RECENT CASES

REPRODUCTIVE RIGHTS — AGENCY ABORTION POLICY — EN BANC D.C. CIRCUIT UPHOLDS ORDER REQUIRING HHS TO ALLOW AN UNDOCUMENTED MINOR TO HAVE AN ABORTION. — *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam).

Abortion rights have been heavily litigated in the Supreme Court. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[1] the Court crafted the "undue burden" test to determine which restrictions on abortion access violate due process rights by "ha[ving] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[2] Among the laws at issue in *Casey* was a parental consent requirement.[3] The Court has consistently struck down such requirements when lack of consent constitutes an absolute veto,[4] but it has allowed parental consent laws when a valid "alternative procedure" is available to the minor.[5] Recently, in *Garza v. Hargan*,[6] the D.C. Circuit sitting en banc upheld an order preventing the federal government itself from prohibiting an undocumented minor immigrant in its custody from obtaining an abortion.[7] The en banc court reached the right outcome by relying on Judge Millett's panel dissent, but it should have more explicitly adopted her analysis of this case as a unilateral veto by the government. The court's ambiguous rationale could lead to further lengthy litigation that harms those seeking abortions.

In early September 2017, Jane Doe (referred to by the court as J.D.), a seventeen-year-old girl, illegally crossed the U.S. border into Texas.[8] She was eight weeks pregnant.[9] The Office of Refugee Resettlement (ORR) is responsible for the care and placement of unaccompanied immigrant children in federal custody;[10] ORR's policy is to work toward "the timely release of children and youth to qualified parents, guardians,

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[1] 505 U.S. 833 (1992).

[2] *Id.* at 877.

[3] *Id.* at 844.

[4] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto . . . ."); *see also* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 440 (1983).

[5] Bellotti v. Baird, 443 U.S. 622, 643 (1979). The alternative procedure is typically a judicial bypass, in which the minor seeks a judge's order instead of a parent's consent.

[6] 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam).

[7] *Id.* at 736.

[8] Findings of Fact in Support of Amended Temporary Restraining Order at 1, Garza v. Hargan, No. 17-cv-02122 (D.D.C. Oct. 24, 2017), ECF No. 30 [hereinafter Findings of Fact]. J.D. was detained at the border and entered federal custody. *Id.*

[9] *Garza*, 874 F.3d at 743 (Henderson, J., dissenting).

[10] 6 U.S.C. § 279(b)(1)(A) (2012). ORR is an office within the U.S. Department of Health and Human Services. *Id.* § 279(a).

relatives or other adults, referred to as 'sponsors,'" who can take custody.[11] J.D. was initially sent to a shelter under contract with ORR, where she decided to terminate her pregnancy.[12] Texas has a parental consent requirement, but after a hearing before a local judge, J.D. was granted a judicial bypass on September 25, 2017.[13] ORR refused to approve her departure from the shelter for an abortion, acting under a March 2017 directive that federally funded shelters could not take "any action that facilitates" abortions without the ORR director's approval.[14]

Rochelle Garza, J.D.'s guardian ad litem, brought suit in the D.C. District Court on behalf of J.D. and others similarly situated against Eric Hargan, the Acting Secretary of Health and Human Services (HHS), and two other HHS officials, including Scott Lloyd, the Director of ORR.[15] On October 18, district court Judge Chutkan issued a Temporary Restraining Order (TRO), finding, with little further explanation, that (1) J.D. was likely to succeed on the merits, (2) J.D. would suffer irreparable injury without the TRO, through increased health risks or even giving birth, (3) the order would not harm ORR, and (4) public interest favored it.[16] Judge Chutkan ordered HHS to allow J.D. to leave the shelter for pre-abortion counseling mandated by Texas law on October 19 and for the procedure on either the twentieth or twenty-first.[17]

The Government appealed the TRO in the D.C. Circuit and filed an emergency motion to stay the order.[18] A three-judge panel, consisting of Judges Henderson, Kavanaugh, and Millett, heard arguments on October 20 and, later that evening, released a per curiam order on behalf of Judges Henderson[19] and Kavanaugh vacating the portion of the order which allowed the abortion procedure.[20] Instead, the panel held that ORR would not have to facilitate the abortion if J.D. could be placed in

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[11] OFFICE OF REFUGEE RESETTLEMENT, CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 2.1 (2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 [https://perma.cc/PF9X-Q9NF]. The sponsorship application process involves evaluations, background checks, and sometimes home visits. *Id.*

[12] Findings of Fact, *supra* note 8, at 1.

[13] *Id.* Parental consent laws must provide a judicial bypass when minors are sufficiently mature to choose abortion or when it is in their best interest. Bellotti v. Baird, 443 U.S. 622, 643–44 (1979).

