No. 17-654

IN THE

Supreme Court of the United States

ERIC D. HARGAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* LEGAL CENTER FOR DEFENSE OF LIFE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment and instruct that court to remand the case to the district court with directions to dismiss all claims for prospective relief regarding pregnant unaccompanied minors.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1989, *amicus curiae* Legal Center for Defense of Life ("Legal Center") is a nonprofit New Jersey corporation dedicated to defending constitutional rights of those who advocate on behalf of unborn children, and the interests of the unborn themselves. The Legal Center includes a network of

[1] *Amicus* files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

attorneys who together have volunteered thousands of hours of *pro bono* services in defense of pro-life advocates.

The Legal Center has a direct and vital interest in opposing the creation of a new constitutional right to abortion by illegal aliens, and in defending the orderly administration of justice when this issue is in dispute, as in this case.

SUMMARY OF ARGUMENT

Illegal aliens do not have a constitutional right to enter the United States to have an abortion, or to obtain an abortion while remaining here illegally. Moreover, no one has a right to compel the federal government to be complicit in the procurement of an abortion. The terse *en banc* judgment below is in error on both fundamental principles of law. The Petition should be granted to vacate the judgment or correct these significant errors of national importance.

At a minimum, as argued by the United States here, the decision below should be vacated as moot. (Pet. 20-24, relying on *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), and similar authorities). In addition, this Court should recognize that the decision below was a radical departure from the decisions of this Court, which is an independent basis for granting *certiorari*. Neither the Constitution nor even judge-made law supports what the D.C. Circuit *en banc* implicitly held below in compelling the federal government to be complicit in an abortion by an illegal alien in Texas. If not vacated or reversed, it is likely there will be attempts to use the decision below as an improper precedent nationwide. The supervisory role

of this Court requires reversal of these substantial errors before they propagate further.

In addition, this Court should disapprove with discipline the legal tactics used below in obtaining an abortion in the middle of the night – scheduled at 4:15 a.m. (Pet. 11) – timed to thwart orderly review by this Court. That conduct increased the medical risks to the 17-year-old girl J.D., and infringed on her right to fully informed consent. Such legally motivated tactics are below the standards of this Court and the legal profession, and should be chastised accordingly.

The Solicitor General's Petition for a Writ of Certiorari should be granted because the decision below cannot stand, and the legal tactics used to disrupt the orderly administration of justice should not go unpunished.

ARGUMENT

I. THE DECISION BELOW ERRONEOUSLY DECIDED IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

This Court has been clear that the federal government can prefer childbirth over abortion, and thus there is no constitutional right for anyone to compel complicity by the federal government in obtaining an abortion. In the case of seeking an abortion for an illegal alien held in federal custody, such complicity is inherently sought by the attempt itself. The decision below squarely conflicts with the fundamental principle of abortion jurisprudence that

the federal government can side completely with childbirth rather than abortion.

Moreover, illegal aliens do not have a right to have an abortion in the United States. Yet the decision below implicitly and improperly invented such a new right where none exists.

A. The Decision Below Erred in Compelling Complicity by the Federal Government in Procuring an Abortion.

"[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Planned Parenthood v. Casey*, 505 U.S. 833, 886 (1992). This concept is central to the longstanding precedent that the federal government may fund the costs of childbirth while refusing to fund expenses relating to abortion. *See Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Congress has [properly] established incentives that make childbirth a more attractive alternative than abortion.").

Despite this, a concurring opinion below stated that:

> What is forcing J.D. to carry on this pregnancy is not J.D.'s choice. It is not Texas law. It is the federal government's refusal to allow an abortion to go forward. The government's refusal to release J.D. from custody is not just a substantial obstacle; it is a full-on, unqualified denial of and flat prohibition on J.D.'s right to make her own reproductive choice.

(Pet. App. 8a, Millett, J., concurring).

In fact no one, and certainly not the federal government, has been depriving J.D. of her full ability

to end her illegal presence in this country by simply returning home. J.D. entered here illegally against the will of the United States government and contrary to applicable law. She has been able to leave this country at any time. It would be as though someone had entered a religious hospital that declines to perform abortions and then refuses to leave until she obtains one at that hospital. The Constitution does not compel a religious hospital – or the United States government – to be complicit in a sought-for abortion.

B. The Decision Below Erred in Assuming an Illegal Alien Has a Right to an Abortion.

The United States is not a sanctuary for all foreigners who want an elective abortion, particularly when the laws of their home country prohibit it, as in this case. Yet that is the basis of the ruling below, in assuming that a foreigner who was eight weeks pregnant when she illegally entered the United States somehow has a constitutional right to obtain abortion here. J.D. is a trespasser on American soil, and has no legitimate right to demand an abortion here.

An illegal alien has a status no greater than that of a trespasser at common law, who may be properly detained and restricted in movement, especially if the trespasser is unwilling to leave. A landowner who restricts the movement of a defiant trespasser is not liable for false imprisonment. *See, e.g.*, *Prinz v. Greate Bay Casino Corp.*, 705 F.2d 692, 694 (3d Cir. 1983) ("If he could not lawfully remain there was probable cause for his detention as a defiant trespasser, which in New Jersey is a defense to a charge of false imprisonment.").

