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THE SUPREME MISTAKE: WHEN A CHOICE IS REALLY NO CHOICE AT ALL

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I. INTRODUCTION

Amid a contentious presidential election, a global pandemic, and a national reckoning on race relations, a nurse working in an immigrant detention facility in Georgia filed a whistleblower complaint, alleging that doctors were performing forced hysterectomies on detained immigrant women.[1] This news shocked the country, and many members of Congress demanded an investigation by the Department of Homeland Security.[2] Outraged,

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1. Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies Of ICE Detainees*, NPR (Sept. 16, 2020), www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detaine [perma.cc/6R6S-2DNA].

2. These members of Congress include House Speaker Nancy Pelosi, House Majority Leader Steny Hoyer, Congressional Hispanic Caucus Chairman Joaquin Castro, Senator Cory Booker, and Senator Richard Blumenthal. Press Release, Speaker Nancy Pelosi, Pelosi Statement on Whistleblower Complaint

House Speaker Nancy Pelosi said, "[i]f true, the appalling conditions described in the whistleblower complaint, including allegations of mass hysterectomies being performed on vulnerable immigrant women, are a staggering abuse of human rights."[3] Unfortunately, this horrific news merely illustrates the most recent example in a long history of denying women, particularly women of color, their right to reproductive justice in the United States.[4]

"Reproductive justice" is an umbrella term that encompasses a countless number of decisions that women make about their own bodily autonomy.[5] Deborah Reid, a noted health policy attorney and defender of reproductive rights, explained:

> [T]he concept of reproductive justice . . . is firmly rooted in a human rights framework that supports the ability of all women to make and direct their own reproductive decisions. These decisions could include obtaining contraception, abortion, sterilization, and/or maternity care. Accompanying that right is the obligation of the government and larger society to create laws, policies, and systems conducive to supporting those decisions.[6]

This Comment will focus on the rights of immigrant women to exercise their right to abortion in the United States. However, it should be noted that the effects of these rights impact women from all walks of life. Part II will provide a brief overview of the history of laws and seminal decisions involving reproductive justice, and it will introduce Jane Doe, an undocumented immigrant minor who

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on Massive Health Care Abuse at ICE Detention Centers (Sept. 15, 2020), www.speaker.gov/newsroom/91520-0 [perma.cc/H2XE-K5X3] [hereinafter Pelosi Statement]; Press Release, House Majority Leader Steny Hoyer, Hoyer Statement on ICE Whistleblower Complaint (Sept. 15, 2020), www.majorityleader.gov/content/hoyer-statement-ice-whistleblower-complaint [perma.cc/H8T6-5BAP]; Press Release, Congressional Hispanic Caucus Chairman Joaquin Castro, Congressional Hispanic Caucus Statement on Whistleblower Complaint of Abuse in ICE Detention Centers, Including Hysterectomies (Sept. 15, 2020), www.chc.house.gov/media-center/press-releases/congressional-hispanic-caucus-statement-on-whistleblower-complaint-of [perma.cc/S6KM-AGFS]; Letter from Senator Cory Booker to Hon. Joseph Cuffari, Inspector General, U.S. Dept. of Homeland Security (Sept. 15, 2020), www.booker.senate.gov/imo/media/doc/9.15.20%20Letter%20to%20DHS%20OIG%20re%20GA%20Whistleblower%20Complaint%20FINAL%20SIGNED%20(002).pdf [perma.cc/L4NS-E9YR]; Richard Blumenthal (@SenBlumenthal), TWITTER (Sept. 15, 2020, 5:07 PM), www.twitter.com/SenBlumenthal/status/1305991708887445504 [perma.cc/3UJW-WHMR].

3. Pelosi Statement, *supra* note 2.

4. *Id.*

5. Deborah Reid, *Reproductive Justice Advocates: Don't Roll Back Sterilization Consent Rules*, REWIRE NEWS GROUP (Apr. 2, 2014) www.rewirenewsgroup.com/article/2014/04/02/reproductive-justice-advocates-dont-roll-back-sterilization-consent-rules/ [perma.cc/X2XQ-RPGS].

6. *Id.*

sought an abortion while in U.S. immigration custody.[7] The Comment will then explain the background of Doe's case and two important aspects of abortion jurisprudence in this country: the Mootness Doctrine and the undue burden standard. Part III will discuss the arguments for and against preserving abortion access for immigrant women, take an in-depth look at the decisions in Jane Doe's case, and analyze the potentially serious ramifications of those decisions. Part IV will propose how a different Supreme Court decision could have set the tone for a country where reproductive justice is protected, and women's bodily autonomy is secure.

II. BACKGROUND

Part A of this section will provide a brief history of reproductive rights in the United States. Parts B and C will explain the two doctrines that are essential for understanding abortion jurisprudence: the Mootness Doctrine and the undue burden standard. Part D will describe the Office of Refugee Resettlement, where this story takes place. Finally, Part E will introduce Jane Doe and her fight for her own bodily autonomy. This section will place Doe's case in the larger constitutional history of abortion jurisprudence by discussing the case's journey through the court system, all the way up to the United States Supreme Court.

A. A Brief History of Reproductive Rights in the U.S.

Historically, reproductive decisions have been stripped away from women of color, disabled women, and immigrant women, to name just a few groups affected.[8] These civil rights violations have been inextricably woven into the laws and social norms of our country, to the point where it has oftentimes felt normal to deny women basic human rights.[9]

In 1907, Indiana passed the first eugenics[10] law, which mandated sterilization for "criminals, idiots, rapists, and imbeciles."[11] More than thirty states quickly followed suit.[12] In

7. Garza v. Hargan, 874 F.3d 735, 743 (D.C. Cir. 2017) (LeCraft Henderson, J., dissenting).

8. Reid, *supra* note 5.

9. *What's going on in the fight over US abortion rights?*, BBC (June 14, 2019), www.bbc.com/news/world-us-canada-47940659 [perma.cc/W3ZU-AG6V] [hereinafter *What's going on?*].

10. *See Eugenics*, HISTORY (Oct. 8, 2019), www.history.com/topics/germany/eugenics [perma.cc/HQ4W-79SJ] (providing a definition and overview of eugenics movements globally and in the United States).

11. Luke Kersten, *Indiana passes first eugenic sterilization statute in the United States*, EUGENICS ARCHIVE, www.eugenicsarchive.ca/discover/timeline/5323488132156674b00024e [perma.cc/RY85-HWF6] (last visited Oct. 11, 2020).

12. A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT

1927, the United States Supreme Court declared forced sterilization to be constitutional in a seminal case involving a mentally disabled woman.[13] As a result of that decision, more than 70,000 women were forcibly sterilized during the twentieth century.[14] Frequent targets of forced sterilization were women of color, poor women, and women who were thought to be mentally disabled.[15]

Over the last one hundred years, doctors forced sterilization on numerous Black women to control Black birthrates.[16] Due to the frequency of this violation of Black women, this practice was termed a "Mississippi appendectomy."[17] Additionally, poor Black women were also chosen to be "practice" for young medical students.[18] After going to the doctor for minor surgery in 1944, Fannie Lou Hamer, a Black woman in Mississippi, discovered the doctors also performed a hysterectomy without her consent or knowledge.[19] After this horrendous violation, Hamer courageously became an active and vocal member of the Civil Rights Movement and even ran for Congress.[20] Hamer's research revealed that sixty percent of the Black women in her community had — like her — received forced sterilizations.[21]

Along with Black women, as many as fifty percent of Native American women were forcibly sterilized without their knowledge or consent between 1970 and 1976.[22] Similarly, in Los Angeles

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TO THE HUMAN GENOME ERA ix (Paul Lombardo ed., 2011).

13. *See* Buck v. Bell, 274 U.S. 200, 205 (1927) (stating that women deemed to be "feeble-minded" and promiscuous can be ordered to undergo forced sterilization).

14. *Fresh Air: The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations [perma.cc/5342-6WE8].

15. *Id.*

16. Clarence Spigner, *Fannie Lou Hamer (1917-1977)*, UNIV. OF WASH., www.depts.washington.edu/hservmph/articles/2070 [perma.cc/ZV4N-EXZR] (last visited Oct. 11, 2020).