[14] Findings of Fact, *supra* note 8, at 2 (quoting Exhibit A at 2, Garza v. Hargan, No. 17-cv-02122 (D.D.C. Oct. 14, 2017), ECF No. 3–5).

[15] Complaint for Injunctive Relief and Damages at 1, *Garza*, No. 17-cv-02122 (D.D.C. Oct. 13, 2017), ECF No. 20.

[16] Temporary Restraining Order at 1, *Garza*, No. 17-cv-02122 (D.D.C. Oct. 18, 2017).

[17] *Id.* at 2. The order further restrained the defendants and their employees from "further forcing J.D. to reveal her abortion decision to anyone, or revealing it to anyone themselves" or retaliating against J.D. *Id.* These provisions remained in place throughout the appellate litigation.

[18] Appellants' Emergency Motion for Stay Pending Appeal at 1, *Garza*, 874 F.3d 735 (No. 17-5236), ECF No. 4.

[19] Judge Henderson intended to write a concurrence within five days, Order at 2, *Garza*, 874 F.3d 735 (No. 17-5236), ECF No. 21, but the en banc rehearing occurred before that deadline.

[20] *Id.* at 1.

a sponsor's custody and that the delay to find a sponsor would not "unduly burden the minor's right . . . so long as the process of securing a sponsor . . . occurs expeditiously."[21] The order set an October 31 deadline; if J.D. were still in ORR custody then, litigation could resume.[22]

Judge Millett dissented ("the panel dissent"), arguing that ORR's refusal to allow J.D.'s abortion was unconstitutional.[23] Applying the undue burden standard from *Casey* and *Whole Woman's Health v. Hellerstedt*,[24] Judge Millett found that the government's actions constituted "not just a substantial obstacle," but "a full-on, unqualified denial of and flat prohibition on J.D.'s right to make her own reproductive choice."[25] Arguing that the government was not asked to "facilitate" J.D.'s abortion, she pointed to specific facts: J.D.'s guardian covered her procedure and transportation, her shelter was run by a contractor willing to allow the procedure, and the district court's TRO absolved the government of having to make its own public policy assessment about the abortion.[26] Next, Judge Millett refuted the claim that the government's custody of J.D. justified the restriction by contrasting her treatment with that of adults in Immigration and Customs Enforcement (ICE) custody, who are permitted to get abortions, and minors in parental custody, who have a judicial bypass mechanism absent in ORR's process.[27] Third, she attacked the government's claim that J.D. could get an abortion if she voluntarily left the country, arguing that conditioning abortion on surrendering other rights would certainly be a "substantial obstacle" prohibited under *Casey*.[28] Judge Millett also rejected the idea that finding a sponsor would avoid government facilitation without creating an undue burden, as the sponsorship process was controlled by HHS and J.D. had already been deemed competent to make her own choice by a Texas judge.[29] Finally, she refuted the argument raised by amici, but waived by the government, that undocumented immigrants are not "persons" under the Due Process Clause, rejecting it under principles of constitutional avoidance.[30] She noted that this argument raised "troubling" implications for the treatment of undocumented immigrants.[31]

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[21] *Id.*

[22] *Id.* at 2 (providing that "the District Court may re-enter a temporary restraining order . . . and the Government or J.D. may, if they choose, immediately appeal" if no sponsor was found).

[23] Order, *Garza*, 874 F.3d 735 (No. 17-5236), ECF No. 23 [hereinafter Panel Dissent] (attaching Judge Millett's dissent).

[24] 136 S. Ct. 2292, 2309 (2016) (requiring courts to assess the benefits of laws restricting abortion access relative to their effects when applying *Casey*).

[25] Panel Dissent, *supra* note 23, at 4.

[26] *Id.* at 3–4.

[27] *See id.* at 5.

[28] *Id.* at 6; *see also id.* at 5–6.

[29] *See id.* at 6–7.

[30] *Id.* at 8.

[31] *Id.* at 9.

