IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated,

Plaintiff,

v.

ERIC HARGAN, Acting Secretary of Health and Human Services;

STEVEN WAGNER, Acting Assistant Secretary for Administration for Children and Families, in his official and individual capacity; and

SCOTT LLOYD, Director of Office of Refugee Resettlement, in his official and individual capacity,

Defendants.

No. 1:17-cv-02122

OPPOSITION TO MOTION FOR TEMPRORY RESTRAINING ORDER OF DEFENDANTS WAGNER AND LLOYD (IN THEIR INDIVIDUAL CAPACITIES)

Defendants Steven Wagner and Scott Lloyd have been named as Defendants in the Amended Complaint in this action, in both their official and individual capacities. As the government has noted, Wagner and Lloyd may not be sued in an individual capacity for equitable relief relating to their performance of official duties. *See, e.g.*, *Auleta v. United States Dep't of Justice*, No. CV 11-2131 (RWR), 2015 WL 738040, at *4 (D.D.C. Feb. 20, 2015). But because Plaintiffs also seek damages against Wagner and Lloyd in their individual capacities—based on allegations that they "acted intentionally and unlawfully in violating [Plaintiffs'] clearly established rights" under the Constitution, Am. Compl. ¶¶ 64, 67—Wagner and Lloyd have a vested interest in defending the constitutionality of ORR's policies.

Wagner and Lloyd thus have an interest in these TRO proceedings to the extent they

address the merits of Plaintiffs' constitutional claims. In addition to the arguments advanced by the government—in which Wagner and Lloyd join—Plaintiffs are unlikely to succeed on their First or Fifth Amendment claims for an additional reason: Plaintiffs have not entered the United States and do not have any substantial connections with this country, so they cannot rely upon the unenumerated right to abortion. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Aliens who have "effected an entry" into the United States are "person[s]" protected by the Fifth Amendment, regardless of "whether their presence here is lawful." *Id*. at 678. But the same cannot be said for aliens "who have not yet gained initial admission to this country." *Id.* at 682; *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."). When an alien is "stopped at the boundary line" and detained, there is no entry "unless and until her right to enter should be declared." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). The fact that the alien may be detained within the United States does not alter this fact; the "detention of an alien in custody pending determination of [her] admissibility does not legally constitute an entry though the alien is physically within the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). An immigrant held at Ellis Island for nearly two years (and subject to an order of indefinite detention) thus "was 'treated,' for constitutional purposes, 'as if stopped at the border.'" *Zadvydas*, 533 U.S. at 693 (quoting *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 213 (1953)).

Plaintiffs' status here is no different. Nothing in the Amended Complaint or the declarations supporting the TRO suggests that Jane Roe or Jane Poe have any connection to this

country. *See* Roe Declaration (Dkt. 63-2) ¶ 4 (noting she "was detained upon arrival" in the United States); Poe Declaration (Dkt. 64-1). Even if they were no longer detained in federal custody, they would remain "in theory of law at the boundary line," having "gained no foothold in the United States" unless and until their legal right to enter was determined. *Kaplan*, 267 U.S. at 230. Thus, they are not "within the United States," and the Due Process Clause does not apply. *Zadvydas*, 533 U.S. at 693; *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

Even aliens who have effected entry into the United States could not assert a constitutional right to an elective abortion absent connections to this country. Aliens undoubtedly receive some level of constitutional protection "when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. But the precise scope of rights due is not fixed: as an alien's connections to the country increase, so do the constitutional guarantees available to her. *See Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (explaining that an alien is "accorded a generous and ascending scale of rights as he increases his identity with our society"); *see also Zadvydas*, 533 U.S. at 694.

Entry alone confers baseline protections against undue harm, but not affirmative liberties. "Mere lawful presence in the country creates an implied assurance of safe conduct and gives [an alien] certain rights." *Eisentrager*, 339 U.S. at 770. These include basic negative rights like freedom from "wanton or malicious infliction of pain or gross physical abuse" by the government. *Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014). An alien's constitutional guarantees "become more extensive and secure when [she] makes preliminary declaration of intention to become a citizen." *Eisentrager*, 339 U.S. at 770; *see also Plasencia*, 459 U.S. at 32. These rights only "expand to those of full citizenship upon naturalization." *Id*. at 770. It is

therefore unsurprising to find policies that might be "unacceptable if applied to citizens" are often the status quo in the immigration context. *Demore v. Kim*, 538 U.S. 510, 522 (2003).[1]

Courts have routinely acknowledged these principles, holding that unlawfully present aliens are not entitled to the same affirmative liberties enjoyed by American citizens. *See, e.g.*, *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (right to keep and bear arms under the Second Amendment); *United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (same); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (same); *Kleindienst*, 408 U.S. at 762, 769-70 (freedom of speech under the First Amendment); *Galvan v. Press*, 347 U.S. 522, 531-32 (1954) (freedom of association under the First Amendment). The substantive-due-process right to an elective abortion is, at best, analogous to these liberties, which have never been accorded to aliens lacking substantial connections to the United States.

To hold otherwise would defy logic. It would suggest that the full panoply of affirmative liberties accorded by substantive due process is at the base of the ascending scale of rights, while the full extent of *procedural* due process is not. *See Plasencia*, 459 U.S. at 34 (noting that the extent of procedural due process afforded to aliens "varies with the circumstances"). There is no reason to suppose that the unenumerated right to an elective abortion comes before core enumerated liberties such as the right to engage in political speech or the right to keep and bear arms. *See, e.g.*, *Kleindienst*, 408 U.S. at 762; *Portillo-Munoz*, 643 F.3d at 442. And the Supreme Court has never implied in its abortion cases that this substantive-due-process right extends to

[1] The Constitution is, of course, not the only law that governs the treatment of aliens. *See Garza v. Hargan*, 874 F.3d 735, 750 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting) (noting the U.N. Convention Against Torture and federal laws imposing liability on government officials who commit torts or crimes). And Congress has charged ORR with "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child," "implementing policies with respect to the care and placement of unaccompanied alien children," 6 U.S.C. § 279(b)(1)(A), (B). Denial of a TRO will not alter ORR's obligation to provide care consistent with its statutory and regulatory duties.

unlawfully present aliens with no ties to this country. *See, e.g.*, *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

Absent evidence of *any* connection—let alone a substantial connection—with the United States prior to detention, Plaintiffs cannot claim the full extent of affirmative liberties afforded to citizens, including the substantive-due-process right to an elective abortion. To hold otherwise would ignore decades of "well established" Supreme Court precedent. *Zadvydas*, 533 U.S. at 693.

CONCLUSION

For all these reasons, Defendants Wagner and Lloyd respectfully request that this Court deny the TRO.

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Respectfully submitted,

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