17. *See id.* (noting how Fannie Lou Hamer, a Black female leader in the civil rights movement, was a victim of forced sterilization when she underwent what she thought was a minor surgery in a Mississippi county hospital); *see also* Debra Michals, *Fannie Lou Hamer: 1917-1977*, NAT'L WOMEN'S HISTORY MUSEUM (2017), www.womenshistory.org/education-resources/biographies/fannie-lou-hamer [perma.cc/3UWV-ZACB] (detailing the specifics of Hamer's procedure, including that it was supposed to be for the removal of a uterine tumor).

18. *Remembering Fannie Lou Hamer*, RESILIENT SISTERHOOD PROJ. (June 22, 2021), www.rsphealth.org/fannie-lou-hamer [perma.cc/WR2B-TAE7].

19. *Id.*

20. *Fannie Lou Hamer*, PBS: AM. EXPERIENCE, www.pbs.org/wgbh/americanexperience/features/freedomsummer-hamer [perma.cc/BR3Z-2TEH] (last visited Oct. 11, 2020).

21. *Remembering Fannie*, *supra* note 18.

22. Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 26, 2016), www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/ [perma.cc/7DTX-

County, Mexican-American women were being coerced into forced sterilization at alarming rates after giving birth.[23]

Even after a long, dark history of women being denied their own autonomy, the laws of the United States still do not adequately protect a woman's right to make her own reproductive health decisions.[24] The United States Supreme Court has a demonstrated history of ignoring, downplaying, and even outright denying the importance of reproductive justice.[25] While some progress was made regarding abortion autonomy in *Roe v. Wade*,[26] fifty years of subsequent decisions have narrowed the scope of a woman's right to choose.[27] Many wonder why we are even still debating this all these years later.[28]

2DDD]; *see also generally* Gregory W. Rutecki, *Forced Sterilization of Native Americans: Late Twentieth Century Physician Cooperation with National Eugenic Policies*, CTR. FOR BIOETHICS & HUMAN DIGNITY (Oct. 8, 2010), www.cbhd.org/content/forced-sterilization-native-americans-late-twentieth-century-physician-cooperation-national- [perma.cc/F8EH-9EKW] (discussing the history of Native women who were coerced or forced into reproductive decisions by their physicians).

23. Renee Tajima-Peña, *"Más Bebés?": An Investigation of the Sterilization of Mexican-American Women at Los Angeles County-USC Medical Center during the 1960s and 70s*, 11(3) SCHOLAR & FEMINIST ONLINE 1 (2013), www.sfonline.barnard.edu/life-un-ltd-feminism-bioscience-race/mas-bebes-an-investigation-of-the-sterilization-of-mexican-american-women-at-los-angeles-county-usc-medical-center-during-the-1960s-and-70s/ [perma.cc/BC3G-5KV5]; *see also generally* Madrigal v. Quilligan, 639 F.2d 789 (9th Cir. 1981) (unpublished opinion) (ruling in favor of doctors who sterilized Latina women without their informed consent); *and see also No Más Bebés* (PBS television broadcast June 14, 2015) (profiling several Latina women who were plaintiffs in *Madrigal*).

24. *What's going on?*, *supra* note 9.

25. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014) (striking down the contraceptive mandate of the Affordable Care Act, which would have required all private employers to cover contraceptives for their female employees).

26. Roe v. Wade, 410 U.S. 113, 164 (1973).

27. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding the Hyde Amendment, which prohibits the use of federal funding for abortions); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 499 (1989) (upholding anti-choice provisions, including required determinations of fetus viability and prohibition on abortions in public buildings); *see also* Rust v. Sullivan, 500 U.S. 173, 203 (1991) (upholding the Reagan era "gag rule" that prevented clinic staff from discussing all options available to pregnant women, not just prenatal care); *see also* Planned Parenthood of Se. P.A. v. Casey, 505 U.S. 833, 880, 883, 899 (1992) (holding that a twenty-four-hour waiting period, parental consent for minors, and required viewing of the fetus was constitutional); *and see also* Gonzales v. Planned Parenthood, 2015 U.S. LEXIS 3381 (2015) (holding that the first-ever federal ban on abortion methods was constitutional).

28. Alexandra Svokos, *Viral Photo Of Woman's Abortion Protest Sign Will Make You Laugh Then Cry*, ELITE DAILY (Oct. 4, 2016), www.elitedaily.com/news/politics/woman-abortion-protest-poland/1632496 [perma.cc/LBP7-3XDY].

B. The Mootness Doctrine

The U.S. Supreme Court does not review the decisions for every single lower court that comes up on appeal.[29] In fact, the Court is quite strategic in choosing the limited number of cases it hears.[30] One of the ways the Court flushes out cases that do not require its review is by checking to see if they are moot.[31] Essentially, the Court does not review a case "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[32] The Court requires that "an actual controversy . . . exist not only at the time the complaint is filed, but through all stages of the litigation."[33] This has "long been settled" for all federal courts.[34] In fact, even "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit . . . ' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[35] This mootness doctrine "ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved."[36]

However, in Justice Harry Blackmun's majority opinion in *Roe*, he outlined an exception to this long-settled doctrine.[37] He wrote:

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non[-]mootness. It truly could be 'capable of repetition, yet evading review.'[38]

Essentially, if the issue involves pregnancy or abortion, the

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29. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 87-9 (5th ed. 2016).

30. *Id.*

31. *Id.*

32. L.A. Cty. v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 498 (1969)).

33. Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1975 (2016) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90-1 (2013)).

34. Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)).

35. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

36. *Genesis Healthcare*, 569 U.S. at 71.

37. *Roe*, 410 U.S. at 123.

38. *Id.* at 125 (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

Court cannot dismiss the case on mootness grounds.39 This exception was written into the fabric of the seminal case that established a woman's constitutional right to access an abortion.[40]

C. The Undue Burden Standard

In 1983, ten years after *Roe*, the Supreme Court decided *City of Akron v. Akron Center for Reproductive Health*.[41] In her *Akron* dissent, Justice Sandra Day O'Connor introduced a new standard of review to replace the strict scrutiny test of *Roe*.[42] In *Roe*, the strict scrutiny test classified abortion as a fundamental right of privacy, just like marriage, conception, family relationships, and child-rearing.[43] However, in her dissent, Justice O'Connor created the undue burden standard.[44] She wrote that "[o]ur recent cases indicate that a regulation imposed on 'a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'"[45] As long as the particular regulation does not unduly burden a woman's ability to access an abortion, such as requiring waiting periods or outside consent, then the court will only review the regulation as it "rationally relates to a legitimate state purpose."[46] However, this was only a dissenting opinion, so the new standard was not the law of the land.[47]

In 1992, in *Planned Parenthood of Se. P.A. v. Casey*, Justice O'Connor saw her chance.[48] The majority opinion formally replaced the strict scrutiny standard of *Roe* with the undue burden standard.[49] First, though, she reiterated that the core of *Roe* was still established precedent:

> It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First 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. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial

39. *Roe*, 410 U.S. at 125.

40. *Id.*

41. City of Akron v. Akron Ctr. For Reprod. Health, 462 U.S. 416 (1983).

42. *Roe*, 410 U.S. at 169.

43. *Id.* at 152-53.

44. *Akron*, 462 U.S. at 452-75 (O'Connor, J., dissenting).

45. *Id.* at 453 (quoting Maher v. Roe, 431 U.S. 464, 473 (1977) (quoting Bellotti v. Baird, 428 U.S. 132, 147 (1977))).

46. *Akron*, 462 U.S. at 453.

47. *See* David Cole, *The Power of a Supreme Court Dissent*, WASH. POST (Oct. 29, 2015), www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html [perma.cc/ABM6-T6AZ] (explaining the historic impact of Supreme Court dissents and how they can act as building blocks for later majority opinions).

48. *Casey*, 505 U.S. at 833.

