CURRENT DEVELOPMENTS IN THE JUDICIARY: GARZA V. HARGAN, AN UNDOCUMENTED MINOR'S RIGHT TO AN ABORTION

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I. INTRODUCTION

In the past few months, followers of national legal news have faced a growing list of nondescript pseudonyms: Jane Doe, Jane Roe, Jane Poe, and Jane Moe. These young women are undocumented minors held in the custody of the United States Government. Recently, a large amount of media attention has fallen upon the Government's attempts to prevent them from obtaining abortions.[1] The public fascination with the legal battle to terminate a pregnancy comes as little surprise, as under the Trump administration, both immigration and abortion are contentious topics. This article will examine Jane Doe's case in *Garza v. Hargan* by discussing the issues of government facilitation of abortions for indigent women, whether or not the government infringed upon Jane Doe's right to an abortion, and the unraised matter of whether or not the constitution applies to Jane Doe on account of her immigration status.[2]

II. *GARZA V. HARGAN*: FACTS AND PROCEDURAL HISTORY

Jane Doe, an undocumented seventeen-year-old, was detained by federal agents upon crossing the border from Mexico into the United States.[3] As required by statute, she was placed in the custody of the Department of

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1. *See generally* Brigitte Amiri, *A Fourth Young Immigrant Woman Is Being Blocked by the Trump Administration From Obtaining an Abortion*, ACLU REPRODUCTIVE FREEDOM PROJECT (Jan. 11, 2018), https://www.aclu.org/blog/reproductive-freedom/abortion/fourth-young-immigrant-woman-being-blocked-trump-administration; *see also* Ann E. Marimow, *Judge clears abortions for two immigrant teens in U.S. custody*, WASHINGTON POST (Dec. 18, 2017), https://www.washingtonpost.com/local/public-safety/two-more-pregnant-immigrant-teens-in-custody-ask-judge-to-allow-abortions/2017/12/17/fc8aba7a-d5f7-11e7-95bf-df7c19270879_story.html; *see also* Amy Lieu, *Trump administration seeks to block immigrant teen from having abortion*, FOX NEWS (Dec. 19, 2017), http://www.foxnews.com/politics/2017/12/19/trump-administration-seeks-to-block-immigrant-teen-from-having-abortion.html; *see also* Elise Foley, *Trump Administration Blocking Another Immigrant Teen From Abortion, ACLU Says*, HUFFINGTON POST (Jan. 11, 2018), https://www.huffingtonpost.com/entry/orr-immigrant-teen-abortion_us_5a5785c1e4b0330eab08c960.

2. Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017).

3. *Id*. at 736.

Health and Human Services ("HHS") under the supervision of the Director of the Office of Refugee Resettlement ("ORR").[4] While in the custody of HHS, Jane Doe discovered that she was pregnant.[5] Jane Doe determined that she wished to terminate her pregnancy, and initiated the procedures by which a minor can obtain an abortion without parental consent under Texas state law.[6] HHS objected to her undertaking by claiming that by agency policy she would have to leave government custody under the auspices of a qualified sponsor in order to procure an abortion.[7] At the time of HHS's refusal to allow her to travel to an abortion clinic, Jane Doe had been seeking such a sponsor for over seven weeks to no avail.[8]

In October 2017, Jane Doe filed a temporary restraining order in the District Court of the District of Columbia against HHS so that she could be briefly released from government custody to travel to a medical facility where she could terminate her pregnancy. On October 17th, the District Court granted Jane Doe a temporary restraining order against the Federal Government, under which HHS was barred from obstructing or interfering with Jane Doe's access to abortion services on grounds that the delay in finding a sponsor might cause the pregnancy to advance to a stage at which an abortion would constitute a grave health risk for Jane Doe or prevent her from terminating the pregnancy altogether.[9] Immediately, the federal government filed an emergency motion for stay pending appeal of the order en banc, arguing that permitting Jane Doe to leave government custody to travel to a clinic was tantamount to illegally forcing HHS to facilitate Jane Doe's abortion, and that the sponsorship process required by the agency did not place an undue burden on Jane Doe's ability to exercise her right.[10] On October 19th, a panel of the District Court granted an administrative stay in order to review the Government's motion for the temporary restraining order to be stayed pending appeal.[11]

