

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X
4 ROCHELLE GARZA AS GUARDIAN :
5 AD LITEM TO UNACCOMPANIED :
6 MINOR, J.D. ON BEHALF OF :
7 HERSELF And OTHERS SIMILARLY :
8 SITUATED, :
9 :
10 Petitioner, :
11 :
12 v. :
13 ERIC D. HARGAN, :
14 ACTING SECRETARY, HEALTH :
15 And HUMAN SERVICES, et al. :
16 Respondents. :
17 - - - - - X

Docket No. 17-5236

Friday, October 20, 2017

Washington, D.C.

18 The above-entitled matter came on for oral
19 argument pursuant to notice.

20 BEFORE:

21 CIRCUIT COURT JUDGES HENDERSON, KAVANAUGH, AND
22 MILLETT

23 APPEARANCES:

24 ON BEHALF OF THE PETITIONER:

25 CATHERINE H. DORSEY (DOJ), ESQ.

ON BEHALF OF THE RESPONDENT:

BRIGITTE AMIRI (Pro hac vice), ESQ.

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Catherine H. Dorsey, Esq.
On Behalf of the Petitioner

3; 70

Brigitte Amiri, Esq.
On Behalf of the Respondent

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P R O C E E D I N G

THE CLERK: Case number 17-5236, Rochelle Garza as guardian ad litem to unaccompanied minor J.D. on behalf of herself and other similarly situated versus Eric D. Hargan, Acting Secretary Health and Human Services, et al., Appellants. Ms. Dorsey for the Appellants, Ms. Amiri for the Appellee.

JUDGE KAVANAUGH: Good morning, Judge Henderson is participating by audio this morning. You may proceed.

MS. DORSEY: Good morning, Your Honors.

JUDGE KAVANAUGH: I wouldn't worry too much about the 15 minute limit either, we'll just keep asking you questions until we're satisfied. Thank you.

MS. DORSEY: Thank you, Your Honor.

ORAL ARGUMENT OF CATHERINE H. DORSEY, ESQ.

ON BEHALF OF THE PETITIONER

MS. DORSEY: Catherine Dorsey on behalf of Defendants/Appellants.

The Government here, Your Honor, has shown a likelihood of success on the merits for a stay. The Government is not preventing blocking or imposing any obstacle on Ms. Doe's pursuant of an abortion here, such that it could constitute an undue burden within the meaning of Casey. The Government has not put any obstacle in her path; rather the Government is refusing to facilitate an

1 abortion, which it is permitted to do in furtherance of its
2 legitimate and significant interest in promoting childbirth.

3 JUDGE KAVANAUGH: So you seem to have three
4 differential strands of arguments, if I could set them as I
5 see them. One is the facilitation argument, you don't want
6 to be facilitating the abortion. Second, is that it's not
7 an undue burden because she can return to her home country.
8 And the third is that it's not a undue burden because she
9 could be released to a sponsor. And I want to explore the
10 sponsor option quickly here at the beginning, which is we're
11 being pushed in a span of 24 hours to make a sweeping
12 constitutional ruling in one direction or another.

13 And when that happens the Supreme Court and this
14 Court often look are there other avenues to resolving a
15 dispute short of that, initially. And it seems to me in
16 this case, if she were released to a sponsor, that would
17 solve the Government's objection. That would allow J.D. to
18 be released from custody, which presumably would be a good
19 thing, and it would allow her to obtain the abortion if she
20 so chooses.

21 The sponsor option, as I read the record, hasn't
22 been explored, there's paragraph 21 of the White
23 declaration, I have no idea what the facts are behind that.
24 There was no exploration of that. There's been very little
25 explanation of that. My understanding is that the sponsor

1 can occur quickly. What is the status of the sponsor
2 situation? How does it work? How quickly could that happen
3 and wouldn't that resolve this case if it could happen
4 quickly without the need for the ruling that either side is
5 pushing for here?

6 MS. DORSEY: The bottom line answer, Your Honor,
7 is yes, if it could happen that would resolve the case. Now
8 in the record there is not much on this, admittedly. I
9 think as you pointed out in the White declaration there is
10 indications that ORR and HHS have pursued the sponsor
11 option. I think she identified a couple of people as
12 potential sponsors.

13 JUDGE KAVANAUGH: Did she have names, I'll just
14 ask a factual question, which is not in the record. Did she
15 have names of people and phone numbers and addresses with
16 her when she arrived in the United States?

17 MS. DORSEY: Again, not in the record, but I
18 believe there was at least one individual who she had
19 contact information and I think --

20 JUDGE KAVANAUGH: Does she have other relatives in
21 the United States?

22 MS. DORSEY: That I don't know of, not that we are
23 aware of, I think, and not that is in the record, of course.

24 JUDGE KAVANAUGH: But I mean that's my concern
25 here is that that option which is an option that solves her

1 problem, it solves the issue, hasn't been explored.

2 MS. DORSEY: Well it's one that I would think if
3 it was an option that plaintiffs would have raised to
4 identify to help because of course --

5 JUDGE KAVANAUGH: Well, I'm going to ask the same
6 question --

7 MS. DORSEY: -- HHS --

8 JUDGE KAVANAUGH: Yes, excuse me. I'm going to
9 ask the same questions of them, too. But it just seems to
10 me that that's something that is a way to resolve this case,
11 in a way satisfactory to everyone and quickly and we just
12 don't have facts on it.

13 MS. DORSEY: Absolutely and HHS, you know, remains
14 willing to work that that. There is some, it does take some
15 time because --

16 JUDGE MILLETT: How much time?

17 MS. DORSEY: -- sponsors have to usually undergo a
18 background investigation. And so there are some procedures
19 that are laid out on the website we cited our brief, the ORR
20 procedures. It goes through the background information but
21 I would assume that could be done fairly quickly. But
22 there's nothing in the record.

23 JUDGE MILLETT: Well I mean I guess a couple of
24 things fairly quickly matters.

25 MS. DORSEY: Sure.

1 JUDGE MILLETT: I mean we're at the point where
2 days matters.

3 JUDGE KAVANAUGH: Right.

4 JUDGE MILLETT: But my understanding is that there
5 were two sponsors that have already been rejected, is that
6 correct?

7 MS. DORSEY: That's my understanding, Your Honor.

8 JUDGE MILLETT: And were those ones that she or
9 her attorneys or somebody identified?

10 MS. DORSEY: I believe so, but I think plaintiffs
11 might have better information on that.

12 JUDGE MILLETT: Do we know why they were rejected?

13 MS. DORSEY: I do not know.

14 JUDGE MILLETT: Okay.

15 MS. DORSEY: I don't know, it may have been that
16 they were unwilling to serves as sponsors, but I'm not sure
17 on that.

18 JUDGE MILLETT: Do you know whether a sponsor is
19 willing, given some of the documents in this record, we
20 don't have much record but there are some documents and e-
21 mails in the record. Do you know whether a sponsor is
22 willingness to permit her to have an abortion is a factor in
23 the decision to approve a sponsor or not?

24 MS. DORSEY: I do not know, Your Honor.

25 JUDGE MILLETT: You do not, so you cannot

1 represent that it is not a consideration?

2 MS. DORSEY: I mean I cannot, Your Honor, on the
3 record.

4 JUDGE MILLETT: Because there are e-mails that
5 talk about if something doesn't work we have met with, I
6 don't think, it's hard to tell because they're all called
7 U.C., but that if a sponsor doesn't work out we know lots of
8 folks who are willing to help and support a pregnancy.

9 MS. DORSEY: Correct, Your Honor.

10 JUDGE MILLETT: Would it be unconstitutional if
11 sponsors were denied that status because of their
12 willingness to support an abortion decision? Would you
13 agree with that?

14 MS. DORSEY: Your Honor, I think that would be
15 whether this, I'm sorry, are you saying if HHS had a policy
16 in effect, basically, that said they --

17 JUDGE MILLETT: Then that'd be a policy --

18 MS. DORSEY: -- wouldn't allow a sponsor to
19 sponsor an individual --

20 JUDGE MILLETT: A policy or even a one at a time
21 decision. They decided, say I know this is in the record,
22 so I'm not trying to put --

23 MS. DORSEY: Sure.

24 JUDGE MILLETT: -- anything in there that isn't.
25 But if it were in the record that she came forward with a

1 sponsor and the sponsor is willing to support her decision,
2 and it sounds like they have some sort of discretionary
3 judgment here, and they decided it's not consistent with
4 their standards to release a minor into the custody of
5 someone who will allow abortion to occur. Would you agree
6 that that would be an unconstitutional undue burden?

7 MS. DORSEY: That would certainly present a much
8 closer question about whether --

9 JUDGE MILLETT: But you won't even agree to that?

10 MS. DORSEY: Well, Your Honor, it's not on the
11 facts here before us, so I would be --

12 JUDGE MILLETT: How would that not be?

13 MS. DORSEY: -- hesitant to take a position that
14 it would definitively be undue burden. But I think it would
15 definitely present a very close case because that would
16 be --

17 JUDGE MILLETT: It doesn't feel like a close to
18 me, actually. How would that not be --

19 MS. DORSEY: Putting an obstacle in her path by
20 the Government.

21 JUDGE MILLETT: Right. How would that not be a
22 undue burden?

23 MS. DORSEY: I think it likely would be, Your
24 Honor.

25 JUDGE KAVANAUGH: And if it were, you would only

1 have your argument that the return to the home country
2 argument, you wouldn't have the sponsor. As of now you have
3 two alternatives you've identified, return to the home
4 country and the sponsor, if Judge Millett's hypothetical
5 came to pass presumably that would be, there would only be
6 one option, the return to home country and we would have to
7 assess whether that's a constitutionally sufficient option.
8 I wanted to ask a question --

9 MS. DORSEY: Well --

10 JUDGE KAVANAUGH: Can I ask a question about the
11 facilitation --

12 MS. DORSEY: Yes, Your Honor.

13 JUDGE KAVANAUGH: -- argument?

14 MS. DORSEY: Yes.

15 JUDGE KAVANAUGH: Your argument --

16 JUDGE HENDERSON: Can I get in here for one
17 second? Because I'd like to ask Ms. Dorsey, I agree with my
18 colleagues that we should avoid constitutional issues if
19 possible. But I would like to know if you have a position
20 on the constitutional rights of Jane Doe and if so, what is
21 that position?

22 MS. DORSEY: If you're asking whether we have a
23 position on whether she had a constitutional right to
24 abortion by virtue of her status here illegally, we have not
25 taken a position on that, Your Honor, and we are not --

1 JUDGE KAVANAUGH: How can you not take a position
2 on that?

3 MS. DORSEY: Because, Your Honor, we don't think
4 it's necessary to deciding the issue here. Because we're
5 saying that even, even if she had a constitutional right to
6 abortion, what's happening here is the Government's refusal
7 to facilitate and that is not an undue burden. That is
8 different under cases like *Webster* and *Maher* and *McRay*.

9 JUDGE KAVANAUGH: Can I ask you a question on the
10 facilitation point, which is women in federal prison under
11 Supreme Court precedent, do they have a right to obtain an
12 abortion?

13 MS. DORSEY: Yes. And the reason that is
14 different, Your Honor, is because by the fact of
15 incarceration there is no other way a woman can obtain an
16 abortion and it's established under Supreme Court precedent
17 that she has such a right. But here, Ms. Doe has the option
18 of voluntary departure.

19 JUDGE KAVANAUGH: Okay. But I just want to
20 isolate your different arguments. That's why I started with
21 the three. In the hypothetical that I gave it's not
22 hypothetical, it happens, there is still Government
23 facilitation by your definition of facilitation of the
24 abortion.

25 MS. DORSEY: I'm sorry, Your Honor, I think I --

1 JUDGE KAVANAUGH: In the federal prison --

2 MS. DORSEY: Yes.

3 JUDGE KAVANAUGH: -- situation, the Government is
4 under your definition of facilitation, facilitating the
5 abortion.

6 MS. DORSEY: Yes, and in that case the Government
7 would have to because there's no other way she could get it
8 and otherwise the woman would be completely denied of a
9 right which would obviously constitute undue burden.