49. *Id.* The test that O'Connor introduced in her *Akron* dissent was a more deferential standard than the one employed in the *Casey* opinion.

obstacle to the woman's effective right to elect the procedure.[50]

Justice O'Connor further explained that "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[51] However, "[t]he very notion that the State has a substantial interest in potential life" means that not every regulation will be struck down because "[n]ot all burdens on the right . . . will be undue." [52] This was the Court's way of balancing both the State's interests in protecting life and the woman's constitutional right to make decisions about her own body.[53] She further described that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[54] A statute may inform a woman's free choice or, in other words, attempt to persuade her to choose childbirth over abortion, but the statute may not hinder that choice.[55] Any statute that places a "substantial obstacle" in a woman's path to getting an abortion is not a permissible means to even legitimate ends.[56] In the same case, Justice John Paul Stevens, concurring in part and dissenting in part, added that "[a] burden may be 'undue' either because [it] is too severe or because it lacks a legitimate, rational justification." [57] Since the adoption of the undue burden standard in *Casey*, the Supreme Court continues to use the standard in all abortion cases it reviews.[58]

D. Problems Inside the Office of Refugee Resettlement

To fully understand these doctrines as they relate to Jane Doe, it is necessary to discuss the Office of Refugee Resettlement ("ORR"). Created in 1980 within the Department of Health and Human Services, ORR was intended to support U.S. policies of providing a safe haven for immigrants with "special humanitarian

50. *Id.* at 846.
51. *Id.* at 874.
52. *Id.* at 876.
53. *Id.*
54. *Id.* at 877.
55. *Id.* at 877, 886.
56. *Id.* at 877, 885.
57. *Id.* at 920.
58. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (striking down requirements for clinics to have hospital admitting privileges and hospital-grade facilities; Breyer, J. writing that "[e]ach [of the two requirements] places a substantial obstacle in the path of a woman seeking a pre[-]viability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution.") (citations omitted); *see also* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2113 (2020) (reaffirming the undue burden caused by a Louisiana law that was almost identical to the Texas law from *Hellerstedt*).

concern[s]."[59] Since its creation, this office has been tasked with resettling nearly three million refugees,[60] with 2019 recording the largest number of unaccompanied immigrant children in ORR's history.[61] That number represents a significant increase from earlier this decade, largely due to President Donald Trump's executive order to separate parents and children apprehended at the U.S.-Mexico border.[62] However, ORR shelters are not safe places for these children, as there have been numerous reports of abuse and neglect of the children who temporarily reside there.[63] Between 2014 and 2018, ORR shelters reported more than 4,500 allegations of sexual abuse and harassment.[64] In addition, ORR shelters have been described as "goldmine[s]" for child sexual predators.[65] Yet, no meaningful action taken to solve these problems has been very successful.[66]

When Jane Doe was housed in ORR's shelters, the Director of the Office was Scott Lloyd.[67] Before being appointed by President

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59. *History*, OFF. OF REFUGEE RESETTLEMENT (Mar. 16, 2020), www.acf.hhs.gov/orr/about/history [perma.cc/Y3C4-NS7P].

60. *Id.*

61. Teresa Mathew, *"They Feel Like They Are Being Jailed"*, SLATE (Aug. 13, 2019), www.slate.com/news-and-politics/2019/08/orr-shelters-unaccompanied-migrant-children-abuse.html [perma.cc/7NH3-EDBL].

62. Alexandra Schwartz, *The Office of Refugee Resettlement Is Completely Unprepared for the Thousands of Immigrant Children Now in Its Care*, NEW YORKER (June 21, 2018), www.newyorker.com/news/news-desk/the-office-of-refugee-resettlement-is-completely-unprepared-for-the-thousands-of-immigrant-children-now-in-its-care [perma.cc/LRU7-WJDH]; *see also* John Cassidy, *Why a Rogue President Was Forced to Back Down on Family Separation*, NEW YORKER (June 21, 2018), www.newyorker.com/news/our-columnists/why-a-rogue-president-was-forced-to-back-down-on-family-separation [perma.cc/B939-8JTW] (discussing the reversal of the child-separation executive order).

63. Mathew, *supra* note 61.

64. *Id.*

65. Michael Grabell & Topher Sanders, *Immigrant Youth Shelters: "If You're a Predator, It's a Gold Mine"*, PROPUBLICA (July 27, 2018), www.propublica.org/article/immigrant-youth-shelters-sexual-abuse-fights-missing-children [perma.cc/G9U2-H97D].

66. *Id.*; *see also* Priscilla Alvarez, *Government watchdog finds ineffective safety measures for children in custody*, CNN (June 18, 2020), www.cnn.com/2020/06/18/politics/office-of-refugee-resettlement-safety-children-custody/index.html [perma.cc/V3LK-AZWG] (discussing reports of confusion within immigration services about how to best protect children in custody ("With ORR, when we seek help, we get different answers.")); *and see also* Letter from Carla Smith, Freedom of Information Office, to William F. Marshall, Judicial Watch (Aug. 5, 2021), www.judicialwatch.org/wp-content/uploads/2021/08/JW-v-HHS-UACs-August-2021-01190.pdf [perma.cc/HQ9K-6S7V] (documenting thirty-three incidents of sexual abuse during a one-month span in the beginning of 2021).

67. Adam Cancryn & Renuka Rayasam, *Meet the anti-abortion Trump appointee taking care of separated kids*, POLITICO (June 21, 2018), www.politico.com/story/2018/06/21/scott-lloyd-anti-abortion-separated-kids-642094 [perma.cc/7XNP-F24L].

Trump, Lloyd worked to pass anti-abortion laws in six states[68] and wrote articles describing "dismemberment abortions"[69] and "Big Abortion[']s (*sic*) evolving profit structure."[70] During Lloyd's less-than-two-year tenure at ORR, he was known for enacting strict anti-abortion policies as well.[71] One existing policy allowed women in ORR custody to seek abortions in the case of rape or incest, but Lloyd immediately overrode that when he came into office and mandated that all abortion requests needed to be approved by him personally.[72] Lloyd's policy stated that shelter personnel were "prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR."[73] Unsurprisingly, abortion requests sent to him for approval were rarely, if ever, granted.[74] Lloyd was eventually fired after "internal emails . . . revealed that Lloyd devoted an outsize share of his time to micromanaging the abortion requests of teen girls in his custody – a tiny fraction of the individuals for which [ORR] is responsible."[75]

While Lloyd was well-known for these policies in immigration centers,[76] his office was not the only one responsible for such acts.[77] After being released from Border Patrol custody, women have reported being "repeatedly slammed against . . . chain link fence[s]" while pregnant or suffering miscarriages without receiving any

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68. *Id.*

69. Scott Lloyd, Banning Dismemberment Abortions: Constitutionality & Politics, 41 HUM. LIFE REV. 11 (2015).

70. Cancryn & Rayasam, *supra* note 67; Scott Lloyd, *Does Contraception Really Prevent Abortion?*, FEDERALIST (Aug. 18, 2015), www.thefederalist.com/2015/08/18/does-contraception-really-prevent-abortions [perma.cc/39C3-TSSF].

71. Roque Planas & Elise Foley, *Anti-Abortion Crusader Scott Lloyd Out At Refugee Resettlement Agency*, HUFFINGTON POST (Nov. 19, 2018), www.huffpost.com/entry/anti-abortion-crusader-scott-lloyd-pushed-out-of-refugee-resettlement-agency_n_5bf34051e4b0d9e7283c4652 [perma.cc/9YM7-2DJW] (Lloyd was the Director of ORR from March 2017 to November 2018).

72. Cancryn & Rayasam, *supra* note 67; *see also id.* (stating how, in one instance, Lloyd ordered a girl who had taken one of two pills needed to complete her requested abortion to undergo medical consultations to see if the procedure, which had already started, could be reversed).

73. *Hargan* 874 F.3d at 744 (LeCraft Henderson, J., dissenting).

74. Tessa Stuart, *The Health Department's Christian Crusade*, ROLLING STONE (Oct. 24, 2018), www.rollingstone.com/politics/politics-features/health-and-human-services-abortion-policies-738904/ [perma.cc/L2FJ-V7GF].

75. Tessa Stuart, *Trump's Anti-Abortion Refugee Program Chief Has Been Removed From His Post*, ROLLING STONE (Nov. 19, 2018), www.rollingstone.com/politics/politics-news/scott-lloyd-removed-o-r-r-755468/ [perma.cc/39RZ-X5Q6].

