DRAFT

No. _____

In the Supreme Court of the United States

ERIC D. HARGAN, et al.,

Applicants,

v.

ROCHELLE GARZA,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF TEXAS, ARKANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPLICANTS' STAY APPLICATION

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MOTION FOR LEAVE TO FILE

The States of Texas, Arkansas, Louisiana, Michigan, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia respectfully move for leave to file a brief as amici curiae in support of applicants' stay application; to file the enclosed amicus brief supporting applicants' stay application without 10 days' advance notice to the parties of amici's intent to file; and to file in unbound format on 8½- by 11-inch paper. *See* Sup. Ct. R. 37.2(a).

Due to the emergency nature of these filings, amici have not yet been able to ascertain whether the parties consent to the filing of the enclosed amicus brief.

1. *Statement of Movants' Interest.* The States have an interest in cooperating with the federal government to establish a consistent and correct understanding of the rights of aliens unlawfully present in the United States, as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The States further have "a legitimate and substantial interest in preserving and promoting fetal life," as well as an "interest in promoting respect for human life at all stages in the pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 145, 163 (2007).

In this case, the district court has entered (and the en banc court of appeals has declined to stay) a temporary restraining order effectively declaring that the U.S. Constitution confers on unlawfully-present aliens the absolute right to an elective abortion that is not medically necessary— even when they have no ties to this country other than the fact of their arrest while attempting to cross the border unlawfully. As far as amici can ascertain, no court has ever before recognized such broad rights for

unlawfully-present aliens with virtually no connections to the country. Under the reasoning of the courts below, there will be no meaningful limit on the constitutional rights an unlawfully-present alien can invoke simply by attempting to enter this country. This contradicts the Court's longstanding precedent that full Fifth Amendment rights vest only in those aliens who "have come within the territory of the United States *and developed substantial connections with this country*." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added).

2. *Statement Regarding Brief Form and Timing.* Given the emergency nature of this matter of significant national interest, amici respectfully request leave to file the enclosed brief supporting petitioners and their stay application without 10 days' advance notice to the parties of intent to file. They further request leave to file in unbound format on 8½- by 11-inch paper.

The district court heard oral argument on Wednesday, October 18, and entered its injunction that same day, ordering that it take effect immediately. The court of appeals entered a temporary administrative stay the next day, Thursday, October 19. A panel of the court of appeals heard oral argument on Friday, October 20, and thereafter vacated the district court's order. On Tuesday, October 24, the en banc court of appeals vacated the panel decision and issued an order effectively upholding the district court's temporary restraining order. Later that same day, the district court re-entered its temporary restraining order. That order took immediate effect.

This accelerated timing justifies the request to file the enclosed amicus brief supporting the stay application without 10 days' advance notice to the parties of intent to file. It further justifies filing this brief in unbound format.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief supporting the stay application.

Date: October 25, 2017

Respectfully submitted.

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BRIEF FOR THE STATES OF TEXAS, ARKANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPLICANTS' STAY APPLICATION

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Arkansas, Louisiana, Michigan, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia.[1] The States have an interest in cooperating with the federal government to establish a consistent and correct understanding of the rights of aliens unlawfully present in the United States, as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The States also have "a legitimate and substantial interest in preserving and promoting fetal life," as well as an "interest in promoting respect for human life at all stages in the pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 145, 163 (2007).

In this case, the district court entered—and the en banc D.C. Circuit sustained—a temporary restraining order effectively declaring that the U.S. Constitution confers on unlawfully-present aliens the absolute right to an elective abortion that is not medically necessary—even when they have no ties to this country other than the fact of their arrest while attempting to cross the border unlawfully. As far as amici can ascertain, no court has ever before recognized such broad rights for unlawfully-present aliens with virtually no connections to the country—and for good reason. Under the reasoning of the courts below, there will be no meaningful limit on

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[1] Pursuant to Supreme Court Rule 37.2, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to the preparation or submission of this brief. Due to the nature of the emergency relief sought in this case of national significance, amici were unable to notify the parties of amici's intent to file 10 days before filing. Thus, amici submit an accompanying motion for leave to file this brief.

the constitutional rights an unlawfully-present alien can invoke simply by attempting to enter this country. This relief also contradicts the Court's longstanding precedent that full Fifth Amendment rights accorded to citizens can only be extended to those aliens who "have come within the territory of the United States *and developed substantial connections with this country*." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added).

Amici thus urge the Court to grant the application for an emergency stay.