Sitting en banc, the D.C. Circuit reversed,[32] ordering the denial of appellants' emergency stay and a remand of the case to the district court to update J.D.'s abortion date in the TRO.[33] In a per curiam opinion ("the en banc majority"), the court denied the stay "because appellants have not met the stringent requirements for a stay pending appeal substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett."[34]

Judge Millett wrote an additional concurrence.[35] She again emphasized that the government never asserted that J.D.'s immigration status reduced her constitutional abortion rights.[36] Next, she argued that the panel should not have offered sponsorship as an alternative to providing the abortion, as it only lengthened the process and did not address the unilateral-veto concern.[37]

Judge Henderson dissented, arguing that J.D. was not a "person" under the Due Process Clause, and thus did not have the same abortion rights citizens do.[38]

Judge Kavanaugh also dissented, joined by Judges Henderson and Griffith. He defended the panel's decision allowing more time to find a sponsor who could remove J.D. from ORR's custody, characterizing the en banc majority's decision as creating "a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."[39] Instead, he would have held that sponsorship is not an undue burden, arguing that avoiding the need for the government to facilitate the abortion successfully balances the parties' interests.[40]

On October 24, Judge Chutkan issued an amended TRO, again preventing the government from interfering in J.D.'s abortion and specifying that it should happen "promptly and without delay."[41] J.D. received an abortion on October 25, 2017.[42]

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[32] Judge Pillard did not participate in the en banc rehearing.

[33] *Garza*, 874 F.3d at 736 (per curiam).

[34] *Id.* (citation omitted) (citing Nken v. Holder, 556 U.S. 418, 434 (2009)).

[35] *Id.* (Millett, J., concurring).

[36] *Id.* at 737.

[37] *Id.* at 738–40.

[38] *Id.* at 749–50 (Henderson, J., dissenting) (citing Zadvydas v. Davis, 533 U.S. 678, 693 (2001)) (distinguishing between people who entered the United States — even if illegally — and those apprehended at the border who only entered in custody). Judge Henderson acknowledged the court was not required to take up the due process question but argued that it should do so sua sponte, as she considered the public interest to be highly supportive of considering it. *Id.* at 745–46.

[39] *Id.* at 752 (Kavanaugh, J., dissenting).

[40] *Id.* at 753–54.

[41] Amended Temporary Restraining Order at 2, Garza v. Hargan, No. 1:17-cv-02122 (D.D.C. Oct. 24, 2017), ECF No. 29.

[42] *After a Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, ACLU (Oct. 25, 2017), https://www.aclu.org/news/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion [https://perma.cc/K5ZN-8V4M]. The government has filed a petition

By issuing an order denying the appellants' stay "substantially for the reasons set forth" in Judge Millett's panel dissent,[43] the en banc majority missed an opportunity to clearly spell out its rationale and avoid any implication that there is some part of the panel dissent to which the majority would not entirely subscribe. Had the en banc majority explicitly endorsed Judge Millett's well-supported argument against unilateral vetoes of abortion rights, the court could have avoided ambiguity which, in the abortion context, has the potential to lengthen litigation and harm particularly vulnerable plaintiffs.

While the D.C. Circuit has used the phrase "substantially for the reasons" when issuing other orders,[44] the phrase's use in *Garza* is unusually mystifying. With many previous uses of the language, the court has gone on to explain its reasoning more clearly,[45] while in other orders, it has left "substantially" out entirely.[46] In *Garza*, the order not only used "substantially," but also noted that the requirements for a stay were "stringent,"[47] emphasizing the government's failure to meet its burden rather than addressing its arguments on appeal. In his dissent, Judge Kavanaugh noted the potential confusion created by the per curiam opinion's language,[48] which has already led to further ambiguity in the District Court's subsequent order.[49]

The arguments in the panel dissent also differ widely in their applicability to future cases. Judge Millett's rejection of the government's "facilitation" argument is tightly bound to the specific facts of this case, where there was "nothing . . . to facilitate."[50] If this is the majority's reasoning, it could apply only in cases where the plaintiff arranges for

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for certiorari in this case. Petition for a Writ of Certiorari, Hargan v. Garza, No. 17-654 (Nov. 3, 2017).

[43] *Garza*, 874 F.3d at 736 (per curiam).

[44] *E.g.*, Reback v. Tyler, No. 92-7009, 1993 WL 150646, at *1 (D.C. Cir. Apr. 29, 1993); Clouser v. Hot Shoppes, Inc., 346 F.2d 834, 834 (D.C. Cir. 1965).

[45] *See, e.g.*, Gwin v. Nat'l Marine Eng'rs Benefits Ass'n, No. 97-7055, 1998 WL 104580, at *1 (D.C. Cir. Jan. 29, 1998); U.S. Dep't of the Treasury, Bureau of Engraving & Printing v. Fed. Labor Relations Auth., No. 95-1499, 1996 WL 311465, at *1 (D.C. Cir. May 23, 1996); Bechtel v. Pension Benefit Guar. Corp., 781 F.2d 906, 907 (D.C. Cir. 1985).