76. MSNBC (@MSNBC), TWITTER (Mar. 15, 2019), www.twitter.com/MSNBC/status/1106746641736970240 [perma.cc/FFA4-JRXR].

77. Brigitte Amiri, *Reproductive Abuse is Rampant in the Immigration Detention System*, ACLU (Sept. 23, 2020), www.aclu.org/news/immigrants-rights/reproductive-abuse-is-rampant-in-the-immigration-detention-system/ [perma.cc/444P-TK4S].

hygiene products or medical care.[78] One woman recounted how, in April 2020, she was forced to give birth in a Border Patrol station while standing and still wearing pants, after repeatedly asking for help and telling agents how much pain she was in.[79] Since these women have come forward, the ACLU has filed several lawsuits against various immigration agencies for the "heinous abuse or neglect" of pregnant women.[80]

E. The Plight of Pregnant Immigrant Minor, Jane Doe

One of the dozens of women to come forward was Jane Doe. Doe was only seventeen years old when she attempted to cross the U.S.-Mexico border as an unaccompanied minor.[81] In an attempt to protect her anonymity, very little information is publicly available about Doe's life before her confinement, except that she experienced "life-threatening physical abuse" and therefore could not return home to her family.[82] She, like many other refugees, made the decision to come to the United States in search of a better life.[83] On September 7, 2017, she was taken into custody by U.S. border patrol agents and sent to a federally-funded immigration shelter run by the ORR in Texas.[84] During a routine physical examination in ORR custody, she was informed that she was eight weeks pregnant, and she requested an abortion.[85]

Her request for an abortion was denied by ORR Director Scott Lloyd.[86] Through her *guardian ad litem*,[87] Rochelle Garza, Doe

78. *Id.*

79. Ema O'Connor, *A Woman Gave Birth In A Border Patrol Station Still Wearing Her Pants. Now The Agents Involved Are Being Accused Of Abuse.*, BUZZFEED NEWS (Apr. 9, 2020), www.buzzfeednews.com/article/emaoconnor/pregnant-woman-birth-border-patrol-aclu-complaint [perma.cc/CK7Y-KM5A].

80. *Id.*; *see also* Letter from Monika Y. Langarica, ACLU San Diego, to Joseph V. Caffari, U.S. Dept. of Homeland Security (Apr. 8, 2020), www.s3.documentcloud.org/documents/6827805/2020-04-07-OIG-Cmplt-Final-Redacted.pdf [perma.cc/3RXT-45YZ] (outlining the ACLU's lawsuit on behalf of the woman who gave birth standing up and while wearing pants in Border Patrol custody).

81. *Hargan*, 874 F.3d at 741-43.

82. *Id.* at 742.

83. *Id.* at 743.

84. *Id.*

85. *Id.* at 744.

86. *After a Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, ACLU (Oct. 25, 2017), www.aclu.org/press-releases/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion [perma.cc/A5BT-Q74D]. In Jane Doe's own words: "[T]hey have not allowed me to leave to get an abortion." *Id.*

87. A *guardian ad litem*, or GAL for short, is an attorney that a court appoints to watch after someone during a case. *Guardian Ad Litem*, LEGAL INFO. INST., www.law.cornell.edu/wex/guardian_ad_litem (last visited Oct. 11, 2020). They will help the court be informed to make decisions for someone

commenced an action against Health and Human Services Secretary Eric Hargan[88] in the U.S. District Court for the District of Columbia.[89] The suit challenged the constitutionality of ORR's new abortion policy and sought to enjoin the ORR to allow Doe to have the abortion.[90] On October 18, 2017, Judge Tanya Chutkan issued a Temporary Restraining Order ("TRO"), allowing Doe to obtain an abortion immediately.[91]

On October 19, 2017, Doe attended pre-abortion counseling with the doctor who would perform her abortion in order to fulfill the requirements of Texas state abortion laws.[92] At this clinic, Doe had to wait a full week before actually obtaining her abortion.[93] This waiting period allowed the government to file an appeal to the Court of Appeals of the D.C. Circuit.[94] On October 20, 2017, a panel of three judges of the D.C. Circuit Court of Appeals vacated the District Court's decision, saying that the ORR policy was not an undue burden.[95]

Upon reversal, Doe immediately requested a rehearing en banc.[96] In support of Doe, numerous organizations and states submitted amicus curiae briefs arguing that the ORR policy placed an undue burden on women's rights to choose an abortion.[97] On

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without full capacity, usually someone who is mentally disabled or someone who is a child. *Id.* In this case, Jane Doe was a child, so Rochelle Garza of the ACLU was appointed by the court as her GAL. *See generally Hargan*, 874 F.3d at 735 (showing the parties as including Rochelle Garza as GAL for Jane Doe); *see also generally* Azar v. Garza, 138 S. Ct. 1790 (2018) (also showing the parties as including Rochelle Garza as GAL for Jane Doe).

88. Eric Hargan served as Secretary of Health and Human Services from October 2017 until January 2018, when he was replaced by Alex Azar. Dan Mangan, *Former drug-company executive Alex Azar sworn in as Trump's new healthcare chief*, CNBC (Jan. 29, 2018), www.cnbc.com/2018/01/29/watch-alex-azar-sworn-in-as-trumps-new-health-care-chief.html [perma.cc/CFS2-KBWD]. Thus, the opposing party in Jane Doe's case switches from Hargan to Azar between the D.C. Circuit Court of Appeals and the U.S. Supreme Court.

89. *Hargan* 874 F.3d at 744.

90. *Azar*, 138 S. Ct. at 1791.

91. Garza v. Hargan, 2017 U.S. Dist. LEXIS 175415.

92. *Azar*, 138 S. Ct. at 1792.

93. *Id.* This is because the doctors at this clinic rotated on a weekly basis, meaning the doctor that Doe attended counseling with would not be on shift for another seven days. *Id.*

94. *Azar v. Garza*, SCOTUSBLOG, www.scotusblog.com/case-files/cases/azar-v-garza [perma.cc/JA8S-RE2U] (last visited Feb. 22, 2021).

95. Garza v. Hargan, No. 17-5236, 2017 U.S. App. LEXIS 20711 (D.C. Cir. Oct. 20, 2017); *see also Casey*, 505 U.S. at 876 (explaining the undue burden standard); *and see also* Margaret Talbot, *The Supreme Court's Just Application of the Undue-Burden Standard for Abortion*, NEW YORKER (June 27, 2016), www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion [perma.cc/M9ZV-LEJF] (agreeing with the way the court used the undue burden standard in *Hellerstedt*).

96. *Hargan*, 874 F.3d at 735.

97. *Id.* at 736. These states include California, Connecticut, Delaware, Hawai'i, Illinois, Main, Massachusetts, New York, Oregon, Pennsylvania,

October 24, 2017, the Court of Appeals, sitting en banc, reversed and remanded the matter back to the District Court.[98] On that same day, Judge Chutkan once again ordered the government to allow Doe to get an abortion.[99] Finally, on October 25, 2017, at 4:15 a.m., Doe successfully obtained an abortion.[100] But her legal journey did not end, as the government still appealed to the U.S. Supreme Court.[101] On June 4, 2018, the Supreme Court granted certiorari, vacated the en banc order, and remanded the case back to the D.C. Circuit Court of Appeals to dismiss the claim as moot.[102]

III. ANALYSIS

This section will discuss arguments regarding abortion access for immigrant women. It will explain the decision of the D.C. Circuit Court of Appeals in *Garza v. Hargan*[103] and then finally review the Supreme Court's decision.

A. Arguments For Preserving Abortion Access for Immigrant Women

Abortion accessibility advocates would say clearly and unequivocally that reproductive rights are human rights,[104] which include "the right to make decisions about one's life and family, to access necessary reproductive health services, and to decide whether and when to have children."[105] According to the Universal Declaration of Human Rights, the United States must provide the same human rights and protections for all people within its borders, regardless of citizenship or immigration status.[106] The Due Process Clauses of the Fifth and Fourteenth Amendments ensure that these rights extend to all "person[s]" in the United States, and neither

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Vermont, Washington, and the District of Columbia. *Id.*

98. *Id.* at 742, 745.

99. *Azar*, 138 S. Ct. at 1792.

100. *Id.*

101. *Id.*

102. *Id.* at 1793. See Part IV for a further explanation of the Court's reasoning for this action. Doe had already obtained her abortion by the time her case reached the Supreme Court. *Id.*

103. *Hargan*, 874 F.3d at 735.

104. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [perma.cc/HKY8-A6UK].