On October 24th, 2017, the Court of Appeals of the District of Columbia dissolved the administrative stay and reenacted the temporary restraining order with its dates altered. The Court reasoned that the temporary restraining order did not require HHS to facilitate Jane Doe's abortion and the requirement of the sponsorship process placed an undue burden on Jane Doe's ability to exercise her right to an abortion under the Fifth Amendment.[12] Jane Doe was eventually able to leave government custody under the supervision of her *ad litem* guardian, Rochelle Garza, to procure an abortion.

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4. 6 U.S.C. § 279 (2012).
5. Garza, 874 F.3d at 736 (Millet, Circuit Judge, concurring).
6. *Id.*
7. Garza v. Hargan, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017).
8. Garza, 874 F.3d at 738.
9. Garza v. Hargan, No. 17-CV-02122 (TSC), 2017 WL 4707287, at *1 (D.D.C. Oct. 18, 2017).
10. Garza, 2017 WL 4707112 at *1.
11. *Id.*
12. Garza, 874 F.3d at 736.

Since this ruling for Jane Doe, at least two more unaccompanied minors in HHS custody have been granted temporary restraining orders against the government for the sake of procuring an abortion: following the standard set by Jane Doe's case, the D.C. District Court ordered that Jane Poe and Jane Roe be permitted to travel to medical facilities to terminate their pregnancies.[13] The government has appealed these decisions.[14]

III. GOVERNMENT FACILITATION OF ABORTION

The government's primary argument for disallowing Jane Doe to travel with her *ad litem* guardian to terminate her pregnancy is that government entities such as HHS are not required to facilitate abortion for women in custody. The government's refusal to facilitate abortion is grounded in well-established case law, as precedent holds that the state does not have to facilitate abortions by indigent women.[15] As the Court held in *Maher v. Roe* and *Poelker v. Doe*, governmental entities have no constitutional obligation to finance any of the pregnancy-related medical expenses of those in its custody, but can opt to subsidize prenatal medical care if they so wish.[16] When providing this optional care, courts have held that the state is permitted to choose to only extend funding for procedures that are conducive to live birth while refusing to proffer similar funding for abortion services.[17] Arguments that this allowance runs afoul of *Roe v. Wade*'s bar on regulations that place an undue burden on the exercise of the right to an abortion have been rejected on the grounds that the plaintiffs still have the same access to privately funded abortions as they would outside of the state's custody, and that no additional barriers to terminating a pregnancy are added by the state's refusal to pay for the procedure.[18]

In her concurrence Millet notes that the government's concern over its resources being used to facilitate an abortion seem misapplied to Jane Doe's case: Jane Doe's *ad litem* sponsor had provided payment of her medical bills, and the contractor detaining Jane Doe had arranged for her transportation to the facility.[19] Millet goes on to claim that HHS would likely expend more time and money expediting its statutorily mandated duty to find Jane Doe a sponsor in time for her to safely have an abortion than it would by simply allowing Jane Doe to travel to a clinic under the auspices of her *ad litem* guardian.[20] Despite its stated unwillingness to dedicate funds to providing abortions, by complying with its own preferred plan of action the government would dedicate a larger amount of resources to the procurement of an

13. *See* Garza, 2017 WL 4707287 at *2.
14. *Id*. at *1.
15. *See* Maher v. Roe, 432 U.S. 464, 469 (1977); *see also* Poelker v. Doe, 432 U.S. 519, 521 (1977).
16. *See* Maher, 432 U.S. at 469-474; *see also* Poelker, 432 U.S. at 521.
17. *See* Maher, 432 U.S. at 469; *see also* Poelker, 432 U.S. at 521.
18. Maher, 432 U.S. at 464.
19. *See* Garza, 874 F.3d at 740-741.
20. *See id*. at 741.