10 JUDGE KAVANAUGH: And then let me ask you another
11 question similar but adults who are here in the country
12 unlawfully and who are being detained, an adult woman who is
13 pregnant in immigration detention unlawfully here, does she
14 under current Supreme Court precedent have a right to obtain
15 an abortion?

16 MS. DORSEY: Again, we haven't taken a position on
17 whether, but I think there are procedures that are --

18 JUDGE KAVANAUGH: Well, that must be happening as
19 a matter of practice on an ongoing basis. Is it happening?
20 Are adult women in immigration detention who chose to have
21 an abortion able to obtain an abortion?

22 MS. DORSEY: Well, plaintiffs have cited, I
23 believe, a policy at least that ICE when individuals are in
24 ICE custody they are able to obtain an abortion. That ICE
25 does facilitate transporting the woman for an abortion,

1 although I think as long as it's not federally funded.

2 JUDGE KAVANAUGH: So plaintiff cited the ICE
3 guidelines which seem to suggest that. You're not disputing
4 that that happens?

5 MS. DORSEY: No, we're not, Your Honor.

6 JUDGE KAVANAUGH: And if J.D. had come into the
7 country unlawfully and committed a crime and was in federal
8 prison, she would be able to obtain the abortion?

9 MS. DORSEY: Yes. But it's not, Your Honor,
10 although that is facilitation, that doesn't necessarily mean
11 that is constitutionally required that has not been
12 decided --

13 JUDGE KAVANAUGH: I understand.

14 MS. DORSEY: -- and so --

15 JUDGE KAVANAUGH: I'm sorry to interrupt. I'm
16 sorry to interrupt. I'm just isolating the facilitation
17 part of your argument from the undue burden part of your
18 argument. It just seems that there is facilitation by the
19 Government and these other examples, and you would argue
20 well that's different because there are other alternatives
21 here and I'm not sure that distinguishes the situation as a
22 matter of facilitation, it may distinguish it as a matter of
23 undue burden.

24 MS. DORSEY: Right. But the Government could
25 still make the decision here to choose not to facilitate, to

1 take affirmative measures to help her when they are trying
2 to promote a policy of --

3 JUDGE KAVANAUGH: And because, in your view, it's
4 not an undue burden and it's not an undue burden because in
5 your view there are two alternatives, the return to home
6 country and the sponsor, right?

7 MS. DORSEY: That's correct, Your Honor.

8 JUDGE KAVANAUGH: On the return to home country --

9 JUDGE MILLETT: Wait, can I --

10 JUDGE KAVANAUGH: Go ahead.

11 JUDGE MILLETT: -- respond on that same thing?

12 Sorry. So I'm trying to understand what the Governmental
13 interest is in your terms, right, take your language of
14 facilitation in not facilitating an abortion for J.D. but
15 facilitating it for adults, who I assume could also
16 voluntarily depart. What is the rationale for that?

17 MS. DORSEY: Well, the rationale here is they're
18 trying to promote childbirth and fetal life and also they
19 are looking over the --

20 JUDGE MILLETT: Well they would do that for --

21 MS. DORSEY: -- best interest of the child, where
22 HHS is --

23 JUDGE MILLETT: Which child? What child?

24 MS. DORSEY: The minor child. The minor child in
25 HHS's custody.

1 JUDGE KAVANAUGH: J.D.

2 MS. DORSEY: J.D.

3 JUDGE MILLETT: Well she got a judicial bypass
4 which is a decision that she gets to make best interest for
5 any guardian or custodian. So they don't --

6 MS. DORSEY: Well, the judicial bypass system,
7 Your Honor, that takes care of the state's requirement that
8 to bypass parental consent provisions. HHS still has an
9 independent custodial obligation over J.D. and it has an own
10 interest in, I mean, securing her best interest in taking
11 care of her and in fact, so they have an interest in --

12 JUDGE MILLETT: So that overrides --

13 MS. DORSEY: -- it doesn't override, it's just
14 independent --

15 JUDGE MILLETT: No, you're overriding Texas'
16 determination that she can make this decision -- so she
17 needs a judicial bypass that covers the federal government
18 as well as the state?

19 MS. DORSEY: No, Your Honor. If she were, the
20 only reason she can't exercise that judicial bypass
21 procedure right now is because she is in HHS custody by
22 virtue of the fact that she's here illegally. Otherwise, if
23 she were here and she's obtained the state bypass there
24 would be no problem with her going in Texas to have an
25 abortion because she has the judicial bypass.

1 JUDGE MILLETT: I guess I'm still not
2 understanding why, if the whole difference here, so the only
3 difference is that you assert best interest that trumps her
4 decision to make, she got the judicial bypass to make the
5 decision to have an abortion without requiring the consent
6 of her guardians or custodians or parents. And your
7 position is that you have an interest that's greater than
8 that and that's the only thing that distinguishes your
9 treatment of adults and minors in immigration custody.

10 MS. DORSEY: No, Your Honor, respectfully I don't
11 think that's quite exactly what I'm saying. The HHS
12 interest here doesn't trump, but it's an independent
13 interest of that of the state and the state procedures
14 requiring parental consent for a judicial bypass.

15 JUDGE MILLETT: But there's no bypass process for
16 bypassing this custodian you're telling me?

17 MS. DORSEY: No, and that's because her bypass
18 process to that because she's in HHS custody would be to
19 choose to voluntarily depart, which then she would be out of
20 custody, she'd be like any other person in the State of
21 Texas who could obtain, who has obtained a judicial bypass
22 and she'd be free to pursue. She'd be in the same position
23 as somebody like that because she'd be out of custody.

24 JUDGE KAVANAUGH: Could the State of Texas pass a
25 law under your theory that says that no hospital, clinic,

1 doctor may perform an abortion on a woman who's not in the
2 country lawfully? On the theory that she can return to the
3 home country?

4 MS. DORSEY: Whether that would apply to all
5 doctors in the state or just state?

6 JUDGE KAVANAUGH: Yes. If you're unlawfully in
7 the State of Texas, the State of Texas passes a law that you
8 may not receive an abortion in the State of Texas as an
9 unlawful immigrant on your theory, I'm asking how far your
10 theory goes, that they can return home?

11 MS. DORSEY: Well, I think that runs into a
12 problem of not only the undue burden, but then the argument
13 that the states have raised in the amicus brief about
14 whether there is constitutional right to an abortion for an
15 illegal alien. So I think that would --

16 JUDGE KAVANAUGH: That's the question. That's
17 Judge Henderson's question.

18 MS. DORSEY: Right. And Your Honor we haven't
19 taken a position on whether and we don't think this Court
20 needs to reach the issue of whether she has a constitutional
21 right here. The fact that she's just --

22 JUDGE KAVANAUGH: What if a Judge on this Court or
23 on the next Court think you need to have a position on that
24 issue in order to resolve the case?

25 MS. DORSEY: Then I guess I would request that we

1 have an opportunity to brief that issue, Your Honor.

2 JUDGE KAVANAUGH: Okay.

3 MS. DORSEY: Because the Government has not --

4 JUDGE MILLETT: What if we don't have the time?

5 MS. DORSEY: -- taken a position.

6 JUDGE MILLETT: What if we don't have the time for
7 that? Should we just assume, since you're assuming and not
8 disputing that there is that base constitutional right then
9 we should assume or is that base constitutional right?

10 MS. DORSEY: I think that's fair, Your Honor,
11 because we haven't disputed that here and we --

12 JUDGE MILLETT: You're waiving any argument to the
13 contrary?

14 MS. DORSEY: -- assumed for the purpose of this
15 argument that even if she has such a right, it's not
16 facilitation.

17 JUDGE MILLETT: And you're waiving any argument to
18 the contrary?

19 MS. DORSEY: Yes, Your Honor.

20 JUDGE KAVANAUGH: You're affirmatively waiving
21 that argument for purposes of this entire litigation,
22 including in the Supreme Court?

23 MS. DORSEY: Well, we haven't raised it here, and
24 we haven't made the argument, so I'm not sure we could do
25 otherwise, Your Honor.

1 JUDGE KAVANAUGH: There's a difference between --

2 MS. DORSEY: But we --

3 JUDGE KAVANAUGH: -- there's sometimes a
4 difference between forfeiture and waiver, and Judge
5 Millett --

6 MS. DORSEY: Yes.

7 JUDGE KAVANAUGH: -- used the precise word, waiver
8 and I want to make sure before we have a rehearing petition
9 or something --

10 MS. DORSEY: Your Honor, I would prefer not to
11 waive it, but I understand --

12 JUDGE MILLETT: I don't know how you cannot waive
13 it by not raising it.

14 MS. DORSEY: -- we have not made the argument
15 here.

16 JUDGE MILLETT: But isn't that waiving? Is there
17 any way --

18 JUDGE KAVANAUGH: That's forfeiture.

19 JUDGE MILLETT: -- that's not waiving?
20 Forfeiture.

21 MS. DORSEY: I would agree with Judge Kavanaugh,
22 Your Honor, that it's forfeiture --

23 JUDGE MILLETT: Well it's now knowing --

24 MS. DORSEY: -- but we're not --

25 JUDGE MILLETT: -- it's now knowing an intentional

1 decision not to raise so it's hard to figure out how it's
2 not only forfeiture but also waiver. But if you have a
3 legal theory, I'm most open to hearing it.

4 MS. DORSEY: Your Honor, I am not authorized to
5 take a position on that issue.

6 JUDGE KAVANAUGH: Okay.

7 MS. DORSEY: And here we have not disputed it, we
8 have assumed for purposes of the argument that if there is a
9 constitutional right that still does not constitute
10 facilitation.

11 JUDGE HENDERSON: And what would be your position,
12 Ms. Dorsey, if we asked you to brief that issue?

13 MS. DORSEY: I don't --

14 JUDGE HENDERSON: I didn't hear your answer to
15 that.

16 MS. DORSEY: I don't know, Your Honor. I, of
17 course, do not make these decisions all by myself at the
18 Government --

19 JUDGE HENDERSON: Right.

20 MS. DORSEY: -- and I would have to get
21 authorization for whatever position we would take.

22 JUDGE HENDERSON: All right. I understand that.
23 Let me ask you another question, Ms. Dorsey, and that is the
24 District Judge, I want to ask you about the medical care
25 that the Government is required to give a minor in one of

1 these shelters. The District Judge made what I think is an
2 appalling comparison between an elective abortion and a
3 tonsillectomy. I'm asking you do you have a position if
4 this were a medically necessary abortion?

5 MS. DORSEY: I'm sorry if this particular
6 procedure is medically necessary?

7 JUDGE HENDERSON: Yes.

8 MS. DORSEY: There is nothing in the record to
9 indicate that an abortion here is anything other than an
10 elective abortion. There is nothing to indicate that it's
11 medically necessary here.

12 JUDGE KAVANAUGH: I think her question --

13 JUDGE HENDERSON: All right. And what I'm
14 asking --

15 JUDGE KAVANAUGH: Go ahead.

16 JUDGE HENDERSON: What I'm asking you is if you do
17 have a position, if you don't okay. What would be your
18 position if it were medically necessary?

19 MS. DORSEY: Well, if it's medically necessary
20 there is an exception in the HHS policy and that indicates
21 that you have to seek ORR Director's approval for
22 significant surgeries, such as abortion, but there is an
23 exception if a procedure is medically necessary.

24 JUDGE HENDERSON: Okay. Thank you.

25 JUDGE KAVANAUGH: How many pregnant minors are in

1 ORR custody at the moment in the United States?

2 MS. DORSEY: I do not have that fact, Your Honor.

3 JUDGE MILLETT: Do you know what medically
4 necessary means in that regulation?

5 MS. DORSEY: There is a, I think an additional,
6 well it's not medically, sorry, emergency. There's an
7 emergency exception.