105. Brief of Reproductive Rights, Health, and Justice Organizations and Allied Organizations as *Amici Curiae* in Support of Appellees and Affirmance at 5, Garza v. Hargan, 874 F.3d 735 (2017) (No. 18-5093) [hereinafter Amici Brief].

106. Felipe González Morales, *Report of the Special Rapporteur on the human rights of migrants*, ¶ 19, U.N. Doc. A/HRC/38/41 (May 4, 2018), www.right-docs.org/doc/a-hrc-38-41/ [perma.cc/3SWM-AYMU].

make any specification as to immigration status.[107] The Supreme Court has affirmed this principle, holding that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[108] Since the Supreme Court has ruled that access to an abortion is a constitutional right for all women, it should follow that this right naturally extends to immigrant and non-citizen women on U.S. soil as well.[109]

Defenders of abortion access for immigrant women would argue that the mootness doctrine does not apply to this case because it involves pregnancy and abortion.[110] Humans have a gestation time that is approximately 268 days,[111] which is roughly the same amount of time it takes for a case to be heard and then decided by the Supreme Court.[112] However, this 268-day timeline does not take into account the amount of time it can take for a case to even reach the Supreme Court in the first place.[113] Clearly, by the time that a case involving pregnancy or abortion finally reaches the Court, the issue will have been resolved one way or another, just due to the passage of time.[114] If it weren't for this mootness exception, the Supreme Court would be unable to hear any cases involving pregnancy or abortion, and the courts' doors would be closed to an entire population of potential plaintiffs.[115] Without access to the court system, women like Jane Doe have nowhere to turn to remedy a serious violation of their civil rights.[116]

In addition to the mootness issue, a significant part of the Supreme Court's abortion jurisprudence involves the undue burden standard.[117] The government, in enacting an abortion-related regulation, cannot place a "substantial obstacle" in the way of a

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107. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

108. Plyler v. Doe, 457 U.S. 202, 210 (1982).

109. *Roe*, 410 U.S. at 164.

110. *Id.* at 124-25.

111. An Oxford study found this to be the median time from ovulation to birth, although the gestational length range was thirty-seven days. A.M. Jukic et al., *Length of human pregnancy and contributors to its natural variation*, 28(10) HUM. REPRODUCTION 2848 (2013).

112. Dr. Adam Feldman, *Crunching Data From this Past Term*, EMPIRICAL SCOTUS (Aug. 20, 2017), www.empiricalscotus.com/crunching-data/ [perma.cc/QS94-X298].

113. Vox, *How a case gets to the US Supreme Court*, YOUTUBE (Mar. 28, 2017), www.youtube.com/watch?v=KEjgAXxrkXY [perma.cc/H6MH-4ESL].

114. *Roe*, 410 U.S. at 125 (quoting *Southern Pac. Terminal Co.*, 219 U.S. at 515).

115. *Roe*, 410 U.S. at 125.

116. *Id.*

117. *See Casey*, 505 U.S. at 874 (creating the undue burden standard); *see Hellerstedt*, 136 S. Ct. at 2300 (applying the undue burden standard to a law requiring clinics to have hospital admitting privileges and hospital-grade facilities); *and see Russo*, 140 S. Ct. at 2113 (reaffirming the undue burden caused by a Louisiana law that was almost identical to the Texas law from *Hellerstedt*).

woman seeking an abortion.[118] Recently, shelter personnel within the ORR were prohibited from taking any action to facilitate an abortion for a detainee unless they had explicit written permission from Lloyd himself.[119] This means that immigrant women who wanted to get an abortion would have to "extract[]"[120] themselves from ORR custody, find their own doctors, arrange for their own transportation, and schedule their own procedures.[121] These physical, financial, and emotional hurdles rise to the level of an undue burden as envisioned by the Supreme Court for any immigrant woman, let alone a minor child seeking an abortion.[122] Denying the right to access abortion "effectively denies the right altogether."[123]

In Doe's specific case, Judge Patricia Millet of the D.C. Circuit Court of Appeals wrote a concurrence that addressed many of the arguments made by anti-abortion proponents.[124] She found the government's argument that it was not imposing a substantial obstacle in the way of Jane Doe and her abortion to be ridiculous, stating:

> [T]he government['s] . . . position [was] that . . . an unaccompanied child, has the burden of extracting herself from [ORR] custody if she wants to exercise the right to an abortion that the government does not dispute that she has. The government has insisted that it may categorically blockade exercise of her constitutional right unless this child (like some kind of legal Houdini) figures her way out of detention . . .[125]

Despite there being alternate routes — such as seeking sponsorship or voluntary leaving the United States — Judge Millet noted that these options were not viable, realistic, or worth the time to try.[126]

1. Sponsorship

A sponsor is an adult guardian, "much like a foster parent, someone who chooses to house and provide for a child throughout her time in the United States."[127] Judge Millet noted that Doe's sponsorship search had already been ongoing for nearly seven weeks with no real leads.[128] The sponsor would have to "either be related to [Doe] or have some 'bona fide social relationship' with

118. *Hellerstedt*, 136 S. Ct. at 2300.
119. Cancryn & Rayasam, *supra* note 67; *Hargan* 874 F.3d at 743.
120. *Hargan* 874 F.3d at 737 (Millet, J., concurring).
121. *Id.* at 737, 740-41.
122. *Casey*, 505 U.S. at 920.
123. Amici Brief, *supra* note 105, at 13.
124. *Hargan*, 874 F.3d at 736-43 (Millet, J., concurring).
125. *Id.* at 737 (emphasis in original).
126. *Id.* at 738-41.
127. *Id.* at 738.
128. *Id.*

[her] that 'existed before' her arrival in the United States."[129] Additionally, the government said that the sponsor would help Doe make the ultimate decision regarding her pregnancy.[130] However, Doe had already obtained a judicial bypass order from a Texas court that would allow her to make that decision entirely on her own, despite being a minor.[131] Therefore, her sponsor would not have a say in the decision anyway.[132] Ultimately, Judge Millet argued that the sponsorship search was just eating away valuable time in Doe's pregnancy.[133]

2. Voluntary Departure

Second, Doe could voluntarily leave the United States and return to her home country.[134] Judge Millet pointed out that this was not an option for Doe, as returning to her home country would mean a return to "life-threatening physical abuse." [135] Additionally, agreeing to voluntary departure also meant agreeing to give up any and all potential claims of legal entitlement to stay in the United States, even as a refugee.[136] Judge Millet wrote that the only reason that the government pushed these two options was because "sponsorship, like voluntary departure from the United States, would get [Doe] and her pregnancy out of the government's hands."[137] These arguments, appeals, and delays by the government were not only impacting Doe's health and the potential complications of her abortion, but more importantly, they were creating an undue burden preventing Doe from obtaining the abortion she sought.[138]

To promote public health for all individuals in the United States, healthcare information and services should be widely accessible and available.[139] In particular, "[a]ccess to accurate, unbiased [reproductive] health information and comprehensive [reproductive] healthcare services is essential to preserving [the] health, dignity, and bodily autonomy [of women]."[140] Studies have shown that "restricting abortion is detrimental, while supportive policies are beneficial to women."[141] Overall, when the interests of

129. *Id.*
130. *Id.* at 753 (Kavanaugh, J. dissenting).
131. *Id.* at 739 (Millet, J., concurring).
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 742.
136. *Id.* at 739.
137. *Id.*
138. *Id.* at 741.
139. Amici Brief, *supra* note 105, at 21.
140. *Id.*
141. Abortion restrictions can lead to poor emotional and financial well-being and prevent women from achieving their life plans and goals. Terri-Ann

and harms to the State are balanced with the interests of and harm to immigrant women, advocates argue that the interests of women outweigh the potential harm to the State.[142] Immigrant women have an interest in their own bodily autonomy and in exercising their constitutional right to obtain an abortion.[143] By denying them this right, the State's interest in protecting a fetus becomes irrelevant because the government's actions "cannot be considered a permissible means of serving its legitimate ends."[144]

B. Arguments Against Preserving Abortion Access for Immigrant Women

Anti-abortion proponents disagree wholeheartedly with pro-choice advocates. Right off the bat, anti-abortion proponents would argue that cases like Doe's are moot. A case must have the controversy or issue be ongoing throughout all stages of the litigation, or else the case becomes meaningless.[145] Because Doe was able to have an abortion before her case made it to the Supreme Court, her case was now pointless.[146] She could no longer request

