

Washington Law Review

Volume 99 | Number 1

3-1-2024

From Precedent to Policy: The Effects of Dobbs on Detained Immigrant Youth

Ciera Phung-Marion

University of Washington School of Law

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Administrative Law Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), and the [International Humanitarian Law Commons](#)

Recommended Citation

Ciera Phung-Marion, Comment, From Precedent to Policy: The Effects of Dobbs on Detained Immigrant Youth, 99 Wash. L. Rev. 277 (2024).

This Comment is brought to you for free and open access by the Washington Law Review at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

FROM PRECEDENT TO POLICY: THE EFFECTS OF *DOBBS* ON DETAINED IMMIGRANT YOUTH

Ciera Phung-Marion*

Abstract: In June 2022, the United States Supreme Court released the historic decision *Dobbs v. Jackson Women’s Health Organization*, holding that the U.S. Constitution does not protect an individual’s right to an abortion. *Dobbs* overturned many cases, including *J.D. v. Azar*, which previously protected abortion rights for unaccompanied migrant youth in federal detention facilities. Post-*Dobbs*, the Office of Refugee Resettlement (ORR)—the agency responsible for caring for detained immigrant children—still protects abortion rights as part of its own internal policy. Without judicial precedent, however, this policy lacks the stability to truly protect the rights of the children in its care.

This Comment discusses the impact of *Dobbs* on the rights of unaccompanied immigrant children (UCs) detained in immigration custody by ORR. Now that detained UCs’ right to abortion is only protected by agency policy, it can be changed by ORR without going through notice and comment rulemaking. This Comment explains the historical context of the rights of migrant children and the right to an abortion. It advances the argument that states that want to protect abortion for detained immigrant youth must incorporate those rights in child welfare laws.

INTRODUCTION

In 2022, 152,057 unaccompanied immigrant children¹ crossed the United States’ southwest border seeking immigration relief.² An unaccompanied migrant child (referred to as a “UC,” “unaccompanied immigrant child,” or “migrant youth”) is a person under the age of eighteen who enters the United States without immigration status, a

*J.D. Candidate, University of Washington School of Law, Class of 2024. A huge thank you to Kimberly Manson and Alexandra Carrasco, two fantastic and wonderful immigration advocates who inspired me to write this Comment while I was an intern at Kids in Need of Defense. I would also like to thank *Washington Law Review* staff and UW Law faculty for their patience and help getting through the editing process. And thank you to Mary Beth Kaufman for taking a chance and giving me my first job as an immigration paralegal and being the kind of advocate I dream of becoming one day.

1. The terms “children” and “youth” throughout this Comment include all persons under the age of eighteen. I use these terms intentionally. Immigrant youth and children of color are often “adultified” or perceived as adult-like by law and society. “Perceiving children of color as more mature than they are creates a presumption that they should be held to a higher standard of responsibility and with less forgiveness.” Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 203 (2020).

2. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (deselect all but “UC / Single Minors” in the “Demographic” dropdown for the first chart; then click “Apply”) (last updated Jan. 26, 2024) (last visited Feb. 27, 2024).

parent, or a guardian.³ While the reasons UCs leave their homelands vastly differ, many face similar hardships once they cross the border.⁴ UCs are especially vulnerable to violence and exploitation because they have no adult present to protect them or advocate for their best interests.

Without adult protection, UCs are especially vulnerable to abuse by family members, strangers, and gang members.⁵ Many UCs experience such violence while traveling to the United States.⁶ Many are dependent on smugglers to guide them thousands of miles from Central America through Mexico to the United States.⁷ In addition to the physical difficulty of this journey, unaccompanied migrant children must avoid being attacked by gangs, corrupt officials, and even their own guides.⁸

When U.S. Customs and Border Patrol (CBP) apprehends a UC at the border, they are transferred to a youth immigration detention facility within seventy-two hours.⁹ While the distinction may seem small, youth and adults experience immigrant detention very differently.¹⁰ Adults are detained by Immigration and Customs Enforcement (ICE), a federal agency under the U.S. Department of Homeland Security (DHS).¹¹ Youth, however, are held in the custody of the Office of Refugee Resettlement

3. See 6 U.S.C. § 279(g)(2).

4. Rebecca Ma & Daniel Tse, *Pushed Away and Stranded: 7 Things to Know About the Border*, MEDIUM (Dec. 1, 2023), <https://medium.com/advancing-justice-aajc/pushed-away-and-stranded-7-things-to-know-about-the-border-9ae63b7b14f9> [<https://perma.cc/6JGG-YKTE>].