[46] *See, e.g.*, Muldrow v. EMC Mortg. Corp., 444 F. App'x 455, 455 (D.C. Cir. 2011) (affirming "for the reasons set forth in the District Court's Memorandum Opinion"); United States v. Cassell, 530 F.3d 1009, 1010 (D.C. Cir. 2008) ("We reject all of Cassell's allegations for the reasons set forth in the district court's careful, detailed opinion.").

[47] *Garza*, 874 F.3d at 736.

[48] Judge Kavanaugh made this point several times in his en banc dissent, noting that "[g]iven this ambiguity, the precedential value of this order for future cases will be debated." *Id.* at 752 n.1 (Kavanaugh, J., dissenting); *accord id.* at 755 n.5.

[49] Judge Chutkan's amended TRO did not specify the rationale she was applying, instead justifying the decision "[f]or substantially the same reasons given in Judge Millett's dissenting statement issued on October 20, 2017, and substantially adopted by the Court of Appeals in its Order of October 24." Amended Temporary Restraining Order, *supra* note 41, at 1.

[50] Panel Dissent, *supra* note 23, at 4.

transportation, funding, and medical care. But Judge Millett's dissent also provides a rationale for upholding the TRO that could have significantly broader precedential value. The argument that the government cannot act in a way that effectively creates a unilateral veto — through a sponsorship process it controls, by exercising its custody rights over a minor, or by conditioning the abortion on the individual giving up other legal rights — frames this case in a way that applies to undocumented minors and arguably to those in other types of government detention.

The en banc court should have explicitly endorsed the broader reasoning in Judge Millett's panel dissent, which correctly framed this case in terms of a unilateral veto. In *Casey*, the Court held that a state's interest was not strong enough to prevent previability abortions completely,[51] but it could enact regulations on abortion provided they did not constitute an "undue burden."[52] To support the panel's sponsorship solution, Judge Kavanaugh's dissent listed a litany of regulations the Court has upheld, including parental notice laws, informed consent requirements, and waiting periods.[53] But as the panel dissent emphasized, the restriction in this case was different in kind, as it gave J.D. no control over the process whatsoever — she could not appeal the agency's decision that the abortion was not in her best interest nor was there "any apparent procedure for challenging a decision or a delayed non-decision" on sponsorship.[54] Even if the government was acting in the role of J.D.'s guardian, J.D.'s case would still be distinguishable because the Court has held that parental consent requirements must provide an alternative procedure that "ensure[s] that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible previously."[55] But J.D. had no alternative. The control the government had over J.D.'s choice is analogous to that exercised in the prison cases Judge Millett cited in the panel dissent,[56] in which the Eighth and Third Circuits held unconstitutional prison regulations that effectively prevented incarcerated individuals from getting abortions.[57] Given the lack of options for J.D., the en banc majority should have unambiguously affirmed the panel dissent's unilateral veto rationale.

By not explicitly signing on to the unilateral veto reasoning in the panel dissent, the court left room for the government to continue to

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[51] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992).

[52] *Id.* at 874.

[53] *Garza*, 874 F.3d at 755 (Kavanaugh, J., dissenting).

[54] Panel Dissent, *supra* note 23, at 7.

[55] Bellotti v. Baird, 443 U.S. 622, 644 (1979) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).

[56] Panel Dissent, *supra* note 23, at 4.

[57] *See* Roe v. Crawford, 514 F.3d 789, 789, 801 (8th Cir. 2008); Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 351 (3d Cir. 1987).

wield such power. The government could in practice exercise a unilateral abortion veto over those in ORR custody,[58] ICE detention, prisons, or jails, as well as minors who need judicial bypasses to get abortions. The abortion rights of all these groups are still subject to legal challenges. At oral arguments in *Garza*, the state said it would not prevent the abortion of someone in ICE detention, which is consistent with ICE policy.[59] But policy is subject to change, and the U.S. House of Representatives has repeatedly passed language allowing ICE personnel to refuse to facilitate abortions.[60] While circuit courts have consistently affirmed that prisoners do not lose their constitutional right to abortion, many have upheld prison regulations that delay or even prevent abortions in practice.[61] The D.C. Circuit has not yet weighed in. And given the power local officials have to prevent individual inmates' abortions, prisoners sometimes still need to sue or even defend themselves in court to get an abortion.[62] Enforcement of abortion rights can be difficult in practice, making clear and applicable precedent all the more important.