8 JUDGE MILLETT: Okay. So there's not a medical
9 necessity exception?

10 MS. DORSEY: I think it's referred to as an
11 emergency.

12 JUDGE MILLETT: Are we sure that emergency is
13 included in medical necessity? I mean I'm just asking
14 because there are constitutional cases and there are rules
15 about --

16 MS. DORSEY: Right.

17 JUDGE MILLETT: -- what counts as medical
18 necessity --

19 MS. DORSEY: Absolutely.

20 JUDGE MILLETT: -- and not for purposes of this
21 constitutional right. So I'm very trying to understand is
22 there any framework in place for that decision to be made?

23 MS. DORSEY: There is just the policy that states
24 that if it is an emergency which I would think would include
25 medical necessity, then the ORR Director's approval is not

1 needed and they should take the minor for the necessary
2 medical care.

3 JUDGE MILLETT: There is also a lot of documented
4 problems about sexual abuse within detention facilities,
5 including ICE ones. What if she had gotten pregnant as a
6 result of rape during detention, what would your position
7 be?

8 MS. DORSEY: There is a different policy in place
9 for that and that does, which I believe it's cited in our
10 brief or at least plaintiff's, which indicates that she is
11 to be allowed to have an abortion and medical services for
12 family planning and the like to make a decision in that
13 case.

14 JUDGE MILLETT: No, no, not to make a decision,
15 she's actually in the position --

16 MS. DORSEY: And to facilitate if she chooses to
17 have an abortion, yes.

18 JUDGE MILLETT: And where is that?

19 MS. DORSEY: (No audible response.)

20 JUDGE MILLETT: Or you can tell me on rebuttal, if
21 you don't want to waste the time now. But is that any rape
22 or is it only a rape in a facility?

23 MS. DORSEY: I don't think it's limited. I think
24 it's limited to rape or sexual assault, I don't think it
25 specifies it has to be in the facility. Because I think

1 envisions to cover women who have problems on their route to
2 the United States and may get impregnated by rape.

3 JUDGE MILLETT: And so if so if she were to show
4 that this was a nonconsensual impregnation, she would be
5 able to get her abortion?

6 MS. DORSEY: If it was in case of rape or sexual
7 assault, yes.

8 JUDGE MILLETT: Well, what else is nonconsensual?

9 MS. DORSEY: No, that's right. Yes.

10 JUDGE MILLETT: Any nonconsensual?

11 MS. DORSEY: That's my understanding, yes, Your
12 Honor.

13 JUDGE KAVANAUGH: Does J.D. under your view though
14 in the country unlawfully, qualify as a person under the due
15 process clause?

16 MS. DORSEY: I think so, Your Honor, though of
17 course that may tie in with the question that the United
18 States has not taken a position on.

19 JUDGE KAVANAUGH: Okay.

20 JUDGE MILLETT: Well, have you not taken a
21 position in other context that children who come here are
22 persons within the meaning of the Fifth Amendment?

23 MS. DORSEY: I believe that's right, Your Honor.

24 JUDGE MILLETT: So they are?

25 MS. DORSEY: Yes.

1 JUDGE MILLETT: Okay. Sorry, I think I
2 interrupted you, did you want to go on to the removal thing,
3 the voluntary departure. Is that where I interrupted you?
4 Do you want to talk about the voluntary departure theory?

5 MS. DORSEY: Yes, Your Honor. Our position is
6 that because she can choose to, her sole need that she
7 alleges why she needs the Government to assist in getting an
8 abortion, is because she is in HHS custody. But she can
9 file a request for voluntary departure at any time and then
10 she is not, she's in the same situation as anybody else not
11 in Government custody, and the Government therefore would
12 have no need to take affirmative steps to help her get an
13 abortion. That would be clear facilitation in line of cases
14 like *Webster* and *Maher*.

15 JUDGE KAVANAUGH: Plaintiffs say that's in essence
16 imposing a penalty on the constitutional right that the
17 Supreme Court has articulated. What's your response to
18 that?

19 MS. DORSEY: It's not imposing a penalty. She
20 came here and because of that, she is in federal detention,
21 and she has the choice to voluntary depart, and even if that
22 puts her to a difficult choice between voluntary departure
23 and not being able to obtain an abortion that's not a
24 substantial obstacle that the Government has put in her way,
25 especially since she has raised no legitimate claim to

1 remain in the U.S.

2 JUDGE MILLETT: And so if she were to claim
3 asylum, like she would be persecuted if returned to her
4 country, what then?

5 MS. DORSEY: That would be a much more difficult
6 case, Your Honor, but she has not raised any such claim
7 here.

8 JUDGE MILLETT: No, no, no. Again, you've asked
9 us to make constitutional rulings in this case by appealing
10 here and so I need to understand what your position is, what
11 you mean by this you can leave. So what if she claims that
12 she would face persecution? Is it still her choice or not?

13 MS. DORSEY: I think that situation is still her
14 choice in that we have not placed an undue burden on her.

15 JUDGE MILLETT: And undue --

16 MS. DORSEY: It is not a Government obstacle
17 placed on her, even though that would obviously be a more
18 difficult choice and I think would raise a harder question.

19 JUDGE KAVANAUGH: Well, suppose that in Judge
20 Millett's hypothetical, that in essence made return to the
21 home country not an option. Then she's in the same
22 position, I would gather, as someone who's in federal prison
23 who you said does under current Supreme Court precedent have
24 a right to an abortion.

25 MS. DORSEY: Although there are constraints on, as

1 I understand them, I'm no immigration law expert, but
2 constraints on how long we can detain somebody under
3 *Zadvydas* and other cases, and so it might not be an issue
4 that she could permanently be detained to be a equivalent to
5 a prison case, Your Honor.

6 JUDGE KAVANAUGH: I think I know the answer to
7 this question, but is the Government trying to remove her
8 back to her home country?

9 MS. DORSEY: I don't know that there have been
10 affirmative efforts to remove her. She's in the state where
11 she can request voluntary departure. But I'm not aware and
12 there's nothing in the record about removal efforts.

13 JUDGE MILLETT: But she, it at least seems by the
14 facts in this case, would be someone who would be entitled
15 to claim the special immigrant juvenile status.

16 MS. DORSEY: I don't know, Your Honor.

17 JUDGE MILLETT: Okay.

18 MS. DORSEY: I'm sorry.

19 JUDGE MILLETT: So that's a protected status for
20 those facing child abuse in the country from which they've
21 come.

22 MS. DORSEY: Right.

23 JUDGE MILLETT: Is it your position that federal
24 law would actually allow the United States to just when you
25 have an unaccompanied minor who has at least to this point

1 undisputed claims of severe child abuse, would you be
2 allowed to remove her without any process? I'm not saying
3 voluntary departure, I'm saying would you be able to remove
4 her as an unaccompanied minor and just put her on a plane
5 back to where she's from given these allegations of abuse?

6 MS. DORSEY: Well, but she hasn't made those
7 allegations.

8 JUDGE MILLETT: I'm just asking how the system
9 works.

10 MS. DORSEY: Okay.

11 JUDGE MILLETT: For unaccompanied, not adults,
12 we're talking about unaccompanied minors here. For
13 unaccompanied minors can the Government simply put someone,
14 and you say she hasn't invoked a protection yet.

15 MS. DORSEY: Right. And usually --

16 JUDGE MILLETT: And can't you just put her on a
17 plane and remove her?

18 MS. DORSEY: Well, usually the protections there,
19 you know, we have obligations for CAT claims and the like
20 where we --

21 JUDGE MILLETT: But she hasn't invoked that.

22 MS. DORSEY: -- have non-removable obligations.
23 But again those haven't been raised here, so.

24 JUDGE MILLETT: Right. So why can't you just put
25 her a plane yourself? Why does she have to voluntarily

1 depart?

2 MS. DORSEY: Well, removal might be another
3 option, but I --

4 JUDGE MILLETT: Why can't you do it? So you can
5 do it, you just have chosen not to do it?

6 MS. DORSEY: I think that's right, but Your Honor,
7 I actually do not know the answer to that question.

8 JUDGE HENDERSON: Can I ask you, Ms. Dorsey, do
9 you in this option to return to her home country, do you
10 consider whether abortion is illegal in that country?

11 MS. DORSEY: No, that is not a factor. I mean the
12 voluntary departure option, that's her choice regardless of
13 whether back home her country makes an abortion accessible
14 or not.

15 JUDGE KAVANAUGH: Do we know what country she's
16 from? I was searching for that?

17 MS. DORSEY: We do, but I think it's in a sealed
18 record, Your Honor.

19 JUDGE KAVANAUGH: Okay. And do we know if the
20 country she's from allows abortion?

21 MS. DORSEY: I believe it does not.

22 JUDGE KAVANAUGH: It does not.

23 MS. DORSEY: Yes.

24 JUDGE MILLETT: And just to be clear if she were
25 to assert that she was pregnant as a product of

1 nonconsensual sex, you would agree that she can receive the
2 abortion?

3 MS. DORSEY: That's correct, Your Honor. And I
4 will get you that cite on rebuttal.

5 JUDGE MILLETT: Okay. And on this facilitation
6 thing, can you explain to me, given that she's actually not
7 directly in your custody, she's in the custody of a grantee
8 who has no opposition to letting her go, other than your
9 threat to take, not your personal threat, the Government's
10 threat to take away funding if they let her go have the
11 abortion. So tell me exactly what it is the Government
12 other than not pulling funding from the grantee, what
13 exactly is it that the Government has to do facilitate her
14 abortion?

15 MS. DORSEY: There are several steps, Your Honor.
16 First the two for a minor in the custody of the shelter, the
17 Director of ORR has to give written approval for abortion or
18 other elective surgical procedures.

19 JUDGE MILLETT: And so that would be the thing
20 that there's no legal mechanism for anybody to bypass,
21 minors can't just bypass that. That abortion restriction
22 can't be bypassed.

23 MS. DORSEY: Correct. Because in HHS that has
24 nothing to do with the state bypass procedures.

25 JUDGE MILLETT: No, no, no. I'm just saying --

1 MS. DORSEY: Yes.

2 JUDGE MILLETT: -- do you think the Federal
3 Government can impose legal constraints like that that can't
4 be bypassed, even though states are not permitted to do so?

5 MS. DORSEY: Well there is a, I mean there is a
6 similar bypass mechanism in that if it's in case of
7 emergency or medical necessity then the minor --

8 JUDGE MILLETT: That's not the same thing as the
9 bypass.

10 MS. DORSEY: Well it's not --

11 JUDGE MILLETT: It's not a judicial bypass.

12 MS. DORSEY: -- a parental consent requirement
13 either. It's somebody who is a custodian looking --

14 JUDGE MILLETT: It's a custodian consent
15 requirement.

16 MS. DORSEY: That's correct, Your Honor.

17 JUDGE MILLETT: Okay.

18 MS. DORSEY: Then normally what would also happen
19 is they would have to set up appointments and transfer her,
20 transport her to those --

21 JUDGE MILLETT: No, they don't have to transport
22 her.

23 MS. DORSEY: I realize in this case they're --

24 JUDGE MILLETT: I'm sorry. I wasn't clear. In
25 this case --

1 MS. DORSEY: In this case --

2 JUDGE MILLETT: -- what do they have to do to
3 facilitate?

4 MS. DORSEY: -- there are volunteers to transport
5 her.

6 JUDGE MILLETT: Right.

7 MS. DORSEY: But then they still have to arrange
8 transfer of custody because they're not allowed to release
9 her on her own recognizance.