SUMMARY OF ARGUMENT

The district court's order is unprecedented. Amici are aware of no other case where a federal court has declared that the Constitution gives unlawfully-present aliens with no ties to this country the full scope of rights accorded to citizens. The district court and the en banc court of appeals thus broke new ground by holding that such unlawfully present aliens have a constitutional right to elective abortion that is not medically necessary.

This Court should stay that order. It should hold that Doe is not entitled to a temporary restraining order because she cannot prevail on the merits: The Constitution does not confer on Jane Doe the right to an abortion, as Judge Henderson's dissent below rightly concluded.

Amici urge the Court to hold that unlawfully-present aliens without any other connection to the country besides the fact that they entered unlawfully do not have the full scope of constitutional rights accorded to citizens. Contrary to the three-judge panel dissent's argument below, this does not mean that the Constitution offers *no*

protection to unlawfully-present aliens; as explained below, the Constitution would protect all aliens from gross physical abuse, for example. *See infra* p.7. But at the same time, this Court's sliding scale recognizes that the degree of connections to this country determines the degree of rights accorded to aliens. This established doctrine means that unlawfully-present aliens without any substantial connection to the country do not have anything close to the same rights accorded to citizens.

Furthermore, the district court's order will harm the public interest. Plaintiff argues that the public is better off if Doe can get an abortion. The amici States strongly disagree. Doe openly concedes that she has "no legal immigration status." Dkt. 3-2 at 3.[2] The district court's order effectively creates a right to abortion for anyone on Earth who entered the United States illegally, no matter how briefly. If Doe has a right to an abortion, it is difficult to imagine what other constitutional protections she would not have. This perverse incentive to unlawfully enter the country will burden the public at large as well as the governmental entities that will be tasked with honoring these newfound rights—while simultaneously trying to prevent and deal with unlawful immigration.

[2] Docket numbers refer to filings in this case before the district court.

ARGUMENT

I. UNLAWFULLY-PRESENT ALIENS WITH VIRTUALLY NO CONNECTIONS TO THE UNITED STATES HAVE NO CONSTITUTIONAL RIGHT TO AN ELECTIVE ABORTION THAT IS NOT MEDICALLY NECESSARY.

The Court should grant an emergency stay because the right Plaintiff asserts does not exist. She therefore cannot show a likelihood of success on the merits, so the district court necessarily erred in entering this temporary restraining order, which is the functional equivalent of a preliminary injunction in these circumstances. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008) (preliminary injunctive relief unavailable if the plaintiff cannot establish a likelihood of success on the merits); *Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (per curiam) (same).

A. The Court Should Apply Its Well Established "Substantial Connections" Test, Which Recognizes a Sliding Scale Providing that the Degree of Connections to this Country Determines the Degree of Rights Accorded to Aliens.

The "initial inquiry" in assessing any due process claim is whether the Constitution protects the right the plaintiff asserts. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976). Only after confirming that the right at issue exists should a court move on to whether the government has violated that right.

The parties have not previously briefed this core antecedent constitutional question presented here; but the amici States raised it below, and the argument was addressed at both the panel and en banc stages. As Judge Henderson's dissent correctly recognized, Henderson Dissent at 5-8, regardless of what the parties have argued, nothing prevents this Court from adjudicating this momentous predicate constitutional question. *See, e.g.*, *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.,*

Inc., 508 U.S. 439, 447 (1993) (if a party "fail[s] to identify and brief" "an issue 'antecedent to . . . and ultimately dispositive of' the dispute," an appellate court may consider the issue sua sponte (citation omitted)). After all, "even an explicit concession on this point would not "'relieve this Court of the performance of the judicial function"' of deciding the issues." *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 471 n.3 (1979) (quoting *Sibron v. New York*, 392 U.S. 40, 59 (1968), in turn quoting *Young v. United States*, 315 U.S. 257, 258 (1942)). In other words, a government's "concessions cannot be accepted" when they are contrary to law. *Massachusetts v. United States*, 333 U.S. 611, 625 (1948).

Thus, in this case, the Court should begin with a threshold question: Does the right to an abortion recognized by this Court under the Fifth Amendment's substantive due process component apply to unlawfully-present aliens with no connection to this country who were apprehended while attempting to cross the border? The answer is no, under this Court's sliding scale providing that the degree of connections to the country determines the degree of rights afforded to aliens.[3]

1. The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." This Court has held that unlawfully-present aliens are "persons" protected by the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Court reiterated in 2001 that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all

[3] The district court's order granting the temporary restraining order overlooks this analysis entirely. At no point does the order address the threshold question of whether the Fifth Amendment's substantive due process guarantees apply to Doe.