abortion than it would by simply temporarily allowing Jane Doe to be released into the custody of her *ad litem* sponsor.[21] This differentiates the case from *Maher* and *Poelker*, in which the government did nothing to prevent abortion but merely encouraged an alternative through subsidization, because the government is electing to dedicate time and resources to a prolonged procedure that seems to serve little purpose other than obstructing Jane Doe's access to an abortion.[22]

IV. JANE DOE'S CONSTITUTIONAL RIGHTS

Circuit Judge Henderson in her dissent claims that, though the government did not raise the issue, Jane Doe does not have a right to an abortion under the Constitution.[23] While the case law applicable to *Garza* surrounding abortion rights is decisive, there is an unclear precedent regarding the ability of a person of Jane Doe's immigration status to invoke the Fifth Amendment.

A. *Jane Doe's Right to an Abortion*

The right to an abortion was derived from the substantive due process clause of the Fourteenth Amendment in *Roe v. Wade*.[24] This right has been extended to minors by *Bellotti v. Baird*, though the state may regulate the procedures for the best interest of the pregnant minor.[25] Jane Doe was subjected to a number of these permissible regulations under Texas state law, but satisfied the requirements to move forward with the procedure.[26] While Circuit Judge Millet in her concurrence noted Jane Doe's minor status may have played a role in the federal government's pursuit of her case, Jane Doe's right as a minor to procure an abortion is supported strongly by case law.[27]

Under precedent from *Planned Parenthood of Southeastern Pennsylvania v. Casey* to *Whole Woman's Health v. Hellerstedt*, the government is not permitted to erect substantial and unjustified barriers between women and access to abortion services.[28] Because of the government's refusal to facilitate abortion by providing transportation or funding for the medical procedure, a woman seeking an abortion would need to leave its custody. By statute, unaccompanied undocumented children are placed with ORR and HHS unless a qualified citizen or permanent resident agrees to house and subsidize them

21. *See id*.
22. *See* Maher, 432 U.S. at 469; *see also* Poelker, 432 U.S. at 521.
23. *Id*. at 743. (Henderson, J., dissenting).
24. Roe v. Wade, 410 U.S. 113, 153 (1973), modified, Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).
25. *See* 443 U.S. 622, 643-648 (1979).
26. *See* Garza, 874 F.3d at 736-737; *see generally* Texas Family Code § 33.003 (2016).
27. Garza, 874 F.3d at 742 (claiming that the government's refusal to allow Jane Doe obtain an abortion is "an acutely selective form of resistance," as the government has acknowledged the argument would not be applied if Jane Doe was of age and in the custody of Immigration and Customs Enforcement or the Bureau of Prisons).
28. *Id*. at 738.

for the duration of their proceedings.[29] In order to prevent vulnerable undocumented youth from falling victim to abuse or trafficking by strangers, a sponsor must be a family member or have a bona fide connection to the minor.[30] Often, no sponsor satisfying this requirement exists. Prior to filing the temporary restraining order, Jane Doe had been engaged in a fruitless seven week long search for a sponsor compliant with the regulations.[31] During this time period, the course of Jane Doe's pregnancy progressed, indifferent to the length of the sponsorship process.[32] As her pregnancy advanced through its second trimester, Jane Doe would become more likely to incur irreparable injury from the practical barriers to a receiving late-term abortion in Texas and from the increased risk to her health posed by the abortion procedure.[33]

The court on appeal in *Garza* found that HHS's demand that Jane Doe find a sponsor before terminating her pregnancy infringed upon her rights, as this requirement served her no protective benefit and jeopardized her ability to safely procure an abortion on account of the process's inexpediency.[34] As such, it was determined that the stay on the temporary restraining order should be dissolved so Jane Doe could circumvent the needless barrier the government had erected between her and her right to an abortion.[35]