10 JUDGE MILLETT: Who has to do that HHS or the
11 grantee?

12 MS. DORSEY: The grantee through orders of HHS.

13 JUDGE MILLETT: No, I know the grantee does all
14 the paperwork and does it routinely for medical
15 appointments.

16 MS. DORSEY: Right but HHS has to give
17 instructions to how this all --

18 JUDGE MILLETT: Those instructions, I mean there's
19 already a system in place by which the grantee, my
20 understanding from the program and regulations and policies,
21 is that the grantee does all of this, HHS doesn't have to do
22 anything of logistics other than not stop it. Is that
23 correct in this case?

24 MS. DORSEY: Well they are implementing the HHS,
25 the grantee does it on behalf of HHS. They are acting to

1 undertake these responsibilities and so they also have to --

2 JUDGE MILLETT: Is the grantee HHS? Is it
3 actually a federal actor? Is it a contractor?

4 MS. DORSEY: It's a contractor is my
5 understanding. Acting on behalf --

6 JUDGE MILLETT: Does the constitution apply to
7 them?

8 MS. DORSEY: -- HHS. Does the constitution apply?

9 JUDGE MILLETT: Apply to the contractor?

10 MS. DORSEY: Yes.

11 JUDGE MILLETT: All right. So the point is you
12 have to allow, I mean you have a court order, assuming you
13 had a court order that said she's entitled to this.

14 MS. DORSEY: Right. They still have to --

15 JUDGE MILLETT: So you have to --

16 MS. DORSEY: -- because they're not allowed to let
17 somebody out of custody without making a transfer that
18 there's somebody authorized to take custody. So in this
19 case, an attorney of record could do it.

20 JUDGE MILLETT: You don't dispute that?

21 MS. DORSEY: No. An attorney of record, the
22 guardian ad litem --

23 JUDGE MILLETT: You did it yesterday.

24 MS. DORSEY: That's right.

25 JUDGE MILLETT: You just did it yesterday.

1 MS. DORSEY: And then they have, after the
2 procedure, they obviously the shelter has to monitor her
3 health and take her for any follow up appointments, or if
4 there is any complications, has to give all the care that
5 would be required --

6 JUDGE MILLETT: Yes. This is only --

7 MS. DORSEY: -- medical or otherwise.

8 JUDGE MILLETT: Okay. So all they have to do is
9 take care of her health, which they have to do anyhow.

10 MS. DORSEY: Yes. Although of course, there could
11 be different postsurgical complications or different needs
12 than, they are required under the Flores Agreement to do
13 basic health but it doesn't necessarily require them to
14 undertake, you know, the complications post elective
15 surgeries.

16 JUDGE MILLETT: So the one healthcare they're not
17 willing to do is for abortion. They'd be willing to do
18 anything if she were to continue the pregnancy and do all
19 this facilitation if she were to continue the pregnancy.
20 It's only an administrative burden if it's to allow her to
21 exercise her right to an abortion, then it's a burden?

22 MS. DORSEY: Well, it's not just because, they
23 don't need to facilitate on for an elective abortion when
24 they have alleged an interest in promoting childbirth. So
25 yes they can choose to take additional measures to promote

1 childbirth and be happy to provide any extra care that that
2 might entail. But the fact that they choose not to do so
3 for an abortion that is line with the governing law --

4 JUDGE MILLETT: For a minor.

5 MS. DORSEY: For a minor is in accordance with the
6 governing law of cases like *Maher* and *McRay* and *Webster*,
7 which say that you know the Government there can be funding
8 differences --

9 JUDGE KAVANAUGH: So --

10 JUDGE MILLETT: Well, none of those involved
11 detention.

12 MS. DORSEY: No, those didn't involve detention.

13 JUDGE MILLETT: Someone in detention.

14 JUDGE KAVANAUGH: So your theory as articulated in
15 the papers was that you would be okay if she's released to
16 the sponsor and then she presumably would choose to have the
17 abortion. But if she's released to the guardian ad litem
18 and chooses to have the abortion, that's not okay. And my
19 question is what's the difference in facilitation between
20 those two situations from the Government's perspective?

21 MS. DORSEY: Because then the Government has to
22 have a role in the process of approving the abortion to let
23 her go for that and in providing health care afterwards, you
24 know, taking out he or she says she can be taken to it and
25 pay for the procedure, but the Government would still have

1 to approve the procedure which it has a reason, a legitimate
2 reason to not want to.

3 JUDGE MILLETT: What do you mean by approve the
4 procedure? What do you mean by that?

5 MS. DORSEY: ORR has to, the Director of ORR has
6 to approve written --

7 JUDGE MILLETT: But you know there's nothing
8 looking at the procedure itself, it's just saying I agree if
9 it's okay for you to go get your abortion. That's
10 favorable?

11 MS. DORSEY: Well he as to approve it and give a
12 written approval of what I would assume --

13 JUDGE MILLETT: A written approval --

14 MS. DORSEY: -- that looks at the procedure and
15 whether it's in the child's best interest and but there's
16 not much in the record on that, Your Honor. But there is an
17 approval that the Government has to go through to facilitate
18 the abortion so that can happen and it also has to provide
19 any care for her after the abortion --

20 JUDGE MILLETT: Yes, okay.

21 MS. DORSEY: -- in this case.

22 JUDGE MILLETT: So just to be clear again, the
23 approval is because you've already had a judicial bypass
24 that says she can make this decision herself, not her
25 custodian. She's got a guardian ad litem that agrees. And

1 your position is that the facilitating would be ORR saying,
2 okay, we're going to let you exercise your choice. That's
3 it.

4 MS. DORSEY: No, ORR --

5 JUDGE MILLETT: Put aside the after abortion
6 stuff.

7 MS. DORSEY: Right.

8 JUDGE MILLETT: That's beforehand.

9 MS. DORSEY: Well, ORR's policy is that it
10 requires a written authorization for significant medical and
11 surgery procedures. And so in the case of, which includes
12 abortion, and any services that may threaten the life of the
13 unaccompanied minor. And so they would have to undertake
14 that written authorization and actually approve her to go
15 get an abortion as a surgical procedure.

16 JUDGE MILLETT: Right. Okay. I won't ask, I'm
17 still trying, I don't understand what the approval is. It's
18 just that we agree that you can get an abortion?

19 MS. DORSEY: It's to --

20 JUDGE MILLETT: If you need an abortion?

21 MS. DORSEY: -- agree that that procedure --

22 JUDGE MILLETT: Is medically --

23 MS. DORSEY: -- is appropriate for the minor, is
24 in the minor's best interest.

25 JUDGE MILLETT: Okay. So that's just another best

1 interest determination that can't be bypassed at all under
2 your procedure? Un-bypassable, best interest determination.

3 MS. DORSEY: Except in an emergency.

4 JUDGE MILLETT: Unless she's going to die.

5 MS. DORSEY: Well, I'm not sure it goes that far,
6 but --

7 JUDGE MILLETT: Well, what else would it include?

8 MS. DORSEY: Emergency, it wouldn't necessary be
9 death, I would think that there could be other risks to her
10 life or if it was going to endanger her health, I would
11 assume that would qualify for an emergency, Your Honor.

12 JUDGE KAVANAUGH: Okay. Why don't we hear from
13 plaintiffs, and we'll give you time on rebuttal.

14 JUDGE MILLETT: May I ask one quick question? Do
15 we know when she turns 18, because she's 17?

16 MS. DORSEY: I do not know, Your Honor.

17 JUDGE MILLETT: You don't?

18 MS. DORSEY: It's not in the record.

19 JUDGE MILLETT: Do you know outside of the record?
20 I mean does the Government know that information?

21 MS. DORSEY: It may be in some sealed documents
22 but I'm not sure if we have an accurate birthdate.

23 JUDGE MILLETT: Is that something you could
24 provide to us under seal?

25 MS. DORSEY: Yes, after, after the argument.

1 JUDGE KAVANAUGH: Thank you. Good morning.

2 ORAL ARGUMENT OF BRIGITTE AMIRI, ESQ.

3 ON BEHALF OF THE APPELLEE/RESPONDENT

4 MS. AMIRI: May it please the Court. Good
5 morning. Since 1973 the Supreme Court has held that the
6 Government may not ban abortion. By refusing to transport
7 J.D. for an abortion, or refusing to allow anyone to
8 transport J.D., including the shelter or her guardian ad
9 litem, the Government is violating well established Supreme
10 Court precedent.

11 We're not asking for a sweeping constitutional
12 ruling, we're asking for basic, the validation of what the
13 Supreme Court has already said for 40-some odd years, and
14 that is the Government may not block abortion for anyone,
15 they may not veto abortion. The Supreme Court has been
16 clear that no one may have a third party veto power over
17 anyone's abortion decision, including a parent or a husband.

18 JUDGE KAVANAUGH: This arises, as you well
19 understand, at the intersection of two complicated areas of
20 law, undue burden abortion law and immigration law. Both of
21 which have their nuances, as you're well aware. And there
22 are two principles, I agree that both sides seem to agree on
23 under current Supreme Court law, the Government can't block
24 the abortion. At the same time I think you acknowledge the
25 Government is not required to pay for or provide, assist the

1 abortion in some direct way, in your view under current
2 Supreme Court law.

3 And my question, I'll start with you, as I did
4 with the Government, doesn't the sponsor option if it's
5 effectuated, resolve the case in a way that satisfies both
6 the, not block the abortion and not pay for or provide for
7 the abortion in a way that also gets J.D. out of detention
8 and therefore seems like a best case resolution of this if a
9 sponsor were available?

10 MS. AMIRI: Your Honor, I know we will talk about
11 facilitation in a minute, but I just want to make clear that
12 plaintiff's position in terms of payment for the abortion
13 itself is well settled under Supreme Court precedent, but
14 that is the limit in terms of --

15 JUDGE KAVANAUGH: Okay.

16 MS. AMIRI: -- what we agree that is the limit
17 with respect to Government --

18 JUDGE KAVANAUGH: Okay. That's an important
19 clarification thank you.

20 MS. AMIRI: Sure.

21 JUDGE KAVANAUGH: But what about and I agree --

22 MS. AMIRI: For sponsors, Your Honor, I agree it's
23 not in the record, and J.D. does have attorneys that are
24 helping her with the immigration status. There are a couple
25 of sponsors that have been identified, extended family

1 members and my understanding is that it is something that
2 they are trying to pursue.

3 JUDGE KAVANAUGH: Well, if it could be done by
4 Tuesday, for example --

5 MS. AMIRI: Your Honor, I'm not sure that --

6 JUDGE KAVANAUGH: -- or Friday and we have a
7 couple of weeks at most and I realize you're going to say
8 correctly that each day matters, and I understand that.
9 Completely understand that. But if the sponsor could be
10 identified as quickly, a sponsor, isn't that a best case
11 scenario for J.D.? Because J.D. has a sponsor then and can
12 also, if she chooses, obtain the abortion that she has so
13 far elected to have?

14 MS. AMIRI: I have no doubt that J.D. would rather
15 be with an extended family member than be in a Government
16 funded shelter. But I understand that that process takes a
17 significant amount of time. There must be vetting process
18 with the sponsor, a home visit. My understanding it could
19 take months.

20 JUDGE KAVANAUGH: But here's my concern as I
21 expressed to the Government as well. We don't know whether
22 what you just said is accurate in this case. We just have
23 no idea. We have one sentence in a declaration, no fact
24 finding from the District Court, no idea in this case who
25 those people you've just mentioned are, whether it would be

1 three days or three months, in which case if it's three
2 months we'll have to confront the issues, if it's three
3 days, maybe not. And we just have no idea. Shouldn't we
4 have some fact finding on that question before we go head
5 long into these difficult issues of immigration and undue
6 burden law?

7 MS. AMIRI: Your Honor, I don't think you need to,
8 because the constitutional violation here is so clear. This
9 Court should not set aside its obligation to enforce the
10 constitution by the possibility that J.D. may have a sponsor
11 that the ORR will approve and properly vet.