'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

But simply because an individual is a "person" covered by the Fifth Amendment, it does not follow that the alien is necessarily "due" the same scope of rights accorded to citizens. As this Court has held, the rights that an alien is "due" depend on the connections that person has established with this country: *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990), clarified that *Plyler's* Fifth Amendment analysis "establish[es] only that aliens receive constitutional protections when they have come within the territory of the United States *and developed substantial connections with this country*." *Id.* at 271 (emphasis added).

Nor did *Zadvydas* alter or undermine *Verdugo-Urquidez's* pronouncement that to invoke the full scope of Fifth Amendment rights, an unlawfully-present alien must demonstrate "substantial connections." *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (applying "significant voluntary connection" test from *Verdugo-Urquidez*); *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (same). Indeed, *Zadvydas* expressly limited its analysis to "aliens *who were admitted to the United States* but subsequently ordered removed." 533 U.S. at 682 (emphasis added). By contrast, "[a]liens who have not yet gained initial admission to this country would present a very different question." *Id.*

2. Given that an alien's connections determine the scope of rights the alien is due, this Court has further held that as a person develops increasing connections with this country, the person's constitutional protections expand. *E.g.*, *Verdugo-Urquidez*, 494 U.S. at 268-69. That is, an alien is "accorded a generous and ascending *scale of rights* as he increases his identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (emphasis added); *see also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (staying injunction of immigration order for aliens "who lack any bona fide relationship with a person or entity in the United States"). Initial lawful entry affords "safe conduct" and confers "certain rights," which "become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Eistentrager*, 339 U.S. at 770; *see Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (alien's "constitutional status changes" only after he "gains admission to our country and begins to develop the ties that go with permanent residence").

a. This Court's sliding-scale approach recognizes that it is the rare exception where constitutional rights are accorded to unlawfully-present aliens with minimal connections to the country. Under that rare exception, the mere fact of presence in this country—even unlawful presence—does confer certain minimal constitutional rights against egregious harm, but not affirmative liberty rights. And even when certain limited constitutional rights are extended to unlawfully-present aliens, courts routinely hold that the full scope of a constitutional provisions' rights do not extend to such aliens.

For example, mere unlawful presence confers a basic right against "gross physical abuse" in this country. *Castro v. Cabrera*, 742 F. 3d 595, 600 (5th Cir. 2014) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987)). The Constitution protects everyone on U.S. soil, even unlawfully-present aliens with no other ties to this country, against the "wanton or malicious infliction of pain" by governmental officials. *Id*.

The panel dissent—which the en banc majority below "substantially" adopted—argued that under *Verdugo-Urquidez*'s substantial-connection sliding scale, "everyone else here without lawful documentation—including everyone under supervision pending immigration proceedings and all Dreamers—have no constitutional right to bodily integrity in any form (absent criminal conviction)." Panel Dissent at 9. But this Court's precedents do not lead to that drastic position. Under the "ascending scale" of rights as articulated in *Johnson* (339 U.S. at 770), reinforced in *Landon* (459 U.S. at 32), restated in *Verdugo-Urquidez* (494 U.S. at 268-69)—and applied in *Lynch* (810 F.2d at 1370) and *Castro* (742 F. 3d at 600)—all persons on U.S. soil are constitutionally protected against "gross physical abuse." *Castro*, 742 F.3d at 600.

However, even though the Constitution confers basic protection against gross physical abuse exists, full Fourth Amendment rights accorded to citizens do not apply to unlawfully-present aliens with only minimal connections to the country. *See, e.g.*, *Castro*, 742 F.3d at 599-600 (Fourth Amendment does not extend to unlawfully-present aliens who remain in the United States illegally, unless they are raising

claims of "gross physical abuse"); *United States v. Vilches-Navarrete*, 523 F.3d 1, 13 (1st Cir. 2008) (criminal defendant lacked "substantial connection" with U.S. necessary to invoke Fourth Amendment protection under *Verdugo-Urquidez*).

In addition to the gross-physical-abuse prohibition, the mere fact of presence in this country—even unlawful presence—also confers a certain set of basic procedural guarantees before the federal government can deport the individual. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (it is "well established" that aliens have due-process rights in deportation hearings).

But even then, the full scope of procedural due process rights guaranteed to citizens does not extend to unlawfully-present aliens. *See, e.g.*, *id.* at 521 ("'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80) (1976))); *accord, e.g.*, *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("The [due process] liberty rights of the aliens before us are subject to limitations and conditions not applicable to citizens, however." (citing *Mathews*, 426 U.S. at 79-80)).