5. KEVIN ACKERMAN, LYNNE ROSENBERG, JOSEPH SHIN, HAJAR HABBACH, KATHRYN HAMPTON & SARAH STOUGHTON, “THERE IS NO ONE HERE TO PROTECT YOU”: TRAUMA AMONG CHILDREN FLEEING VIOLENCE IN CENTRAL AMERICA 16 (Claudia Rader ed., 2019).

6. *Id.*

7. Lauren Paulk & Karla Torres, *Resilience at the Texas Border: Migrant Children, Reproductive Health, and Legal Harms*, 31 GEO. IMMIGR. L.J. 93, 99–100 (2016); ACKERMAN ET AL., *supra* note 5, at 16.

8. See ACKERMAN ET AL., *supra* note 5, at 16 (“One girl described her travel alone toward the United States and detailed how a trafficker sexually assaulted, kidnapped, and threatened to murder and dismember her: ‘One of the coyotes who had a gun, began to touch her breasts and genitalia, and no one did anything, although others noticed. ‘You’re mine now. No one is going to help you,’ the coyote said to her.”); Philip E. Wolgin & Angela Maria Kelley, *5 Things You Need to Know About Unaccompanied Children*, CTR. FOR AM. PROGRESS (June 18, 2014), <https://www.americanprogress.org/article/5-things-you-need-to-know-about-the-unaccompanied-minors-crisis/> [<https://perma.cc/89TL-MML4>] (“[Smugglers and traffickers] are often related to—or working in concert with—the same groups perpetrating the violence within the children’s home countries.”); ADAM ISACSON, MAUREEN MEYER & GABRIELA MORALES, WASH. OFF. ON LATIN AM., MEXICO’S OTHER BORDER: SECURITY, MIGRATION, AND THE HUMANITARIAN CRISIS AT THE LINE WITH CENTRAL AMERICA 2 (2014).

9. 8 U.S.C. § 1232(b)(3).

10. Meghan Koushik, *Undue Burdens at the Border: Garza v. Azar and the Limits on Regulating the Right to Choose in the Immigration Detention Context*, 15 STAN. J. C.R. & C.L. 253, 260 (2019).

11. HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R45020, PRIMER ON U.S. IMMIGRATION POLICY 12, 15 (2021).

(ORR), an agency under the U.S. Department of Health and Human Services (HHS).¹² Once initially processed at the border, adults and minors are separated into different detention facilities, governed by different agencies with completely different laws and policies.¹³ This Comment specifically focuses on the treatment of youth in immigrant detention.

Although there is ample data about pregnant adults who arrive at the U.S. border, data is lacking for pregnant youth.¹⁴ In 2014, the Government Accountability Office reported a “significant” increase in pregnant youth in immigrant detention.¹⁵ Girls are especially vulnerable to sexual violence in their home countries, on their journeys to the United States, and while in U.S. immigrant detention.¹⁶ In their home countries, girls reported experiencing sexual assault, extortion, trafficking, and domestic violence.¹⁷ While crossing the border, it is estimated that sixty to eighty percent of women and girls are sexually assaulted.¹⁸ Rape and sexual

12. Koushik, *supra* note 10, at 260.

13. *See id.*; STRAUT-EPPSTEINER, *supra* note 11, at 12, 15; *see also* 8 U.S.C. § 1232(b)(3) (requiring UCs to be transferred to HHS custody within 72 hours of receiving the designation of UC).