12 JUDGE KAVANAUGH: If you --

13 MS. AMIRI: Today her constitutional rights are
14 being violated.

15 JUDGE KAVANAUGH: I'm sorry to interrupt. On
16 possibility, you may be right that it's a mere possibility.
17 But you may not be right if there were fact finding that
18 said actually it's not going to happen, that's one thing.
19 If there's fact finding that says yes it could be done in
20 six days, that's a potentially different result. If there's
21 fact finding that says we don't know, then we'd have to
22 confront that. But we just don't know whether what you just
23 said is what the record would show if there were some fact
24 finding on the sponsor thing. And no doubt if, this is a
25 hypothetically, this is not trying to explore all options

1 here. We've had 24 hours on this. But hypothetically if we
2 were to get more facts on that question, it could narrow the
3 issues before us and also help J.D. As you said it would be
4 better for her to be with a sponsor than to be in a
5 Government Immigration Detention Facility, correct?

6 MS. AMIRI: Yes, Your Honor. But I do think that
7 one thing we do know is that she has been in legal custody
8 of ORR for a number of weeks now and there have been some
9 sponsors that have been identified and there has been no
10 actual sponsorship that has happened. So we do know that
11 this has been a process that has been worked --

12 JUDGE KAVANAUGH: But we don't --

13 MS. AMIRI: -- for weeks.

14 JUDGE KAVANAUGH: I'm sorry to interrupt again.
15 But we don't know why, we don't know what the status is, we
16 don't know with the little nudge from the Court that that
17 wouldn't happen more quickly, that it couldn't be
18 effectuated more quickly both from the Government side and
19 from the sponsor, J.D.'s attorneys, and people assisting her
20 side to get it done.

21 MS. AMIRI: We don't have those facts in the
22 record.

23 JUDGE MILLETT: We do know that two sponsors
24 already have been rejected or fallen through. Have they
25 withdrawn or did they get rejected by ORR?

1 MS. AMIRI: Your Honor, I'm not aware of those
2 circumstances. The immigration lawyers and J.D.'s guardian
3 have been working on that issue, and I'm not sure of the
4 accuracy of that statement. My understanding is that there
5 are still avenues to pursue with respect to sponsors.

6 JUDGE KAVANAUGH: Where was she detained?

7 MS. AMIRI: Your Honor, I don't know, she was in
8 the United States though.

9 JUDGE MILLETT: Not at the border?

10 MS. AMIRI: She may have been at the border, but
11 she was in the United States.

12 JUDGE KAVANAUGH: She may have been at the
13 border --

14 MS. AMIRI: She was entry without inspection.

15 JUDGE MILLETT: I'm sorry?

16 MS. AMIRI: She was entry without inspection.

17 JUDGE KAVANAUGH: And did she have, to your
18 knowledge, names of people with her?

19 MS. AMIRI: I don't know, Your Honor, I do know
20 that she has identified at least two extended family members
21 who may be potential sponsors.

22 JUDGE KAVANAUGH: Do you know if she knows other
23 people in the United States other than those two?

24 MS. AMIRI: Other than those two, I'm not sure if
25 she has extended family members or knows anyone that has a

1 connection to her that could be a viable sponsor.

2 JUDGE HENDERSON: Is she in school?

3 MS. AMIRI: I don't believe she's in school, Your
4 Honor. My understanding is that she's under close
5 supervision in the shelter and is really only allowed to
6 leave for medical appointments.

7 JUDGE HENDERSON: Okay.

8 JUDGE KAVANAUGH: Okay. Just on the legal side
9 now so obviously my colleagues can jump in with more factual
10 questions, but on the legal side, does it matter at all from
11 your point of view that she's in the country unlawfully?

12 MS. AMIRI: No, Your Honor, it does not. The
13 Supreme Court has said that the due process clause of the
14 Fifth Amendment applies to all persons in the United States.
15 And the right to abortion is grounded in the Fifth Amendment
16 due process clause, and so there is no reason why her
17 immigration status should be diminished or should diminish
18 her constitutional right to access abortion. And I think we
19 heard the Government saying that they are not taking a
20 position on that and so I agree that we should assume for
21 the purposes of this litigation that it does and we should
22 follow what the Supreme Court has said with respect to
23 access to abortion and that is that the Government may not
24 ban abortion for anyone.

25 JUDGE KAVANAUGH: So I think the Government would

1 say or does say that suppose she had been detained at the
2 border but not in the United States before she entered, she
3 would have been sent back, presumably, to her home country
4 and the Government's theory of this, as I understand it, is
5 that that's the same position she would be in now.

6 MS. AMIRI: But that's not the position she's in
7 now, Your Honor. She does, I do know that deportation
8 proceedings have not begun against her. She may very well
9 have defenses against those deportation hearings. She
10 should not be forced to give up the right to make those
11 defenses simply because she has exercised her constitutional
12 right to seek an abortion. That would be a penalty on the
13 access to abortion, just like it was in *Shapiro v. Thompson*
14 when the issue was people coming to different states needing
15 to establish residency before accepting welfare benefits.
16 The argument there could have been well people could have
17 just gone back to the states that they came from. They
18 don't need to stay here in our state and get our benefits,
19 but that's not what the Supreme Court said. The Supreme
20 Court said you cannot penalize people for exercising their
21 constitutional rights and that would be what would happen if
22 the Government was allowed to use the excuse of voluntary
23 deportation to avoid their constitutional obligations to
24 J.D.

25 JUDGE MILLETT: If people in the country without

1 documentation are not persons under the Fifth Amendment,
2 that that would go beyond minors, it would be all adults
3 whether in custody or rolled out into probation or whatever
4 it's called, released out into the United States, correct?

5 MS. AMIRI: Yes, Your Honor. And the Supreme
6 Court has --

7 JUDGE MILLETT: All dreamers?

8 MS. AMIRI: Yes, Your Honor, and the Supreme Court
9 has also never taken that position that individuals here
10 without documentation are not entitled to Fifth Amendment
11 substantive due process protection.

12 JUDGE MILLETT: That's not its position in this
13 litigation?

14 MS. AMIRI: Correct. So, Your Honor --

15 JUDGE MILLETT: Have you -- no, you go ahead.

16 MS. AMIRI: No, Your Honor, please.

17 JUDGE MILLETT: I was going to ask about your
18 response to their argument that another things that's unique
19 about this context, is it's a little hard for the
20 Government, they would say, to facilitate the abortion
21 because they have custody of this minor. And so it's not
22 the same as somebody who is, whether lawfully present or
23 not, has been released into society. And it's not the same
24 as adults in ICE detention because they assert an overriding
25 interest in protecting her from her own decision.

1 MS. AMIRI: Your Honor, I'm not sure I understand
2 the Government's distinction between adults in ICE detention
3 and unaccompanied minors, particularly where here J.D. has a
4 court order saying that she has shown that the abortion is
5 either in her best interest or that she's mature enough to
6 make that decision. The Government then has --

7 JUDGE MILLETT: Well, does that bind the Federal
8 Government?

9 MS. AMIRI: No, Your Honor, that is by a state
10 court.

11 JUDGE MILLETT: And so they say we have that's
12 fine for purposes of state custodians or who would the state
13 would recognize as a custodian, but they say we have our own
14 overrides as the Federal Government we have an interest with
15 respect to these unaccompanied minors in making sure that
16 decisions are safe and appropriate for them.

17 MS. AMIRI: Your Honor, they do have the
18 requirement to act in the best interest of minors and I will
19 say that they are not doing that with respect to J.D. when
20 she has made a decision to have an abortion. She has a
21 judicial bypass from a state court judge. What they are
22 actually doing is supplanting their decision about what J.D.
23 should do with her pregnancy and that is not acting in her
24 best interest and that is actually veto power over J.D.'s
25 abortion decision, which the Supreme Court has said in

1 *Bellotti v. Baird*, that even parents can't do for their
2 children and in *Planned Parenthood v. Casey*, that husbands
3 cannot do for their wives.

4 JUDGE KAVANAUGH: But it's not a full veto here
5 because the Government would say because there is the option
6 of the sponsor. And the sponsor option is analytically akin
7 to parental consent procedures. I realize there are
8 differences and you'd right to point out some of those
9 differences, but analytically it is parental consent slows
10 it down, burdens the right but permissibly burdens it the
11 Supreme Court has said, so long as there is a bypass. Here
12 to the sponsor option slows it down in your view, burdens
13 the right, takes some time, obviously. But if it can be
14 accomplished quickly, wouldn't it be analytically akin to
15 the parental consent cases of the Supreme Court has issued?

16 MS. AMIRI: Your Honor, it would not. For
17 example, in *Bellotti v. Baird* and in the other cases
18 relating to parental consent or parental notification, the
19 Court has made very clear that any sort of alternative
20 mechanism for a minor to effectuate her abortion decision
21 must be expeditious, and anonymous, and there must be very,
22 very clear safeguards to ensure that the minor is not
23 delayed in accessing abortion, and that she is able to do so
24 quickly without notification to her family member, and also
25 that she is able to effectuate her decision on her own. So

1 I do not think it's akin to that.

2 JUDGE KAVANAUGH: But that raises the question
3 again of whether the sponsor process can be expeditious or
4 not.

5 MS. AMIRI: Yes, Your Honor. From my
6 understanding I would be quite surprised if we would be able
7 to effectuate a sponsor decision in the same amount of time
8 that a judicial bypass takes place. The Supreme Court has
9 said that those must be very expeditious and I would be
10 surprised if the timeline could be similar in any way.

11 JUDGE KAVANAUGH: So in HHS says you're dealing
12 with someone 14, 15, 16, 17, here 17 years old, who is
13 making a major life decision, who is in a detention center,
14 who undoubtedly is anxious, scared, as you would be in a
15 detention center at age 14, 15, 16, 17 and dealing with a
16 major life decision. And that the sponsor, if one can be
17 found, serves the same role in some respects as the adults
18 in the parental consent, parental notification cases, who at
19 least is someone putting aside abuse hypotheticals, is
20 someone the minor can talk to about this major life decision
21 and yet reassurance, get talk to about options, get support,
22 and so isn't the sponsor option in that sense serving some
23 of the same purposes that the parental consent options, at
24 least when they work properly, are designed to serve?

25 MS. AMIRI: Your Honor, the Supreme Court has said

1 that there should be encouragement between parents and
2 children in making these decisions but there is some
3 children who cannot involve their parents, or for whatever
4 situation --

5 JUDGE KAVANAUGH: Yes.

6 MS. AMIRI: -- including abuse. And with respect
7 to now that J.D. has the judicial bypass there are lower
8 courts that have said that any sort of state interest in
9 informing the parents or anyone is now extinguished.

10 JUDGE KAVANAUGH: But this is not so much
11 informing the parents, it's helping the minor. And I
12 realize the minor may say I don't need the help, which I
13 understand that position, but the Supreme Court has said
14 when you're a minor, the state can understandably structure
15 the process so as to make sure it's an informed decision.
16 And suppose we're in a state that doesn't have parental
17 consent law. So the HHS in that circumstance really wants
18 to make sure that the minor in this situation has has the
19 opportunity to consult with an adult.

20 MS. AMIRI: Well, Your Honor, a couple of things.
21 One, revelation of the abortion decision to anyone including
22 the sponsor by the Government also raises a host of
23 constitutional issues, including informational privacy as we
24 raised in our complaint as well as the Fifth Amendment right
25 to abortion. But nevertheless, I understand that the

1 instinct and you know as a parent we all want our children
2 to be able to talk to us and have someone, an adult that
3 they can confide in, but here where J.D. and we're
4 specifically talking about J.D. on this emergency order, she
5 has a bypass from a Court that has found her mature enough
6 to make the decision and --

7 JUDGE MILLETT: But she also has a guardian ad
8 litem.

9 MS. AMIRI: And she has a guardian ad litem,
10 you're right.

11 JUDGE MILLETT: And so she's already got the
12 adult --

13 MS. AMIRI: Yes. Yes, Your Honor, she does.

14 JUDGE MILLETT: -- so now we're talking about
15 guardianship squared.

16 MS. AMIRI: Correct. And she also has an attorney
17 ad litem also appointed for her in that process as well. So
18 she has two adults that are working with her, acting in her
19 best interest and that she is confiding in. They have been
20 with her every step of the way. They went with her
21 yesterday to the counseling appointment and they are acting
22 in her best interest.