Most other countries of the world properly have laws against abortion, in contrast with the framework

of unlimited abortion in the United States as established in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Elective abortion is illegal in the country from which J.D. came. (Pet. 37a) Indeed, elective abortion is properly illegal in much of Central and South America. *See, e.g.*, Johanna Zacarias, Note: "Suffering in Silence: The Urgent Need to Address El Salvador's Lack of Reproductive Rights," 47 Geo. Wash. Int'l L. Rev. 233, 239 (2015) ("After April 20, 1998, all abortions - including those which were previously allowed - were criminalized and [t]he abortion provisions were placed in a new section of the Penal Code that details offenses against the 'human life in formation.'").

Middle Eastern countries likewise have laws against abortion that are stricter than in the United States. In Israel, for example, abortion is allowed only if there is an application to and approval by a Pregnancy Termination Committee, and "as of 1993, legal access to abortion had been narrowed through stricter limitations on the discretion of" those committees to approve abortion. Noya Rimalt, "When Rights Don't Talk: Abortion Law and the Politics of Compromise," 28 Yale J.L. & Feminism 327, 355 (2017). Respect for abortion laws in other nations should benefit from the same level of international comity that other legal issues receive, such as the matter of personal jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (reversing the Ninth Circuit for having "paid little heed to the risks to international comity its expansive view of general jurisdiction posed").

In *Plyler v. Doe*, a 5-4 Supreme Court ruled that children of illegal aliens have a constitutional right to attend public schools free of cost, and that this right cannot be denied by States. But J.D. is an illegal alien herself, and the rationale in *Plyler* does not apply to the issue of whether an illegal alien herself has a right to an abortion:

> ***Persuasive arguments support the view that a State may withhold its beneficience from those whose very presence within the United States is the product of their own unlawful conduct***. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation.

Plyler v. Doe, 457 U.S. 202, 219-20 (1982) (emphasis in original). Here illegally herself, J.D. has no right to a free public education under the *Plyler* decision, and she has no constitutional right to an abortion in Texas.

II. THE HURRIED, MIDDLE-OF-THE-NIGHT ABORTION INCREASED MEDICAL RISK, UNDERMINED INFORMED CONSENT, AND IS A BLIGHT ON THE ORDERLY ADMINISTRATION OF JUSTICE.

The hurried, middle-of-the-night[2] abortion put a 17-year-old girl at heightened medical risk, and

[2] The abortion was scheduled for 4:15 a.m. (Pet. 11)

deprived her of fully informed consent for the life-changing procedure. Even many who support legalized abortion would agree that the circumstances and timing of the abortion below are not a proper way to terminate a pregnancy or resolve an ongoing legal dispute about one. What transpired in this case is a blight on the orderly administration of justice, and might be characterized by a future observer as uncivilized.

Had a State hurriedly executed a prisoner in the middle of the night to avert review by this Court, there is little doubt that this Court would harshly and unanimously condemn it. Such chicanery is even less appropriate in the context of an abortion, where fully informed consent by the patient, without any time pressures, is essential.

A. Risk of Medical Harm Was Increased by the Middle-of-the-Night Abortion.

Elective surgery is more dangerous when conducted in the middle of the night, for obvious reasons. Surgeons are more likely to be fatigued, and less support staff is typically available both to assist in the procedure and to address complications. The patient herself may be more fatigued. Whatever the causes, night surgery is widely known to carry an increased risk of medical harm to the patient. *See, e.g.*, "Night Surgeries Linked to Risks," Business Daily (Oct. 17, 2017) (study of 15,000 surgeries showed a massive 50% increase in complications when done between the hours of 9pm and 7am).[3]

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[3] https://www.msn.com/en-za/news/other/night-surgeries-linked-to-risks/ar-AAtFk2q (viewed 11/26/17).

Research shows that sleep deprivation is as harmful to clinical performance as alcohol intoxication is, and experts advise against performing elective surgery under such circumstances:

> Sleep deprivation adversely affects clinical performance and impairs psychomotor performance as severely as alcohol intoxication.

Michael Nurok, M.D., Ph.D., Charles A. Czeisler, Ph.D., M.D., and Lisa Soleymani Lehmann, M.D., Ph.D., "Sleep Deprivation, Elective Surgical Procedures, and Informed Consent," N. Engl. J. Med. 2010; 363:2577-2579 (Dec. 30, 2010).[4]

The rushed, middle-of-the-night abortion on J.D. put her at unjustified medical risk. It may not be known for years if her cervix was damaged by the procedure, thereby causing her problems with future pregnancies. Complications from abortion include both immediate harm and long-term effects. In addition she may be scarred psychologically by the inherently frightening timing of the procedure. Patients to be seen the following day by the same practitioners were also jeopardized, given that the sleep deprivation is as deleterious as intoxication.

For legal advantage, a foreign 17-year-old girl was subjected to increased risk to her health, in order to establish an ideologically motivated precedent. Regardless of whether J.D. or ensuing patients suffered actual harm, an attempt at legal advantage does not justify inflicting greater medical risk on a minor.