In sum, the fact that basic procedural safeguards and protections against "gross physical abuse" are afforded to everyone on U.S. soil does not mean that the full panoply of constitutional rights accorded to citizens extends to each unlawfully-present alien with only minimal connections to the country.

b. Furthermore, courts routinely hold that unlawfully-present aliens with minimal connections to the country lack affirmative liberty rights.

For example, unlawfully-present aliens with minimal connections to the country do not have Second Amendment "fundamental rights"[4] to keep and bear arms. *See United States v. Portillo–Munoz*, 643 F.3d 437, 442 (5th Cir. 2011); *United States v. Carpio–Leon*, 701 F.3d 974, 979 (4th Cir. 2012); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam); *cf. Meza-Rodriguez*, 798 F.3d at 669-672 (unlawfully-present alien has Second Amendment rights only because he arrived in the U.S. at a young age and lived here for 20 years).

And full First Amendment rights do not extend to unlawfully-present aliens without substantial connections to the country. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (noting federal statute, now codified at 52 U.S.C. §30121, prohibiting "foreign national[s]" from making direct contributions or independent expenditures for political speech); *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (alien may be returned to home country for engaging in disfavored political speech in this country); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (government may restrict alien's freedom of association). The Department of Justice has explicitly advanced this view in previous litigation. *See* Brief for Defendant, *Pineda-Cruz v. Thompson*, No. 5:15-cv-00326 (W.D. Tex. May 7, 2015) (Dkt. 22) ("Because Plaintiffs never gained entry into the United States and have not developed substantial connections with this country, they are not within the scope of individuals contemplated by the Supreme Court as being able to raise claims under the First Amendment.").

[4] *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

These principles establishing that unlawfully-present aliens lack affirmative liberty rights held by citizens comport with this Court's declaration that aliens subject to deportation may be detained as their deportation is processed. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) ("At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."). With physical detention necessarily comes a restriction of other liberties; in fact, detention pending deportation would become constitutionally suspect if unlawfully-present aliens with no ties to this country possessed the full scope of affirmative liberty rights the Constitution accords U.S. citizens.

c. The affirmative substantive due process right recognized by the Court to seek the medical procedure of an elective abortion that is not medically necessary is much more analogous to the affirmative liberty rights courts have repeatedly held are not accorded to unlawfully-present aliens who lack substantial connections to the country. In contrast, minimal procedural safeguards and the basic protection against gross physical abuse are negative prohibitions on drastic government conduct (detention and removal without any process, and gross physical abuse).

Here, the federal government has not taken any such drastic action. It has lawfully detained an alien who admits she has no legal status—which is indisputably "a constitutionally valid aspect of the deportation process." *Kim*, 538 U.S. at 523. As the federal government has explained here, the Plaintiff is free to voluntarily depart

the country, and the government has not imposed any undue burden on obtaining an abortion.

B. The Operative Complaint Confirms that Doe Has No "Substantial Connections" to This Country.

The Complaint (Dkt. 1) never alleges any facts that would establish that Doe has significant ties to this country. To the contrary, the paragraphs that state facts pertinent to Doe establish no connection to the United States at all:

- Paragraphs 4 and 5 summarize Doe's current situation but offer no allegations establishing a connection to the United States other than her current unlawful presence.

- Paragraph 13 alleges: "J.D. was detained by the federal government and placed in a federally funded shelter in Texas. J.D. is years [*sic*] old, pregnant, and told the staff at the shelter where she is currently housed that she wanted an abortion." This paragraph admits that Doe entered the United States unlawfully but offers no allegations establishing a connection to the United States.

- Paragraphs 14 and 15 discuss Doe's recent efforts to obtain an abortion during her time in custody.

- Paragraphs 33, 34, 35, 36, and 43 allege that the defendants have restricted Doe's ability to receive an abortion in the United States.

In short, there are 69 paragraphs in the Complaint, and not one of them attempts to show substantial connections to the country.

Moreover, the declaration that Doe submitted in support of her motion for a temporary restraining order *confirms* that she has no substantial ties to this country because Doe explicitly admits that she was "detained upon arrival." Dkt. 3-3 ¶ 4. Doe repeats that she "came to the United States from [her] home country without [her] parents," and that she is 17 years old. *Id.* ¶¶ 2, 3. But she never offers any fact establishing a connection to this country. *See id.* ¶¶ 5-18.

C. Plaintiff's Authorities Do Not Establish the Right Doe Seeks to Assert.

Not only are Plaintiff's factual assertions inadequate, but in the court of appeals, she further offered no case or authority establishing the right she asked the district court to recognize.