23 JUDGE KAVANAUGH: Suppose we are in a state
24 without parental consent and judicial bypass, then there is
25 no judicial approval, no finding that someone is mature

1 enough, what then?

2 MS. AMIRI: Well, Your Honor, I think that in
3 those states they have made the decision to not enforce any
4 sort of restrictions on access to minors and I would say
5 that those states have made that policy decision that they
6 do that.

7 JUDGE KAVANAUGH: I mean that's a good federalism
8 answer which is that this is really a state decision and the
9 Federal Government should have no role, but I don't think
10 the Supreme Court has ever said that the states have the
11 exclusive authority in an issue like this where's the
12 custody of a minor and the Federal Government might have an
13 independent interest in ensuring that the the decision is
14 informed. It's not so much the parental right side of it,
15 it's ensuring that the child's, the minor's, the woman's
16 decision is informed and I realize there's opposition to
17 those informed consent kind of laws, and I understand that
18 completely. But the Supreme Court has upheld them.

19 MS. AMIRI: They have, Your Honor, and actually in
20 *Planned Parenthood v. Casey*, they do uphold and informed
21 consent law with respect to information from the physician
22 to the patient. But they have also been very clear that any
23 sort of restriction on access to abortion, any informed
24 consent law must be designed to inform the woman's decision,
25 not to hinder it. So what we're here talking about today is

1 the Government's interest in potential life and the question
2 is, can they effectuate that interest by vetoing J.D.'s
3 decision? We're not talking about providing or making sure
4 that the abortion provider provides the proper information
5 to J.D., which it has and will do, but we're talking about
6 whether the Government can veto her decision.

7 JUDGE MILLETT: Well isn't it, I mean she was
8 appointed a guardian ad litem as part of the judicial bypass
9 process?

10 MS. AMIRI: Yes, Your Honor.

11 JUDGE MILLETT: Okay. And so if through that she
12 and the guardian had talked and she had this consultation
13 and she decided to continue her pregnancy, it seems clear
14 that HHS would then not require a second consultation to
15 ensure that that was informed.

16 MS. AMIRI: Yes, Your Honor.

17 JUDGE MILLETT: They only want more if she decides
18 she wants an abortion?

19 MS. AMIRI: Yes, Your Honor. Absolutely.

20 JUDGE MILLETT: That we could claim this
21 sponsorship thing.

22 MS. AMIRI: That is right, Your Honor, and
23 obviously carrying a pregnancy to term has higher health
24 risks. Childbirth is 14 times more dangerous than an
25 abortion. HHS would be required then to see her through her

1 prenatal care, delivery, postnatal care.

2 JUDGE MILLETT: I'm just following up on the
3 initial big major decision, and a decision is made either
4 way, right, there's no non-decision option here. It's
5 either to go forward with the pregnancy or to terminate the
6 pregnancy, and so if I understand it, HHS I perfectly fine
7 with relying on the guardian ad litem decision if it leads
8 to a decision to continue the pregnancy. But the question
9 is whether we need, whether having this sponsorship process
10 as an out as a substitution for another layer of parental
11 consent, that only applies when they choose the abortion
12 route --

13 MS. AMIRI: Yes.

14 JUDGE MILLETT: -- would be constitutional.

15 MS. AMIRI: Yes, Your Honor. That is correct.

16 JUDGE KAVANAUGH: Is the guardian ad litem in this
17 case is someone who knew her before?

18 MS. AMIRI: She's not.

19 JUDGE KAVANAUGH: How long did she just meet her
20 through this process then? Meet him or her through this
21 process?

22 MS. AMIRI: She met her through the, when she was
23 appointed by the judicial bypass process which began I
24 believe it's now been about a month ago.

25 JUDGE MILLETT: Are sponsors always people that

1 have known the people before?

2 MS. AMIRI: I believe there is a preference for
3 sponsors that have a tie to to the minor already.

4 JUDGE MILLETT: But if that doesn't work
5 apparently no one has come forward yet for six or seven
6 weeks for J.D. There can be sponsors who, bless their
7 souls, are just willing to help people, almost like foster
8 parents, I guess. Is that right? Is that how it works?

9 MS. AMIRI: My understanding that it's possible,
10 but I think it's more difficult, but that it certainly
11 something that I think everyone is considering for J.D.

12 JUDGE MILLETT: I just saw something in the record
13 that talked about we have plenty of sponsors who are ready
14 if they're willing to continue the pregnancy and help with
15 that.

16 MS. AMIRI: Correct. And that was with respect to
17 another minor. I just wanted to make clear that wasn't with
18 respect to J.D.

19 JUDGE MILLETT: Right.

20 MS. AMIRI: That was another minor that the Office
21 of Refugee Resettlement Director went to personally meet
22 with to talk to her about her pregnancy and I believe,
23 unfairly pressure her to carry her pregnancy to term.

24 JUDGE MILLETT: And so if you don't have family
25 members sort of stepping up or located early on, then the

1 sponsorship process sounds to me like it understandably
2 requires more vetting. Is it clear, are there any
3 regulations or anything that talk about how that process
4 works? Probably some, I hope some even for family members
5 but for nonfamily do we know how the process works and how
6 long it takes?

7 MS. AMIRI: I believe there are, I'm not
8 intimately familiar with them. I do understand it is, does
9 involve a background check. I think it might even involve a
10 home visit and from what I've seen at least in working on
11 this particular issue that it does take some amount of time
12 for that vetting process to happen, just as it would for a
13 foster parent.

14 JUDGE MILLETT: They don't have lists of people
15 who are already willing to do this like the foster system
16 sometimes do?

17 MS. AMIRI: I'm not aware of that list.

18 JUDGE MILLETT: Pre-clear people?

19 MS. AMIRI: I'm not aware of it, if there is one

20 JUDGE KAVANAUGH: Is there any background check
21 done on the guardian ad litem?

22 MS. AMIRI: No, Your Honor, there was not done on
23 her but under ORR policies she is an attorney of record.
24 The guardian herself is an attorney. And on both her
25 guardian ad litem and her attorney ad litem, are attorneys

1 of record that under defendant's own admission may have
2 custody over Jane Doe.

3 JUDGE KAVANAUGH: The Government argues and cites
4 Casey and other Supreme Court cases that say, as you're well
5 aware, that the Government may favor life over abortion
6 option, it has an interest in protecting the life of the
7 unborn according to Casey, that's a quote, an important and
8 legitimate interest that lasts throughout pregnancy, those
9 are quotes from Casey. Not every law which makes a right
10 more difficult to exercise is ipso facto an infringement of
11 that right, that's also a quote from Casey. How does the
12 Government in your view effectuate those principles in this
13 circumstance or how can they?

14 MS. AMIRI: Well, Your Honor, they are entitled to
15 have a Government interest in potential life and the Supreme
16 Court cases make that absolutely clear. But the Supreme
17 Court cases also make clear that they cannot act on that
18 interest if what they're doing is hindering access to
19 abortion rather than informing the woman's free decision.
20 And there is --

21 JUDGE KAVANAUGH: Just to be very technical,
22 unduly burdening, there can be burdens the Supreme Court has
23 said, time for example, but they can't be undue, right?

24 MS. AMIRI: Right. Correct. So I guess two
25 different pieces here. If they can't act on their right to

1 further their interest in life, if it does so to burden in
2 an undue way or create a substantial obstacle in the path of
3 women seeking abortions. And with respect to that, I think
4 it's very clear here that what they're doing is not allowing
5 J.D. to leave the shelter either with the shelter transport,
6 which they're willing to do, or the guardian and the
7 Government is not willing to transport themselves. So
8 really what we're talking about is a ban on abortion for
9 J.D. which the Court has said you cannot, no matter how much
10 of an interest the Government has in potential life, you
11 cannot act on that interest to ban abortion for anyone. It
12 would become a tautology.

13 JUDGE KAVANAUGH: Suppose HHS had a policy which I
14 understand is not the current policy, but suppose they had a
15 policy that said our preference in these circumstances would
16 be to find a sponsor and if a sponsor is found by 18 weeks
17 of the pregnancy, we'll go with the sponsor option. If a
18 sponsor is not found by 18 weeks or 20 weeks or 16 weeks,
19 pick a date, and I know the date matters, then the minor
20 will be in the same position as the adult detainee in an
21 immigration facility, so long as they have the state law
22 bypass.

23 MS. AMIRI: Your Honor, the Supreme Court in
24 addition to finding that complete obstruction to access
25 abortion has also found that delays are also an undue

1 burden. So just recently the Supreme Court decision in
2 *Whole Woman's Health v. Hellerstedt*, recognizes that if the
3 Government is imposing obstacles that create delays in
4 access to abortion that is also an undue burden and
5 unconstitutional.

6 JUDGE KAVANAUGH: Doesn't parental consent in
7 practice, and I realize there's the bypass, but sometimes
8 minor women are not necessarily going to the bypass right
9 away, but doesn't parental consent in practice often take
10 some time?

11 MS. AMIRI: Your Honor, it may but there is always
12 that bypass option that the Supreme Court has said that must
13 be expeditious and must be anonymous. So if it does seem
14 like the parental consent option is taking some time, there
15 is always that option and here J.D. has no option.

16 JUDGE KAVANAUGH: I take your point about the
17 paper and the law and what it says and what the Supreme
18 Court has said. I'm asking a question more about real world
19 of you know someone who is 15 and the parental consent is
20 required but for the bypass, how quickly is every 15, 16, 17
21 year olds going to leap to court as opposed to going through
22 them. And that can, I would imagine, that that process can
23 be not only fraught but also time consuming in various
24 cases, yet the Supreme Court has upheld that process many
25 times.

1 MS. AMIRI: Yes, but only as long as there is also
2 an expeditious state patch. There is always some
3 alternative mechanism for a minor to seek an abortion on her
4 own without her parent's permission.

5 JUDGE MILLETT: Do the options have to some
6 bypass, if we're going to ask your parents for consent, have
7 to be something that's within the control of the pregnant
8 minor?

9 MS. AMIRI: Your Honor, I do believe it does.
10 Because otherwise there would be a veto power over her
11 decision and the Supreme Court has said that there has to be
12 a mechanism, there has to be a way in which a minor can
13 effectuate her abortion decision expeditiously without
14 having to tell her parents.

15 JUDGE KAVANAUGH: Right, it 100 percent has to be
16 her decision to go to the bypass, otherwise it would be a de
17 facto veto and the Supreme Court has said that's
18 impermissible, right.

19 MS. AMIRI: Yes, Your Honor.

20 JUDGE KAVANAUGH: That's your point?

21 MS. AMIRI: Yes.

22 JUDGE MILLETT: I just don't know how it works.
23 How much role, control do minors in this situation have over
24 the sponsorship process? I mean they could say here's the
25 name of somebody, I just don't know that they have say input

1 or is it really the hands of HHS or I don't know if they
2 appoint guardian ad litem or how it works.

3 MS. AMIRI: Your Honor, it's a good question. I
4 certainly don't think it's a unilateral decision by the
5 unaccompanied minor herself, I think that the ORR has a
6 substantial role in vetting the sponsor.

7 JUDGE MILLETT: I would hope so.

8 MS. AMIRI: Doing a home visit, things like that.

9 JUDGE MILLETT: It wouldn't be unilateral.

10 MS. AMIRI: Right. Id that J.D. could all of a
11 sudden say I want to be with my extended family member in a
12 different state and that's who I want my sponsor to be and
13 leave tomorrow. That is not how it works.