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Thompson & Jane Seymour, *Evaluating Priorities: Measuring Women's & Children's Health & Well-Being Against Abortion Restrictions in the States*, IBIS REPROD. HEALTH & CTR. FOR REPROD. RIGHTS (2017), www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA-Ibis-Evaluating-Priorities-v2.pdf [perma.cc/3BQ5-H2HU]. Women who cannot obtain abortions are at a higher risk for poverty, physical health impairments, and intimate partner violence. *Id.* On the other hand, studies have shown that access to abortion can contribute to improved health and safety, lower risk of poverty, and better outcomes for children as well. *Id.* Immigrant women are already less likely to finish high school than native-born Americans, and they experience higher rates of poverty. Jeanne Batalova, *Immigrant Women and Girls in the United States*, MIGRATION POL'Y INST. (Mar. 4, 2020), www.migrationpolicy.org/article/immigrant-women-and-girls-united-states-2018 [perma.cc/87RN-H8DR]. Most importantly, immigrant women are more likely to experience negative health outcomes, due in part to higher rates of stress and trauma and lower rates of social support. Brian Karl Finch & William A. Vega, *Acculturation stress, social support, and self-rated health among Latinos in California*, 5(3) J. IMMIGR. HEALTH 109-17 (2003). Oftentimes, they have no medical records at all, or at least no access to their medical records from their home country. Susan L. Ivey & Shotsy Faust, *Immigrant women's health: initial clinical assessment*, 174(6) WEST J. MED 433-37 (2001). It is clear that immigrant women need access to healthcare, including reproductive healthcare, just as much if not more than other groups of people. *Id.*

142. Thompson & Seymour, *supra* note 141.

143. *Id.*; *see also Plyler*, 457 U.S. at 210 (holding that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of the law by the Fifth and Fourteenth Amendments.").

144. Brief for Appellees at 47, Garza v. Hargan, 874 F.3d 735 (2017) (No. 18-5093).

145. CHEMERINSKY, *supra* note 29, at 87-9.

146. *Azar*, 138 S. Ct. at 1792; *see also generally* DeFunis v. Odegaard, 416 U.S. 312 (1974) (finding a case involving a law student admission controversy

an abortion because she was no longer pregnant.[147] The relief she sought was already obtained, so there was no live issue or controversy.[148]

They may also claim that immigrant women have no right to an abortion at all because they are not U.S. citizens and are undocumented.[149] While abortion jurisprudence states that the government cannot set up substantial obstacles in the way of accessing abortion, there is also no obligation on the government to expend resources to facilitate the process either.[150] The government may, in fact, actively adopt policies that "favor life."[151] Proponents argue that this refusal to facilitate does not constitute an undue burden for immigrant women because there are other options available if they wish to terminate their pregnancies.[152] These options again include sponsorship and voluntary departure.[153]

1. Sponsorship

The first option that immigrant women have is to find a sponsor, who is essential for protecting minors from human trafficking, sexual abuse, and those who would abuse or neglect them.[154] Although the process of securing a sponsor can sometimes take several weeks or months, it is a viable option for immigrant women like Doe.[155] In fact, the Supreme Court has previously upheld state laws that created three-week delays before abortions, so the potential time delay is not a constitutional problem here.[156] If an immigrant woman can get sponsorship, she can leave ORR

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moot because the student bringing the suit was already set to graduate from law school in just a few weeks' time); *and see also generally* Moore v. Madigan, 2013 U.S. Dist. LEXIS 146304 (C.D. Ill. 2013) (declining to hear a concealed carry case because of the passing of a state law legalizing concealed carry, which rendered the case moot).

147. *Azar*, 138 S. Ct. at 1792.

148. *Id.*

149. *Hargan*, 874 F.3d at 746-48 (LeCraft Henderson, J., dissenting).

150. Harris v. McRae, 448 U.S. 297, 315 (1980); s*ee also* Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989) (stating that the government does not need to "commit any resources to facilitating abortions" in a decision about state restrictions on the use of state funds, facilities, and employees in performing or advising about abortions).

151. Appellant's Reply Brief at 16-7, Azar v. Garza, 138 S. Ct. 1790 (2018) (No. 18-5093); *see also* Maher v. Roe, 432 U.S. 464, 471-74 (1977) (holding that unequal government subsidization for childbirth and abortion was constitutional).

152. Appellant's Reply Brief, *supra* note 151, at 14.

153. *Id.*

154. *Hargan*, 874 F.3d at 738-39 (Millet, J., concurring).

155. Appellant's Reply Brief, *supra* note 151, at 18.

156. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 514, 532 (1990). In this case, the Court held that Ohio's judicial bypass procedures met the "expedition" requirement, even though the procedures could take three-weeks due to court scheduling and administrative logistics. *Id.*

custody expeditiously[157] and obtain her abortion once she is in the custody of the sponsor.[158] In Doe's case, her adult sponsor could help her weigh her options and make the right decision regarding her pregnancy.[159]

2. Voluntary Departure

The second option is voluntary departure, where immigrant women return to their home countries to access abortion services because the U.S. government has no obligation to provide those services in the United States.[160] Instead of exercising a "right" to access an abortion, they can exercise their right to voluntary departure.[161] This is not interpreted as punishment, but rather as "simply an alien's return to her country of nationality, where she likely resided until just a short time before coming [to the U.S.]"[162] Anti-abortion advocates warn of "abortion tourism," where the idea is that minors enter the United States seeking abortion services that are not available in their own country, creating a strain on U.S. judicial systems, immigration facilities, and medical resources.[163] Allowing this practice presents clear concerns with respect to foreign affairs and national security.[164] The United States cannot be known around the world as a haven for those seeking to circumvent the laws of their home countries,[165] and voluntary departure would prevent all of these problems.[166]

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157. Judge Kavanaugh explains that "expeditiously" should be defined for future cases as a combination of "(i) expeditious from the time the Government learns of the pregnant minor's desire to have an abortion and (ii) expeditious in the sense that the transfer to the sponsor does not occur too late in the pregnancy for a safe abortion to occur." *Hargan*, 874 F.3d at 753 (Kavanaugh, J. dissenting).

158. *Id.*

159. *Id.*

160. Appellant's Reply Brief, *supra* note 151, at 19; Robert Pear, *Do Migrant Teenagers Have Abortion Rights? Two Volatile Issues Collide in Court*, N.Y. TIMES (Sept. 29, 2018), www.nytimes.com/2018/09/29/us/politics/court-abortion-immigrants.html [perma.cc/WTJ8-WHG4]; *see also* Meagan Burrows, *Trump Administration Claims Preventing Young Immigrants from Accessing Abortion is Constitutional*, ACLU (Sept. 27, 2018), www.aclu.org/blog/reproductive-freedom/abortion/trump-administration-claims-preventing-young-immigrants-accessing [perma.cc/AV7B-LHQZ] (explaining the Trump Administration's argument that the U.S. government has no obligation to provide immigrant women with an abortion).

161. Appellant's Reply Brief, *supra* note 151, at 20.

162. *Id.*

163. Appellant's Brief at 45, Azar v. Garza, 138 S. Ct. 1790 (2018) (No. 18-5093); *see also* Appellant's Reply Brief, *supra* note 151, at 20-21 (discussing the possibility of this court decision leading to an increase in such "tourism").