Plaintiff relied on *Roe v. Wade*, *Planned Parenthood of Se. Pa. v. Casey*, and *Whole Woman's Health v. Hellerstedt* for the proposition that "the government may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Dkt. 3-2 at 9 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality op.); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)). But those cases never say or imply that the affirmative substantive due process right to an abortion recognized by this Court extends to unlawfully-present aliens—especially not those who, like Doe, have no ties to this country and were merely apprehended at the border.

Plaintiff relied further on *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976), and *Bellotti v. Baird*, 443 U.S. 622, 633 n.12 (1979), for the proposition that the principles of *Roe* and *Casey* extend to minors. Dkt. 3-2 at 10-11. Those cases, too, did not involve unlawfully-present aliens. Plus, those cases simply confer on minors the right to bypass parental-consent requirements by initiating a judicial proceeding to establish that an abortion is in their best interests. *See Bellotti*, 443 U.S. at 651. As Plaintiff admits, "if *Bellotti* means anything, 'it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, independent of parents or legal guardians." Dkt. 3-2 at 11 (quoting

Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1112 (5th Cir. 1997)). But Doe concedes that she already has received a judicial bypass in Texas state court. *See* Dkt. 3-3 ¶ 6. That ends the relevance of *Bellotti* and *Planned Parenthood of Central Missouri*.[5]

Lacking case support, Plaintiff turned to 45 C.F.R. § 411.92(a) for the proposition that unlawfully-present, unaccompanied minors such as Doe are entitled to reproductive care. Dkt. 1 ¶ 29. But she mischaracterizes § 411.92(a), which merely requires certain medical services, including emergency contraception, to minors who are "victims of sexual abuse." Doe has not alleged that she is the victim of sexual abuse. *See* Dkt 3-3.

Finally, in a footnote, Plaintiff offered a string citation of cases she suggests establish that Doe has the right to an abortion. But none of those cases supports the proposition Plaintiff asserts:

- *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 187 (D.D.C. 2015), concerned whether ICE could continue to detain asylum applicants after those individuals had demonstrated a credible fear of persecution. Each of the applicants had family members in the United States who had agreed to provide shelter and support for the asylum-seekers. On those facts, and in light of the plaintiffs' threshold showing of asylum eligibility, the district court held that they could invoke the protection of the Due Process Clause. Here, the operative complaint says nothing about asylum, alleges no connection to the U.S. at all, and offers no basis to believe that Doe is on track to permanent residence.

- *Plyler*, 457 U.S. at 210, has been clarified by *Verdugo-Urquidez* and its substantial-connections inquiry.

[5] A judicial bypass order does not confer on a minor the right to obtain an abortion. *See In re Doe*, 501 S.W.3d 313, 315-16 (Tex. App.—Houston [14th Dist.] 2016). It simply relieves Doe's abortion provider of any duty to consult her parents.

- *Mathews v. Diaz*, 426 U.S. 67, 77 (1976), is inapposite because it concerned resident aliens who were lawfully admitted to the United States. And in any event, *Mathews* was also clarified by *Verdugo-Urquidez*.

- *Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004), concerned whether an alien who had been lawfully present in the U.S. for almost two decades abandoned her application for an adjustment of status by leaving the country without obtaining permission. No one doubts that the plaintiff in that case had established "substantial connections" under *Verdugo-Urquidez*.

- Finally, *Lynch*, 810 F.2d at 1374, as discussed above, simply provides that "gross physical abuse" by governmental officials is prohibited regardless of a person's immigration status or connections to this country. *Castro*, 742 F. 3d at 600.

Plaintiff says that the notion that the Fifth Amendment does not protect Jane Doe is "indefensible." But despite multiple rounds of briefing in multiple courts, Plaintiff cannot produce a single case confirming this misguided view of the law.

II. THE DISTRICT COURT'S ORDER HARMS THE PUBLIC INTEREST.

If allowed to stand, the temporary restraining order will harm the public interest. As this Court has recognized, the States already "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397; *see, e.g.*, *Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997) (Texas' "educational, medical, and criminal justice expenditures on undocumented aliens" are over a billion dollars annually). The district court's order effectively announces that anyone on Earth has any number of constitutional rights simply by being apprehended while trying to cross the United States border. That dramatic expansion of rights available to unlawfully-present aliens with no substantial connection to this country will incentivize even more unlawful entries and further consume public resources at the State and local level.

CONCLUSION

The Court should grant the stay application.

Date: October 25, 2017

Respectfully submitted.

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