14 JUDGE KAVANAUGH: And I'm hindered here by the
15 lack of facts in the record on the sponsor process, but my
16 understanding is that a lot of people who arrive in this
17 country, minors, and I don't know the percentages, I don't
18 know that anyone does, do have people that they have names
19 and numbers of with them. Is that consistent with your
20 general understanding or is that off base?

21 MS. AMIRI: Your Honor, I actually don't know the
22 answer to that, but I think even if they do arrive with
23 family member's names in their pockets, there is still a
24 process by which ORR --

25 JUDGE KAVANAUGH: Yes.

1 MS. AMIRI: -- has to undertake in order to
2 effectuate that sponsorship.

3 JUDGE KAVANAUGH: Right. And understandably,
4 right, they would have such a process.

5 MS. AMIRI: Yes.

6 JUDGE MILLETT: Is the ORR decision subject to any
7 challenge, review or is it unreviewable?

8 MS. AMIRI: In terms of the sponsorship process?
9 I'm not aware, I don't know the answer, Your Honor. If I
10 may, no, please.

11 JUDGE KAVANAUGH: Further points?

12 MR. ALSTON: Further points, I just wanted to make
13 in terms of this facilitation argument. Defendants really
14 only need to step aside. This idea that somehow they have
15 to approve the abortion by filling out some paperwork is
16 completely unpersuasive. Really all that has to happen is
17 that the Office of Refugee Resettlement needs to make a
18 phone call to the shelter and say that the shelter may now
19 transport the minor or that the guardian may do so. And
20 that is what happened yesterday when J.D. was able to
21 receive her counseling. And the idea that there's --

22 JUDGE MILLETT: Do they even need the call from
23 ORR if they had a court order?

24 MS. AMIRI: I'm sorry?

25 JUDGE MILLETT: Do they need a call from ORR --

1 MS. AMIRI: No. No, Your Honor.

2 JUDGE MILLETT: -- if they have a court order?

3 MS. AMIRI: But even just putting the court order
4 aside for a minute in terms of the facilitation, the actual
5 action that must happen with respect to the Government is de
6 minimis if nonexistent. And they're relying on cases that
7 are completely in opposite. They are relying on cases about
8 facilitating abortion, the context of funding abortion in
9 the Medicaid Program or in *Webster v. Reproductive Health*
10 about whether the state could ban state hospitals from
11 providing abortions, and neither case is on point. They are
12 about the Government making decisions in terms of funding or
13 their actual facilities and here what we're talking about is
14 them standing in the way and all they need to do is get out
15 of the way.

16 JUDGE KAVANAUGH: So I think the Government says
17 and I want to give you a chance to respond, that those cases
18 represent a principle or stand for a principle about the
19 Government consistent with Supreme Court law may favor
20 childbirth over abortion and the Government does not want to
21 be complicit in the abortion procedure. I think that's the
22 theme that emerges from those cases and you're quite right
23 to point out the specific facts of those cases and what they
24 stand for. But what is your response to their suggestion
25 that they don't have to be complicit in the abortion, at

1 least if there's an alternative mechanism?

2 MS. AMIRI: Your Honor, I would say that in this
3 circumstance what they're doing is simply blocking the
4 abortion by refusing to allow J.D. to leave with her
5 guardian and also that they have admitted in the context of
6 ICE detention and the Federal Bureau of Prisons that they
7 will and do facilitate abortion to the extent far greater
8 than what we're asking for here. So it seems to completely
9 undermine their argument that they have a state interest in
10 not facilitating abortion whatsoever. Either J.D. is
11 confined like a prisoner or she is not and she should be
12 able to go with her guardian.

13 I would also like to say we haven't really talked
14 about the harm very much. The Government has a very heavy
15 burden of showing irreparable harm here and they cannot show
16 that. What we're talking about here is an unaccompanied
17 immigrant minor, 17 years old, pregnant, who has been forced
18 to remain pregnant against her will for three weeks no
19 because the Government has blocked her abortion decision.
20 Every day she remains pregnant take a toll on her physical
21 and emotional health.

22 JUDGE MILLETT: I don't want to interrupt you, but
23 what was the date of the judicial bypass order?

24 MS. AMIRI: September 25th.

25 JUDGE MILLETT: Okay.

1 MS. AMIRI: She was scheduled to go for her first
2 counseling session on September 28th, it was September 27th
3 that the Federal Government then prohibited the shelter from
4 releasing her for any abortion related appointments. And
5 the harm to J.D. and the circumstance is irreparable. She
6 is going to be pushed further later into her pregnancy,
7 she's already been pushed from the first trimester into the
8 second trimester. The further that we get, the further
9 risks that are apparent for her and also if we get so far
10 she'll be forced to carry this pregnancy to term against her
11 will.

12 JUDGE KAVANAUGH: At what point would you say the
13 abortion will no longer be a safe option in this case.

14 MS. AMIRI: Texas bans abortions at 20 weeks in
15 pregnancy.

16 JUDGE MILLETT: And she's 17 right now?

17 MS. AMIRI: She's about 15 approximately.

18 JUDGE KAVANAUGH: 15 is what you said yesterday,
19 right?

20 MS. AMIRI: Yes.

21 JUDGE MILLETT: Okay.

22 JUDGE KAVANAUGH: Or two days ago in the hearing,
23 right, 15 weeks?

24 MS. AMIRI: Approximately 15 but, Your Honor, I
25 would also say and I think as you have recognized every day

1 matters for J.D. It's been three weeks and it's been three
2 weeks too long. And balancing her harm compared to the
3 Government's making a phone call, it's quite easy here.

4 JUDGE MILLETT: Can I ask, more on the timing of
5 things. So she got the counseling yesterday and one, is
6 there any expiration date on that counseling or will that
7 continue for the next to be valid for the next five weeks?
8 You just need to get the day if it were to be approved for
9 her to go?

10 MS. AMIRI: So, Your Honor, this is a complicated
11 layer of Texas abortion restrictions. So Texas law requires
12 counseling at least 24 hours in advance of the procedure by
13 the same doctor who is to provide the abortion. Because of
14 the limited availability of abortion in Texas the same
15 doctor is not always at the facility in south Texas. So if
16 for example, the doctor that provided the counseling
17 yesterday to J.D., is there today and on Saturday but is not
18 the same doctor who is there next week. So next week
19 there's a different doctor on Monday and Tuesday and so if
20 J.D. were allowed to have the abortion next week, she would
21 have to be, unless this Court declares otherwise, would have
22 to be counseled again by this different doctor on Monday and
23 wait 24 hours and have the abortion on Tuesday. So it is a
24 complicated layer of --

25 JUDGE MILLETT: And if it went after Tuesday?

1 MS. AMIRI: Then we're looking at the following
2 week. And the doctor that is there Thursday, Friday and
3 Saturday the following week. But Your Honor, we are really
4 hoping we don't get that far.

5 JUDGE MILLETT: I thought there was one doctor who
6 didn't do them after 15 weeks.

7 MS. AMIRI: After 15.6 and that's the doctor next
8 week and we're very concerned that she's on the cusp and so
9 even if she's able to go next week, that she may be past the
10 limit for that particular doctor.

11 JUDGE KAVANAUGH: I'm not sure this question
12 effects the legal analysis but I'm curious, did someone from
13 HHS or the detention facility travel with her? I know
14 they're not the transporter but did someone accompany or
15 not?

16 MS. AMIRI: The shelter did yesterday.

17 JUDGE KAVANAUGH: Yes.

18 MS. AMIRI: I don't believe that there is any
19 requirement and in fact, the Government has pointed to
20 nothing that says that they are prohibited from allowing
21 J.D. to be in the custody of the guardian. Certainly,
22 there's a law that says that J.D. cannot be released on her
23 own recognizance but that's not what we're asking for. And
24 the shelter also too in terms of Government facilitation
25 they are a government contractor. They are not the

1 Government. They have a broad contract to provide care to
2 unaccompanied minors and the shelter is willing to take her
3 and they should be allowed to take her, or the guardian
4 should be allowed to take her. And that is really simply
5 what we're asking.

6 JUDGE MILLETT: You mentioned something in your
7 paper too, I just wanted to clarify about at some point she
8 was going to have to travel much further away --

9 MS. AMIRI: Yes, Your Honor.

10 JUDGE MILLETT: -- and at what point is that?

11 MS. AMIRI: 17 weeks and 6 days she will have to
12 travel several hundred miles north to a different facility.

13 JUDGE MILLETT: If she did that would she have to
14 go back one day for counsel and one day for --

15 MS. AMIRI: Yes, Your Honor. She would have to
16 make two trips unless there were arrangements for her to
17 stay overnight in the city north of her, a couple hundred
18 miles north of her. The round trip is several hundred
19 miles.

20 JUDGE KAVANAUGH: Anything else?

21 MS. AMIRI: No, Your Honor, thank you.

22 JUDGE HENDERSON: Yes, I've got a question. Going
23 back to the school, is she not in school because she's
24 pregnant?

25 MS. AMIRI: No, Your Honor. Her mobility has been

1 restricted by ORR because of these issues, we believe. But
2 I --

3 JUDGE MILLETT: Well, that would be because she's
4 pregnant.

5 MS. AMIRI: I'm sorry?

6 JUDGE MILLETT: That would be because she's
7 pregnant.

8 MS. AMIRI: Because she's pregnant and seeking an
9 abortion.

10 JUDGE MILLETT: Okay. So if she were pregnant and
11 continuing her pregnancy, she could go to school?

12 MS. AMIRI: I don't think any of the minors of the
13 shelter are going to school. But they have been going on
14 outings, and she has been prohibited from going on those
15 outings.

16 JUDGE MILLETT: Okay.

17 JUDGE KAVANAUGH: Okay. Thank you very much.

18 MS. AMIRI: Thank you.

19 JUDGE KAVANAUGH: We'll hear from the Government
20 on rebuttal.

21 ORAL REBUTTAL OF CATHERINE H. DORSEY, ESQ.

22 ON BEHALF OF THE APPELLANTS/PETITIONER

23 MS. DORSEY: In quick response on the school
24 point, Your Honors, she doesn't go to school but my
25 understanding is the shelter provides education at the

1 shelter. They pretty much provide everything --

2 JUDGE MILLETT: It sounds like that's where all
3 the --

4 MS. DORSEY: -- the minors need for the children
5 at the shelter.

6 JUDGE MILLETT: Is it only minors in that shelter?
7 Because these are for minors only?

8 MS. DORSEY: I believe it's only for minors, Your
9 Honor.

10 JUDGE HENDERSON: Let me ask you just, so they're
11 providing schooling K through 12, is that right?

12 MS. DORSEY: I think they are providing whatever
13 schooling of the age of the children there that they need
14 yes.

15 JUDGE HENDERSON: Right.

16 MS. DORSEY: Tailored to the children, I think
17 there's kind of an individual educational plan. There is a
18 lot of detail on both the sponsor process and kind of the
19 whole ORR process on the ORR website that we cite in our
20 brief. And that goes through a lot of the details of the
21 sponsorship process and the procedures that they go through
22 to --

23 JUDGE MILLETT: How much control does she have
24 over it?

25 MS. DORSEY: (No audible response.)

1 JUDGE MILLETT: How much control does J.D. have
2 over sponsorship process?

3 MS. DORSEY: I think the sponsorship process, when
4 she arrived at the border, she had at least the name of one
5 relative that she provided. That relative decided she did
6 not want to sponsor and then I think she also identified
7 another individual, a family relation, but I believe because
8 it was a kind of single male there were some concerns about
9 safety of having her, that individual be her sponsor. But
10 to answer your question about how much control, I think they
11 go through a normal process of vetting whether she has a
12 right of refusal, I, I don't know about that. That might
13 be --

14 JUDGE MILLETT: I more imagine if ORR were going
15 really slowly when she wanted to speed it up.

16 MS. DORSEY: Well I think her and her attorneys
17 could definitely provide input and ideas of sponsors that I
18 think ORR would be happy to consider. They could definitely
19 play a part in this process to help because otherwise --

20 JUDGE MILLETT: But they don't have any --

21 MS. DORSEY: -- trying to find somebody could take
22 a while --

23 JUDGE MILLETT: Yes, but that's a huge --

24 MS. DORSEY: -- which is a problem.

25 JUDGE MILLETT: Do you know if they have lists of

1 like foster families that do this?