164. Appellant's Brief, *supra* note 165, at 45.

165. Appellant's Reply Brief, *supra* note 151, at 20-21.

166. In 1972, the year before *Roe* legalized abortion in all states, 100,000 women travelled to New York City to obtain abortions because of New York's relaxed abortion laws. Jordan Larson, *The 200-Year Fight for Abortion Access*,

Similarly, then-Judge Brett Kavanaugh[167] said in his D.C. Circuit dissent that allowing Doe to obtain an abortion in this instance would lead to "unlawful immigrant minors [having access to] immediate abortion on demand."[168] Abortion jurisprudence in this country already limits the means by which lawful citizens can access an abortion, so anti-abortion proponents argue that creating a narrower exception that allows access specifically for minor immigrant women is unjustified.[169]

C. The Decision of the U.S. Supreme Court

Jane Doe's case finally came up before the U.S. Supreme Court in the fall term of 2017.[170] On June 4, 2018, the Court published its decision, stating that Doe's abortion, which she had on October 25, 2017, rendered her claim moot.[171] Additionally, the Court vacated the D.C. Circuit's grant of injunctive relief to Doe.[172] In its per curiam opinion, the Court wrote "[w]hen 'a civil case from a court in the federal system . . . has become moot while on its way here,' this Court's 'established practice' is 'to reverse or vacate the judgment below and remand with a direction to dismiss.'"[173] But they also noted that not every moot case should automatically be vacated too — it ultimately depends on the circumstances of each case.[174] However, the Court should vacate where "mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'"[175] The Court said that this is because it cannot allow a plaintiff who won her case to take voluntary action that moots the issue and then also reaps the benefits of that judgment in her

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CUT (Jan. 17, 2017), www.thecut.com/2017/01/timeline-the-200-year-fight-for-abortion-access.html [perma.cc/3X9Y-6NJR]. Half of those women reportedly travelled more than 500 miles for the procedure. *Id.*

167. At the time of his dissenting opinion in Jane Doe's case, Brett Kavanaugh was a Judge on the D.C. Circuit Court of Appeals. He has since been appointed by President Trump to the U.S. Supreme Court, and he was confirmed by the U.S. Senate on October 6, 2018, despite numerous allegations of sexual assault that were levied against him. Marie Solis, *Kavanaugh Confirmed to the Supreme Court Despite Sexual Assault Allegations*, VICE (Oct. 6, 2018), www.vice.com/en/article/9k7zey/kavanaugh-confirmed-to-the-supreme-court-despite-sexual-assault-allegations [perma.cc/22MM-TE3Y].

168. *Hargan*, 874 F.3d at 755 (Kavanaugh, J. dissenting).

169. *Id.*

170. No. 17-654, SUPREME COURT OF THE U.S., www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-654.html [perma.cc/8Q93-QH6K] (last visited Nov. 1, 2020).

171. *Azar*, 138 S. Ct. at 1792.

172. *Id.* at 1793.

173. *Id.* at 1792 (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950)).

174. *Azar*, 138 S. Ct. at 1792-93.

175. *Id.* at 1792 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 71-2 (1997) (quoting U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 23 (1944))).

favor.[176] Yet the very same Court has previously held that the mootness doctrine does not apply in cases involving pregnancy and abortion.[177] In conclusion, the Supreme Court erred when it rendered Doe's case moot and vacated the D.C. Circuit's en banc decision, putting a decisive end to Doe's case. Additionally, the Court failed to respond to the constitutional question presented in the underlying case, namely "whether the government can violate decades of Supreme Court precedent by banning abortion for unaccompanied minors."[178]

IV. PROPOSAL

Immigrant women in this country, even if they are undocumented, have a constitutional right to access an abortion.[179] However, due to political jockeying,[180] systemic racism and misogyny,[181] and the high number of conservative judges in this country appointed by President Trump,[182] this right is being contested by anti-abortion advocates.[183] If the Supreme Court had heard Jane Doe's case back in 2018, and if it had ruled that ORR's policy presented an undue burden on her right to an abortion, then

176. *Azar*, 138 S. Ct. at 1792 (quoting *Arizonans*, 520 U.S. at 75).

177. *See* Section II, Part A of this Comment (outlining the mootness exception to abortion cases).

178. Brigitte Amiri, *Young Immigrant Women Have the Right to Access Abortion. Monday's Supreme Court Decision Doesn't Change That.*, ACLU (June 4, 2018), www.aclu.org/blog/reproductive-freedom/abortion/young-immigrant-women-have-right-access-abortion-mondays-supreme [perma.cc/GZR3-ZP2M]. The government policy in question has been called "a blanket ban on abortion for anyone while they're in government custody." Zoe Tillman, *The Trump Administration Is Still Trying To Stop Pregnant Undocumented Teens From Getting Abortions*, BUZZFEED NEWS (Sept. 26, 2018), www.buzzfeednews.com/article/zoetillman/trump-administration-stop-undocumented-teens-abortion [perma.cc/JG3K-VSDS].

179. *See* Section III, Part A of this Comment (outlining arguments made by pro-choice advocates).

180. *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, ANTI-DEFAMATION LEAGUE (last visited Nov. 22, 2020), www.adl.org/the-anti-immigrant-movement-in-the-us [perma.cc/9A2U-XDE9].

181. Surina Khan, *White Supremacy Is Rooted In Misogyny And Racism*, WOMEN'S FOUND. CA. (Aug. 25, 2017), www.womensfoundca.org/news/white-supremacy-rooted-misogyny-racism/ [perma.cc/HQ4G-JVKC].

182. Kadhim Shubber, *How Trump has already transformed America's courts*, FIN. TIMES (Sept. 25, 2020), www.ft.com/content/032b3101-9b8b-4566-ace4-67b86f42370b. President Trump has made 217 judicial appointments in during his presidency, most of whom are white men. John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RSCH. CTR. (July 15, 2020), www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges [perma.cc/ZAL3-NFPD]. President Trump's appointees make up twenty-four percent of all active federal judges currently presiding in the United States as of 2020. *Id.*

183. *What's going on?*, *supra* note 9.

the reproductive rights of immigrant women would not be up for decision today. If the Supreme Court had followed its own well-established precedent, then it would be clear that immigrant women have just as much bodily autonomy as women who are American citizens. We would likely not be hearing chilling tales of forced hysterectomies in Immigration and Customs Enforcement ("ICE") detention centers in Georgia,[184] outright denials of abortion access,[185] and women giving birth under inhumane and unsanitary conditions.[186] The Supreme Court in 2018 should have first heard Jane Doe's case; and second, ruled that ORR's policy created an undue burden for immigrant women seeking abortions.

Part A of this section will explain why the U.S. Supreme Court made a mistake and should have heard Jane Doe's case. Part B will propose that the Supreme Court should have ruled that the ORR's policy created an undue burden on immigrant women's ability to obtain abortions. Finally, Part C will discuss the importance of the Supreme Court taking up this issue and ruling in such a way, due to its effect on solidifying abortion jurisprudence and protecting immigrant women's right to choose to terminate their pregnancy.

A. The Supreme Court Should Have Accepted Jane Doe's Case

In a per curiam decision, the U.S. Supreme Court ruled that Jane Doe's case was moot, and therefore, it was not going to discuss any of the very real and very pertinent issues presented by Doe, like whether ORR's policies violated the undue burden standard from *Casey*.[187] However, as written by Justice Blackmun into the fabric of *Roe v. Wade*, the mootness doctrine does not apply to cases involving pregnancy and abortion because they are wrongs "capable of repetition, yet evading review."[188] Unfortunately, Doe's situation is all too common, and many women share a similar plight.[189] In fact, Doe was only one of several plaintiffs in her suit; Jane Roe, Jane Poe, and Jane Moe joined her because they too could not obtain the abortions they wanted due to ORR policy.[190] While each of the four girls came to the United States under different circumstances, they each were pregnant while in ORR custody, requested

184. Treisman, *supra* note 1.

185. Amiri, *supra* note 77.

186. O'Connor, *supra* note 79.

187. *Azar*, 138 S. Ct. at 1791.

188. *Roe*, 410 U.S. at 125 (quoting *Southern Pac. Terminal Co.*, 219 U.S. at 515).

189. Brief for Appellees, *supra* note 144, at 8-13.

190. *Id.* Additionally, the caption for this case lists the appellees as "ROCHELLE GARZA, as guardian ad litem to unaccompanied minor JANE DOE, on behalf of herself *and others similarly situated*, et al.[]" (emphasis added). *Azar*, 138 S. Ct. at caption.

abortions, and were denied by the same policy enacted by ORR Director Scott Lloyd.[191] Additionally, since the Supreme Court handed down this ruling, there have been several subsequent plaintiffs repeatedly bringing essentially the same suit. [192]

In this case, the fact that Doe had already gotten an abortion may indeed have negated her personal claim of injunctive relief,[193] but there was still a need to discuss and make a decision about the right at issue – that being the right of an unaccompanied, undocumented, immigrant minor to obtain an abortion, if she so chooses. However, in order to have this discussion and decision, the Court must first have accepted the case, which it incorrectly failed to do.