As J.D.'s experience exemplifies, lengthy litigation in the abortion context can itself be used to prevent people from exercising their rights.[63] To secure her abortion, J.D. first had to obtain a judicial bypass, which meant she had to personally appear before a judge to show that she was "mature and sufficiently well informed to make the decision to have an abortion."[64] She then had to wait through multiple appeals, orders, and

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[58] The order does create fairly clear precedent for similar minors in ORR custody, who are still subject to the policies that were preventing J.D.'s abortion. Since J.D.'s order, three such minors have had their cases appended to the original complaint. *See* E.A. Crunden, *Trump Administration Denies Abortion for Another Young Undocumented Immigrant*, THINKPROGRESS (Jan. 11, 2018, 3:17 PM), https://thinkprogress.org/undoc-abortion-trump-aclu-9a0ca9f8a88b/ [https://perma.cc/XNG5-4QQG]. For different reasons, the government declined to appeal each case to the D.C. Circuit, and all three minors received abortions. *See id.*; Ann E. Marimow, *Pregnant Immigrant Teen Seeking Abortion Is Released from Government Custody*, WASH. POST (Jan. 16, 2018), http://wapo.st/2B7z8Vj [https://perma.cc/9XM5-V76Q].

[59] U.S. IMMIGRATION & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 322–23 (2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [https://perma.cc/GCX4-9BYW]. ICE will provide funding for women whose pregnancies endanger their lives or in cases of rape or incest; in other cases, ICE provides for transportation if the detainee funds her own abortion. *Id.*

[60] *See* Lauren Holter, *Detained Immigrant Women Are Facing a Grueling Abortion Struggle*, BUSTLE (May 10, 2017), https://www.bustle.com/p/detained-immigrant-women-are-facing-a-grueling-abortion-struggle-50388 [https://perma.cc/GZS8-V6P6].

[61] *See* Lauren Kuhlik, Note, *Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare Access in Prison*, 52 HARV. C.R.-C.L. L. REV. 501, 525–29 (2017).

[62] In a 2015 case, an Alabama district attorney petitioned a court to strip an inmate seeking an abortion of her parental rights to the fetus. *See* Nina Martin, *Alabama's Meth Lab Law, Abortion Rights and the Strange Case of Jane Doe*, PROPUBLICA (July 31, 2015, 1:00 PM), https://www.propublica.org/article/alabamas-meth-lab-law-abortion-rights-and-the-strange-case-of-jane-doe [https://perma.cc/4NB8-2BKY]. She chose not to terminate, ending the litigation. *Id.*

[63] Indeed, the D.C. Circuit may have issued such a general opinion to reach a quick resolution.

[64] TEX. FAM. CODE ANN. § 33.003(i) (West 2016).

stays as her pregnancy advanced, limiting the number of doctors who would perform the procedure and bringing her closer to twenty weeks, when abortions in Texas are banned.[65] Future litigation in this area would likely resemble J.D.'s: an individual suit to allow an abortion, needing injunctive relief to prevent the process from outlasting the pregnancy. The preliminary injunction standard requires the plaintiff to "establish that [s]he is likely to succeed on the merits."[66] A decision from the en banc court explicitly adopting the unilateral veto reasoning in Judge Millett's dissent would have more clearly supported a showing of likely success in future cases. If a lower court focuses on the panel dissent's narrow facilitation arguments, it is less clear whether future cases are likely to succeed with different facts, and that could make it harder to quickly resolve a case.

Even if the courts are able to come to a final resolution in time for a plaintiff to actually procure an abortion, there are concrete harms to health the longer litigation lasts. One study found a thirty-eight percent increase in risk of death for each additional week of gestation.[67] Given that minors are likely to learn they are pregnant later than are adult women, their risks when delaying an abortion are particularly acute.[68] Moreover, these harms are accompanied by the emotional burdens both of an unwanted pregnancy and of navigating the legal system. Professor Carol Sanger has also argued that the judicial bypass proceeding itself is "an improper use of the law" to punish pregnant minors who want an abortion without parental consent — imposing both physical and emotional costs even when the bypass is granted.[69] For minors who must go through a bypass procedure, the "experience is one of dread, tension, and anxiety."[70] While the state certainly has the right to use the legal system and appellate process to argue for its position, just as J.D. had the right to advocate for hers, clear federal precedent could limit the number of different judicial procedures a minor like J.D. has to endure.

The D.C. Circuit responded to J.D.'s emergency petition with admirable alacrity, and its order relied on strong arguments made in Judge Millett's dissent. But by not clearly adopting the panel dissent's unilateral veto rationale, the court created uncertainty that sets the stage for similarly prolonged litigation. More explicit guidance to lower courts and persuasive authority to other circuits might help dispose of similar cases with the expedition pregnant litigants crucially need.

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[65] Findings of Fact, *supra* note 8, at 12.

[66] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[67] Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States,* 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004).

[68] Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L., POL'Y & FAM. 305, 311 (2004).

[69] *Id.* at 311–14.

[70] *Id.* at 311.