2 MS. DORSEY: I don't know about that, Your Honor.

3 JUDGE MILLETT: No, I'm just (indiscernible).

4 JUDGE KAVANAUGH: Do you know if in general there
5 are people who volunteer around the country to be sponsors
6 or at least in the southwestern states?

7 MS. DORSEY: I don't know. I know the preference
8 is generally to try to place them with family members or
9 relatives that they identify when they arrive. But beyond
10 that I don't know and I don't remember, I'm sorry if it's on
11 the ORR website, more information on that.

12 JUDGE MILLETT: What if and this is purely
13 hypothetical, but what if ORR were arbitrarily denying
14 sponsorship of anybody who would support the abortion
15 decision? Is there any challenge expeditious challenge that
16 could be brought, how would she even know? Is she told why
17 someone is rejected and how would she challenge it?

18 MS. DORSEY: I don't know if she's told or if
19 there is a right to challenge. There is you know there's
20 certainly nothing in the procedures that indicate that there
21 is such a policy that ORR would not release and their
22 preference is to try and find a sponsor here and they've
23 been trying.

24 JUDGE MILLETT: I'm sure it's a very difficult
25 process for ORR.

1 MS. DORSEY: And just to address, we are in the
2 unfortunate position here of the timing of this because
3 obviously you know we need a decision sooner rather than
4 later. But part of delay here has also been that
5 plaintiff's filed two previous suits in this before
6 challenging before we got here into a correct forum to
7 challenge this. And so that's been part of the delay here
8 in being able to adjudicate the issue.

9 JUDGE MILLETT: How does that impact --

10 MS. DORSEY: Just in terms of --

11 JUDGE MILLETT: -- it's just a consequence she has
12 to bear?

13 MS. DORSEY: No, but just in terms of their, the
14 allegation of irreparable harm and that here it's, you know,
15 they brought two lawsuits before coming here, so part of the
16 delay and the need for exigency here has been of their own
17 making.

18 JUDGE MILLETT: Well maybe they thought it would
19 be faster to go to an existing, does that make the harm to
20 her if she had to, as she alleges, he had to continue with
21 the pregnancy any less?

22 MS. DORSEY: No, I don't think it does, Your
23 Honor.

24 JUDGE MILLETT: Yes, so --

25 MS. DORSEY: The harm --

1 JUDGE MILLETT: -- the irreparable harm is the
2 same.

3 MS. DORSEY: -- is the same, it's just a factor I
4 think in determining the exigency and here of course, if she
5 were to get an order for the abortion, the leave would moot
6 the case out so it's not just temporary relief. And in
7 terms of opposing counsel about having an escape hatch and
8 no way here safety, but the escape hatch here is a
9 sponsorship for voluntary departure and here she has the
10 option to voluntarily depart which then puts here in the
11 same position as anyone else then there is nobody else --

12 JUDGE KAVANAUGH: But that again raises the
13 question which is the Government has told us to assume that
14 she has constitutional rights. And if that's true, normally
15 the answer to someone who has constitutional rights is not
16 oh we can deny them just leave the country. So really that
17 assumption that you've made and I understand why but does
18 make it hard then for you turn around and say yes assume she
19 has constitutional rights, but also leaving the country is
20 an option.

21 MS. DORSEY: Right, but Your Honor, I think in
22 terms of because we're not putting an obstacle in her path,
23 we're declining to facilitate an abortion. And here I think
24 although of course there is the custody issue so it's not on
25 all fours, but I think the *Webster* case is helpful in that

1 it, you know, in that case there were definite practical
2 effects about the state regulation and state law that
3 prohibited public employees from performing abortions. And
4 even though that had practical limits on a woman's options,
5 the Court held that that was not an undue burden.

6 JUDGE MILLETT: But the --

7 MS. DORSEY: The Government didn't have to --

8 JUDGE MILLETT: -- people there had other options
9 to go to. What other option does she have?

10 MS. DORSEY: Well here she has voluntary departure
11 or a sponsorship.

12 JUDGE MILLETT: Which she can't control.

13 MS. DORSEY: Well she can play a part, I mean
14 voluntary departure is entirely in her control.

15 JUDGE MILLETT: I'm assuming at this point that
16 she's done everything she can to try to help identify
17 somebody. So if there's nothing more she can do to help
18 with the sponsorship process, let's assume that, then she
19 has no control over it.

20 MS. DORSEY: Well voluntary departure is entirely
21 within her control.

22 JUDGE MILLETT: Okay.

23 MS. DORSEY: She can file a request for voluntary
24 departure at any time and then she will be out of HHS
25 custody.

1 JUDGE MILLETT: And if she were to at some point
2 assert special juvenile immigration status, asylum, would
3 that argument fall out for you or would your position be the
4 same?

5 MS. DORSEY: I would think then that would be
6 raised in the removal process or if she raises it in the
7 immigration proceedings --

8 JUDGE MILLETT: Yes, it would be raised there,
9 but --

10 MS. DORSEY: -- then that can be litigated.

11 JUDGE MILLETT: -- I'm just saying if she were to
12 today say I intend, normally I wait for a deportation order
13 and then I assert my defenses, but if she were to say today
14 I'm invoking a right under, not the constitution, but under
15 immigration law to stay in the United States, would you
16 still make the same argument that her choice is to leave or
17 not have the abortion?

18 MS. DORSEY: We would still make that argument.
19 Again, I think it would be a much closer call in that
20 situation and we don't need to address it here because she
21 has not raised any legal claim.

22 JUDGE KAVANAUGH: What about, and I guess I'm
23 going back to a question that I asked before then, the adult
24 women who are in detention centers and are pregnant, they
25 obtain the abortions and under what you've said about

1 facilitation the Government is facilitating those abortions
2 rather than saying we're not going to facilitate you can
3 leave the country if you desire. What do we to make of that
4 difference in treatment and how that effects the weight of
5 the facilitation argument or you can leave the country
6 argument?

7 MS. DORSEY: I think the considerations there are
8 different in the ability to leave the country and to
9 voluntarily depart --

10 JUDGE KAVANAUGH: Why? Why?

11 MS. DORSEY: I think there are some different
12 rules on voluntary departure.

13 JUDGE KAVANAUGH: Why? What are the different
14 rules?

15 MS. DORSEY: I don't think, sorry again I'm not an
16 immigration expert, I think voluntary departure is available
17 to most of those people in ICE detention, but not all. And
18 again, I don't think it would be constitutionally required
19 if there is an option of voluntary departure. But they may
20 provide it --

21 JUDGE KAVANAUGH: No, it's not constitutionally
22 required --

23 MS. DORSEY: -- it doesn't matter because there
24 may be a mix.

25 JUDGE KAVANAUGH: Of course it's not

1 constitutionally required. The point is, I think as I'm
2 thinking through it, the Government has argued consistent
3 with the Supreme Court case law we want to favor life over
4 abortion and the Supreme Court case law says you can have
5 that general policy and you say that it's a matter of
6 implementing that principle we don't want to facilitate
7 abortion and merely plaintiff's would say merely doing the
8 paperwork would you would say facilitates the abortion. But
9 that happens in the adult detention situation. And there as
10 I understand it and you can correct me if I'm wrong, or file
11 something to correct me if we're wrong about this, there the
12 Government does not say to the adult women that we're not
13 going to allow you to have the abortion; if you want to
14 leave the country, you can do so. And I'm just trying to
15 understand those two things together and how to make sense
16 of the Government's facilitation argument given those two
17 things together.

18 MS. DORSEY: And I don't know why ICE has that
19 particular policy that allows facilitation and why they've
20 made that determination that they would permit and
21 facilitate in those circumstances. But I don't think that
22 requires --

23 JUDGE KAVANAUGH: You're talking about ICE as if
24 it's some separate or if it's one Executive Branch and so
25 ICE is part of the Executive Branch --

1 MS. DORSEY: That's right.

2 JUDGE KAVANAUGH: -- as is HHS and maybe they --

3 MS. DORSEY: But there might be some reason in
4 those detention circumstances and with the categories of
5 people they have detained that they have made that
6 determination, that they need or want to facilitate in that
7 circumstance, and I don't think that would require HHS to
8 make the same determination where it chooses to promote --

9 JUDGE KAVANAUGH: Right.

10 MS. DORSEY: -- childbirth and fetal life here
11 that it couldn't make a different decision.

12 JUDGE KAVANAUGH: I hear you on require, I'm just
13 trying to explore and when we hear an argument from the
14 Government about the strength of an interest one of the
15 things we look at often times is that being consistently
16 applied, that interest.

17 MS. DORSEY: Sure.

18 JUDGE KAVANAUGH: And that's one of the things I'm
19 just asking questions about to explore.

20 MS. DORSEY: Understood, Your Honor.

21 JUDGE MILLETT: And one more thing just to clear
22 on the facilitation, the upfront facilitation that you call
23 it of having the ORR having to sign some paperwork before
24 she can go, authorizing it, if there were a court order
25 directing her release into the custody of her guardian ad

1 litem and attorneys for this procedure, would you still
2 claim that ORR still has to authorize it?

3 MS. DORSEY: I don't think so because for
4 instance, Your Honor, they complied with the District
5 Court's TRO to take her to counseling yesterday even though
6 they have made no decision to approve the abortion --

7 JUDGE MILLETT: Right.

8 MS. DORSEY: -- which includes the counseling
9 procedures. So they complied with the court order and she
10 went to counseling.

11 JUDGE MILLETT: And just one last thing. You had
12 promised me a regulation that said --

13 MS. DORSEY: Yes. They, the other side cites it
14 in their opposition, it's 45 C.F.R. Section 41.92(a) and
15 that provides that unaccompanied children, how are victims
16 of sexual assault while in federal custody can get access to
17 abortion and other --

18 JUDGE MILLETT: I'm sorry, if they're victims
19 while in custody?

20 MS. DORSEY: I think while they are held in
21 custody, if they've been victims of sexual assault.

22 JUDGE MILLETT: Right. But what if, you know, you
23 had a sex trafficking ring, this is not uncommon, you bust
24 up a sex trafficking ring and there there are unaccompanied
25 minors who --

1 MS. DORSEY: Right.

2 JUDGE MILLETT: -- came or were brought into the
3 country without documentation. So they would not have
4 gotten pregnant in custody.

5 MS. DORSEY: I'm not saying that the sexual
6 assault has to occur in custody. I think that provision
7 applies when they are in custody then an abortion is made
8 available for them.

9 JUDGE MILLETT: Okay. All right.

10 MS. DORSEY: That's my understanding, Your Honor.

11 JUDGE KAVANAUGH: In oral argument in this Court,
12 it is traditional for the Judges to ask tough questions of
13 all sides and no one should assume that our questions
14 represent our decision on the merits. Our decision on the
15 merits will be known soon enough and thank you both for --

16 JUDGE WILLIAMS: Wait, I have one very
17 uncontroversial question. And that is when did she come
18 across the border?

19 MS. DORSEY: Where?

20 JUDGE KAVANAUGH: When.

21 JUDGE WILLIAMS: When.

22 MS. DORSEY: I think it was September 7th.

23 JUDGE WILLIAMS: Okay. Thank you.

24 MS. DORSEY: Thank you.

25 JUDGE KAVANAUGH: Okay. Thank you to both sides

1 for excellent arguments. The case is submitted.

2 THE CLERK: Stand please. This Honorable Court
3 now stands adjourned until Monday morning at 9:30 a.m.

4 (Whereupon, at 11:34 a.m., the proceedings were
5 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Diane Wilson

DEPOSITION SERVICES, INC.

November 1, 2017

Date