B. The Supreme Court Should Have Ruled That ORR's Policy Created an Undue Burden

In *Planned Parenthood v. Casey*, the Court defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." [194] Under Director Scott Lloyd, the ORR's policy on abortion stated that shelter personnel were "prohibited from taking any action that facilitates an abortion without direction and approval from the [ORR] Director."[195] Predictably, these requests were almost always denied.[196] This policy ultimately amounted to an undue burden that stood in the way of immigrant women, like Doe, who wanted to obtain an abortion while in ORR custody.[197] ORR's policy did not allow Doe to leave their custody, let alone leave to have an abortion.[198] She did have two options presented to her by the government: finding a sponsor or voluntarily departing the United States and returning to her home country.[199] However, neither was a reasonable or viable option for Doe.[200]

Finding a sponsor would have a negligible effect on her ability to get an abortion, as she had already obtained a judicial bypass from a Texas judge that allowed her to decide for herself, even as a

191. *Id.* at 8-13.

192. Garza v. Hargan, 2017 U.S. Dist. LEXIS 209883 (D.C. December 18, 2017); J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019); ACLU v. Azar, No. 16-cv-03539-LB, 2018 U.S. Dist. LEXIS 175470 (N.D. Cal. Oct. 11, 2018); ACLU of N. Cal. v. Burwell, No. 16-cv-03539-LB, 2017 U.S. Dist. LEXIS 168352 (N.D. Cal. Oct 11, 2017).

193. *Azar*, 138 S. Ct. at 1792.

194. *Casey*, 505 U.S. at 877.

195. *Hargan,* 874 F.3d at 744 (LeCraft Henderson, J., dissenting).

196. Stuart, *supra* note 74.

197. *Hargan,* 874 F.3d at 737 (Millet, J., concurring).

198. *Id.*

199. *Id.*

200. *Id.*

minor, whether to get an abortion.[201] While it is true that a sponsor would allow her to leave ORR custody to obtain that abortion, it simply would take too long to locate and fully process the sponsorship.[202] On average, sponsorship applications take six to twelve months to process.[203] For Doe, who was already in her second trimester when she had her abortion, such a delay represented a risk to her health, higher complexity of the abortion procedure, and the greater difficulty of finding a doctor in Texas who would perform the procedure.[204] And without a massive expedition of her sponsorship, such a delay would have condemned Doe to childbirth. This delay is unnecessary and presents an undue burden on Doe's right to have an abortion.

Doe's second option, voluntary departure, was the government essentially saying, "Go back where you came from if you don't like the fact that we are violating your constitutional rights."[205] This option would have forced her to "surrender any legal right she has to stay in the United States" and return to her home country, where she faced severe abuse from her family.[206] Moreover, her home country prohibited abortion, so the closest — and only — place she would be able to legally undergo the procedure was in the United States.[207] The voluntary departure option left Doe with two choices: carrying her pregnancy to term or death. These choices practically left Doe with no choice at all, and under *Casey*, this burden is both too severe and lacking in any "legitimate, rational justification."[208] Therefore, ORR's policy presents an undue burden on Doe's right to access an abortion.

C. It is Vitally Important for Immigrant Women's Rights for the Supreme Court to Rule on This Issue

Though the Supreme Court should have heard Doe's case and ruled that she had a constitutional right to an abortion, it did not. The decades of abortion jurisprudence clearly support immigrant women's right to terminate their pregnancies if they so choose.[209] However, more liberal justices on the Court, including Justices Steven Breyer, Ruth Bader Ginsburg,[210] Elena Kagan, and Sonia

201. *Id.* at 739.

202. *Id.* at 738.

203. *Family-Based Green Card Processing Time*, VISANATION, www.immi-usa.com/family-based-green-card/processing-time [perma.cc/86GH-7MQH] (last visited Dec. 13, 2021).

204. *Hargan,* 874 F.3d at 741 (Millett, J., concurring).

205. Burrows, *supra* note 162.

206. *Hargan,* 874 F.3d at 737, 740 (Millett, J., concurring).

207. Appellant's Brief, *supra* note 165, at 45.

208. *Casey*, 505 U.S. at 920 (Stevens, J., concurring in part).

209. *See* Section III, Part A of this Comment (outlining arguments made by pro-choice advocates).

210. Justice Ginsburg is no longer on the court, as she passed away in late

Sotomayor, could have seen that, despite having the law on their side, there simply were not enough votes on the court to win a majority opinion in favor of immigrant women having access to abortions.[211] Because both sides saw an uphill battle to getting what they wanted out of Doe's case, they took the easy way out and declined to hear her case altogether.[212]

However, this is unacceptable behavior from the Court. The Supreme Court is supposed to apply judicial review to laws, policies, and regulations and determine if they are in line with the Constitution.[213] But the Court is supposed to "apply the law with only justice in mind, and not electoral or political concerns."[214] Here, both liberal and conservative justices determined that Doe's plight, which is a common plight for many immigrant women being held in government custody here in the United States, was not quite the right fit to serve their own political agendas. So, they discarded her and her case, leaving justice for another day. But "justice too long delayed is justice denied."[215] Because Doe did not receive her justice in 2018, many immigrant women and girls that came after her have had their justices denied as well. Given the humanitarian crisis on the U.S. southern border and the institution of an ORR policy in clear conflict with abortion jurisprudence, the Court should have taken this case.

2020. Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barret to Fill Ginsburg's Seat on the Supreme Court*, N.Y. TIMES (Oct. 15, 2021), www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html [perma.cc/X9UW-YGZN]. The late Justice was shortly replaced by young conservative Justice Amy Coney Barrett, marking a significant ideological swing on the Court. *Id.*

211. *The political leanings of the Supreme Court justices*, AXIOS (June 1, 2019), www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html [perma.cc/2A6H-YGC4].

212. *See* Richard Wolf, *Abortion cases are headed toward the Supreme Court. Can the justices avoid them for long?*, USA TODAY (Oct. 25, 2018), www.usatoday.com/story/news/politics/2018/10/25/abortion-supreme-courts-conservative-majority-likely-avoid-cases/1662105002 [perma.cc/AZW7-5673] (discussing likely rulings on upcoming abortion cases given the political make-up of the Supreme Court in 2018).

213. *About the Supreme Court*, U.S. COURTS, www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [perma.cc/77AQ-DWSL] (last visited Nov. 22, 2020).

214. *The Judicial Branch*, WHITE HOUSE, www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ [perma.cc/LEF5-8Y9Z] (last visited Nov. 22, 2020).

215. Martin Luther King, Jr., *Letter from Birmingham Jail*, KING INST. (April 16, 1963), www.kinginstitute.stanford.edu/sites/mlk/files/letterfrombirmingham_wwcw_0.pdf [perma.cc/QD8S-4ZZJ].

V. CONCLUSION

The Supreme Court made a mistake and should have heard Jane Doe's case. They then should have ruled that the ORR's policy created an undue burden on immigrant women's ability to obtain abortions in violation of the Constitution. We have recently seen that women's rights to bodily autonomy are under attack in this country, which particularly affects women of color and women who are immigrants. From mass hysterectomies in Georgia ICE detention centers[216] to the vigilante law in Texas,[217] the rights and liberties of women to decide what to do with their own bodies are hanging in the balance. Justice O'Connor once said, "Liberty finds no refuge in a jurisprudence of doubt."[218] The Supreme Court, in declining to hear Doe's case, missed a chance to clear up that doubt, make a necessary statement about the constitutionality of these rights and liberties, and reaffirm their importance. Because the Court has been swinging farther right in the past few years, Doe's case may have been the Court's last chance to do so. Doing so would have strengthened *Roe* with another reaffirmation of the case's central holding. Doing so would have solidified the fact that abortion laws explicitly include immigrant women, immigrant minors, and those in immigration custody. And doing so would have said, loud and clear, that immigrant women's bodies are their own.

216. Treisman, *supra* note 1.

217. Todd J. Gillman, *Supreme Court lets stand Texas 6-week abortion ban and 'vigilante' lawsuits to enforce it*, DALLAS MORNING NEWS (Dec. 10, 2021), www.dallasnews.com/news/politics/2021/12/10/supreme-court-rules-on-texas-6-week-abortion-ban [perma.cc/KE5A-6CK4].

218. *Casey*, 505 U.S. at 844.