V. DOES THE CONSTITUTION APPLY TO JANE DOE?

While the government conceded that the Fifth Amendment applied to Jane Doe, a dissenting circuit court judge questioned whether or not she could, in fact, invoke the Constitution.[36] The Supreme Court has held that immigrants can invoke the Bill of Rights to ensure due process if they have affected entry to the United States either through legitimate immigration procedures, or by developing substantial connections within the country.[37] By her own admission, Jane Doe was detained "upon arrival" to the United States.[38] In the *Knauff-Chew-Mezei*'s trilogy of decisions, the Court held that aliens who had not affected entry into the United States before being taken into government custody could not invoke certain rights protected by the Fifth Amendment.[39] Judge Henderson in her dissent claims that under this trilogy of cases that Jane Doe has no constitutional right to an abortion because as an excludable

29. 6 U.S.C. § 279 (2012).
30. *Id*.
31. Garza, 874 F.3d at 738.
32. *Id*.
33. *Id*. at 741-742.
34. *Id*. at 738.
35. *Id*.
36. *Id*. at 743.
37. *See* Kaoru Yamataya v. Fisher, 189 U.S. 86, 99 (1903); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 282 (1990).
38. Garza, 874 F.3d at 743.
39. *See generally* U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); *see also* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

alien who did not affect entry into the country she does not have any constitutional rights whatsoever.[40]

The extent of this precedent, however, has been questioned. In his dissent in *Jean v. Nelson*, Justice Marshall noted that despite limitations on excludable aliens' rights, a number of constitutional provisions had been previously extended to excludable aliens by the Court.[41] Marshall further cites to *Plyler v. Doe*, which holds that detained aliens within the United States' jurisdiction fall under the protection of the Fourteenth Amendment's "all persons" clause.[42] Marshall also discusses the potential troubling ramifications of using the *Knauff-Chew-Mezei* trilogy to absolutely refuse to extend rights to those who are held in custody but have failed to affect entry to the United States: ". . . even in the immigration context, the principle that unadmitted aliens have no constitutionally protected rights defies rationality."[43] Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees."[44] While not controlling law, Marshall's line of reasoning has been cited in circuit court decisions in cases pertaining to the rights of excludable aliens who have not affected entry to the country.[45]

Though these arguments were never brought properly before the court in *Garza*, the facts of Jane Doe's case evoke questions about the rights of immigrants detained at the border and it is possible that the undefined scope of excludable aliens' rights will come into controversy in the future.

VI. CONCLUSION

The time-sensitive demands of the circumstance, and the emphasis that the current administration has placed on issues of abortion and immigration has drawn widespread attention to *Garza*. The questions raised before the court, however, are still subject to well-established and decisive case law on abortion rights. More interesting, and much more troubling, are the questions that

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40. Garza, 874 F.3d at 746.

41. Jean v. Nelson, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting).

42. Plyler v. Doe, 457 U.S. 202, 210 (1982) (stating that for the sake of the all persons clause of the Fourteenth Amendment, "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.") One towing the line of the dissenting judge might argue that *Plyler* only applies to those who have affected entry into the country as per *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). However Marshall in *Jean* claims that the broad language employed in *Plyler* is meant to invoke universal coverage that extends to excludable aliens. 472 U.S. at 875. (Marshall, J., dissenting).

43. Jean, 472 U.S. at 875.

44. *Id.* at 874.

45. *See* Kwai Fun Wong v. United States, 373 F.3d 952, 974 (9th Cir. 2004) (discussing whether or not detainees were able to raise a suit for invidious discrimination); *see also* Amanullah v. Nelson, 811 F.2d 1, 9 (1st Cir. 1987) (stating "[e]xcludable aliens also have personal constitutional protections against illegal government action of various kinds; the mere fact that one is an excludable alien would not permit a police officer savagely to beat him, or a court to impose a standard-less death penalty as punishment for having committed a criminal offense").

were not properly raised—questions of how Jane Doe's immigration status affects which rights she is to be afforded. The legal grey area surrounding the applicability of the Constitution to excludable aliens looms untouched upon behind the discussions about abortion at the forefront of *Garza*. The current national contention over immigration may soon bring cases before the Court that would require the bench to more definitively construe the rights of excludable aliens held in government custody.