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[4] http://www.nejm.org/doi/full/10.1056/NEJMp1007901 (viewed 11/23/17).

B. The Right to Revoke Consent Is Deprived by a Time-Pressured, Middle-of-the-Night Abortion.

A woman's right to revoke consent remains essential until the abortion begins, and she has a right to have full clarity of thought until that life-changing moment. Even in the context of capital punishment, where no consent is required, this Court has prohibited executions where there are doubts about the lack of clarity of mind. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (overturning capital punishment where doubts were raised about the mental clarity of the subject, observing that "'the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.' The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it.") (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 409-410 (1986)).

Had J.D. confessed to a crime under circumstances similar to how the abortion was performed, her confession would likely be deemed non-consensual and inadmissible. The Ninth Circuit held as follows:

> Commencing the interrogation of a teenager after midnight, and pressing it past 3:00 a.m., absent some showing that delay would risk the destruction of evidence or other such harm, creates far too great a risk that a false confession will be extracted, leading to the unjust conviction of an innocent person.

Taylor v. Maddox, 366 F.3d 992, 1013 (9th Cir.), *cert. denied*, 543 U.S. 1038 (2004).

J.D. was merely 17 years old while in a land foreign to her, and one can only wonder what she was told to explain why the abortion was being done in the middle of the night. This Court held the following about an interrogation of a 15-year-old boy in "the dead of night":

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition.

Haley v. Ohio, 332 U.S. 596, 599 (1948).

It is plausible, even likely, that J.D. did not feel she had much of a choice to decline the middle-of-the-night abortion, or to request more time to reconsider whether to have it. She was probably told it was necessary to have it done immediately, and she may have felt she did not have a right to change her mind. That is not true consent, and that is inconsistent with the applicable Texas law requiring informed consent after counseling. See Pet. 69a, ¶ 6 (referencing application of Texas's "state-mandated counseling" requirement).

C. The Abortion Violated the Orderly Administration of Justice.

Zealous representation should end where unnecessary risks to health and safety begin, particularly for a minor such as J.D. Moreover, the orderly administration of justice depends on respect by

officers of the court – its licensed attorneys – for legal procedure. Deference to the orderly procedure of this Court was lacking in the rushed abortion below.

Were this a case of capital punishment rather than an abortion dispute, there is little doubt that this Court would discipline any attorney who arranged for a surprise execution by a State in order to deny this Court full review of the issue. The integrity of legal process suffers if such conduct goes unaddressed. Indeed, it is difficult to see why such conduct would not be repeated in future cases, if there is no sanction of it here.

"An attorney acts not only as a client's representative, but also as an officer of the court, and has a duty to serve both masters." *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 564 (1991). The conduct in procuring the middle-of-the-night abortion, as recounted by Petitioner (Pet. 10-17), does not comport with the obligations of an attorney to serve as an officer of the Court.

In both *Roe v. Wade* and *Doe v. Bolton*, the plaintiffs opposed or regretted positions that their attorneys took. In *Doe*, the plaintiff Sandra Cano later testified before the United States Senate Committee on the Judiciary that she never even sought an abortion:

> I only sought legal assistance to get a divorce from my husband and to get my children from foster care. I was very vulnerable: poor and pregnant with my fourth child, but abortion never crossed my mind. Although it apparently was utmost in the mind of the attorney from whom I sought help. ***At one point during the legal proceedings, it was necessary for me to flee to Oklahoma to avoid***

> ***the pressure being applied to have the abortion scheduled for me by this same attorney***. Please understand even though I have lived what many would consider an unstable life and overcome many devastating circumstances, at NO TIME did I ever have an abortion. I did not seek an abortion nor do I believe in abortion.

Linda L. Schlueter, "40th Anniversary of Roe v. Wade: Reflections Past, Present and Future," 40 Ohio N.U.L. Rev. 105, 122-123 (2013) (quoting the Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights, of the S. Judiciary Comm., 109th Cong. (2005), statement of Sandra Cano, emphasis added).

As to the "Roe" in *Roe v. Wade*, the plaintiff Norma McCorvey later brought a lawsuit in an attempt to reverse the outcome that had supposedly been in her favor. While this Court declined to review her appeal, Judge Edith Jones on the Fifth Circuit remarked on how "the Court will never be able to examine its factual assumptions on a record made in court." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring), *cert. denied*, 543 U.S. 1154 (2005). "Thus, the 'facts' that gave rise to the cases of *Roe v. Wade* and *Doe v. Bolton* were based on lies and deception." Schlueter, *supra* at 123.

There are necessary limits to zealous representation. "The obligations owed by the attorney to the client are defined by the professional codes, not by the … entity from which … compensation is derived." *Polk Cty. v. Dodson*, 454 U.S. 312, 327 (1981). Subjecting a 17-year-old foreign girl to heightened medical risk, and depriving her of her full right to revoke consent, in a rushed elective medical

operation timed to deprive this Court of jurisdiction, transgresses those limits. Such conduct interfered with the orderly administration of justice in a shocking manner, and should be addressed accordingly by this Court.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, it should be granted.

Respectfully submitted,

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