on file with *The University of the Pacific Law Review*).

214. *See* KLUCHIN & GOLDEN, *supra* note 47, at 2; Hull & Hoffer, *supra* note 44, at 11 (outlining the history of oppressive abortion law in the United States).

215. *See* KLUCHIN & GOLDEN, *supra* note 47, at 2; Hull & Hoffer, *supra* note 44, at 62.

216. Plaintiff's Memorandum, *supra* note 63, at 4.



health.<sup>217</sup>

Now is the time to recognize that every woman in every state, regardless of immigration status or age, has a constitutionally protected right to abortion.<sup>218</sup> A policy that imposes an undue burden on that right, such as requiring parental consent instead of a court order, mandating religious-based anti-abortion counseling, or refusing to transport a detainee to an abortion facility, is plainly unconstitutional.<sup>219</sup>

*“I am not free while any woman is unfree, even when her shackles are very different from my own.”*

—Audre Lorde<sup>220</sup>

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217. *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (Millett, J., concurring).

218. *See supra* Parts II–III.

219. *See supra* Part IV.

220. AUDRE LORDE, *SISTER OUTSIDER: ESSAYS & SPEECHES BY AUDRE LORDE* 132–33 (1984).