14. *See, e.g.*, Maya Yang, *Pregnant Migrants at US Border Say Texas Soldiers Denied Them Water*, GUARDIAN (July 21, 2023), <https://www.theguardian.com/us-news/2023/jul/21/migrants-us-border-texas-national-guard> [<https://perma.cc/4C54-TMA5>] (reporting that two pregnant women crossing the border were denied water by Texas National Guard soldiers); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-330, IMMIGRATION DETENTION: CARE OF PREGNANT WOMEN IN DHS FACILITIES 7 (2020) (studying only the effects of immigrant detention on pregnant women in ICE and CBP custody, not girls in ORR custody); Julia Ainsley, *Biden Admin Blocks ICE from Detaining Pregnant, Nursing, Postpartum Women Caught Crossing Border*, NBC NEWS (July 9, 2021), <https://www.nbcnews.com/politics/immigration/biden-admin-blocks-ice-detaining-pregnant-nursing-postpartum-women-caught-n1273569> [<https://perma.cc/8TR9-E3EP>] (reporting how under President Biden's administration ICE can detain pregnant women only in limited circumstances); SARAH STOUGHTON & ELIZABETH YIM, PHYSICIANS FOR HUM. RTS., HEALTH HARMS EXPERIENCED BY PREGNANT WOMEN IN U.S. IMMIGRATION CUSTODY (2019) (providing data about health harms resulting only from pregnancy while in ICE custody).

15. Sarah Salvatore, *“There Was So Much Violence Around. I Felt So Alone. I Wanted to See My Mother.”*, SLATE (Jan. 27, 2017), <https://slate.com/human-interest/2017/01/why-are-so-many-pregnant-and-parenting-teens-appearing-at-the-u-s-mexico-border.html> [<https://perma.cc/24HT-2T3Y>].

16. *See* ACKERMAN ET AL., *supra* note 5, at 15; Koushik, *supra* note 10, at 259; Aura Bogado, Patrick Michels, Vanessa Swales & Edgar Walters, *Migrant Children Sent to Shelters with Histories of Abuse Allegations*, REVEAL (June 20, 2018), <https://revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations/> [<https://perma.cc/E727-TCDS>].

17. *See* Suzanne Gamboa, *Sexual, Gender Violence Driving Central American Youths to Flee Their Countries*, NBC NEWS (May 5, 2017), <https://www.nbcnews.com/news/latino/sexual-gender-violence-driving-central-american-youths-flee-their-countries-n754886> [<https://perma.cc/CY4V-TSGV>] (“Gang members are using rape, kidnapping, torture, sexual violence and other crimes, predominantly against women and girls and people who are lesbian, gay, bisexual or transgender, as a main tactic to expand their control of territory in Central America . . .”).

18. Koushik, *supra* note 10, at 258.

assault have become so common while traveling to the United States that some smugglers force women and girls to take birth control to prevent pregnancy.¹⁹ Even in immigrant detention, youth are still not safe from sexual assault. From 2014 to 2018, children in ORR custody reported more than four thousand allegations of sexual abuse.²⁰

Part of the reason why abortion rights are so important for detained immigrant youth is because of these high rates of sexual assault. The majority of pregnancies resulting from sexual assault are unwanted.²¹ Medical research has shown that forcing someone to carry an unwanted pregnancy to term, regardless of whether it is the result of sexual assault or rape, increases their risk for serious medical complications.²² These risks are exacerbated by the detention conditions in ORR facilities.²³ UCs have reported being underfed or served inedible food, unable to access medical care, drugged, assaulted, and kept inside twenty-three hours a

19. Deborah Bonello & Erin Siegal McIntyre, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, SPLINTER (Sept. 10, 2014), <https://splinternews.com/is-rape-the-price-to-pay-for-migrant-women-chasing-the-1793842446> [<https://perma.cc/MF6J-G8Q4>].

20. Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> (last visited Feb. 5, 2024); see also Michael Grabell & Topher Sanders, *Immigrant Youth Shelters: "If You're a Predator, It's a Gold Mine,"* PROPUBLICA (July 27, 2018), <https://www.propublica.org/article/immigrant-youth-shelters-sexual-abuse-fights-missing-children> [<https://perma.cc/M5QG-HD89>] (describing instances of sexual abuse of children by staff at the Southwest Key detention center in Tucson, Arizona).

21. Melisa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1996).

22. ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH, UCSF MED. CTR., INTRODUCTION TO THE TURNAWAY STUDY 3 (2022) [hereinafter ADVANCING NEW STANDARDS].

23. Cf. Rebecca J. Schlafer, Jamie Stang, Danielle Dallaire, Catherine A. Forestell & Wendy Hellerstedt, *Best Practices for Nutrition Care of Pregnant Women in Prison*, 23 J. CORR. HEALTH CARE 297 (2017) (explaining the importance of adequate nutrition for pregnant people and how pregnant people require more calories than the average person); Alexander Testa & Dylan B. Jackson, *Incarceration Exposure and Barriers to Prenatal Care in the United States: Findings from the Pregnancy Risk Assessment Monitoring System*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Oct. 2020, at 1 (explaining how lack of access to medical care while pregnant leads to higher risk of low birth weights and infant mortality); Cristina Novoa, *Ensuring Healthy Births Through Prenatal Support*, CTR. FOR AM. PROGRESS (Jan. 31, 2020), <https://www.americanprogress.org/article/ensuring-healthy-births-prenatal-support/> [<https://perma.cc/QR9P-YJZK>] (explaining how individuals who do not receive adequate "prenatal care are three to four times more likely to die from pregnancy-related complications"); Sristy Agarwal, Roshan Prasad, Saket Mantri, Rashi Chandrakar, Shalvi Gupta, Vaishnavi Babhulkar, Samridhi Srivastav, Arpita Jaiswal & Mayur B. Wanjari, *A Comprehensive Review of Intimate Partner Violence During Pregnancy and Its Adverse Effects on Maternal and Fetal Health*, CUREUS, May 2023, at 4 ("[P]regnant women who experience severe physical violence may be at risk of developing pregnancy-related complications such as preeclampsia, premature rupture of membranes, and preterm labor, which can also increase the risk of maternal mortality.").

day.²⁴ Detention conditions “change children’s brains and bodies, including disrupting learning, behavior, immunity, growth, hormonal systems, immune systems, and even the DNA.”²⁵ Detained immigrant children already lack basic freedoms and much of their bodily autonomy; they should not be forced to carry an unwanted pregnancy to term as well.

Although abortion was considered a constitutional right between 1973²⁶ and 2022,²⁷ in June 2017, a class of UCs in immigrant detention filed an action seeking an injunction against the federal government for ORR policies and practices that violated their rights to abortions.²⁸ One of the named plaintiffs, Jane Doe immigrated to the United States at the age of seventeen.²⁹ After she was taken into ORR detention, she found out she was nine weeks pregnant.³⁰ Jane immediately knew she wanted an abortion.³¹ To do so, Jane found a doctor, secured her own funding to pay for the abortion, and received authorization from a judge to get an abortion without her parents’ consent.³² After Jane took all these steps, ORR still refused to let her leave the facility for her appointments.³³ Instead, detention officials forced Jane to visit a religious anti-abortion crisis center.³⁴ Jane challenged the constitutionality of ORR’s actions and its ability to interfere with her right to get an abortion. In *J.D. v. Azar*,³⁵ the D.C. Circuit ruled in her favor, holding that ORR could not interfere with

24. Hlass, *supra* note 1, at 238.

25. *Id.* at 239.

26. *See* *Roe v. Wade*, 410 U.S. 113, 165–66 (1973).

27. *See* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022) (holding that the right to an abortion is not a fundamental right protected by the U.S. Constitution).

28. *Garza v. Hargan*, 304 F. Supp. 3d 145, 150 (D.D.C. 2018), *aff’d in part, vacated in part, remanded sub nom. J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019).

29. *Id.* at 151.

30. Cristian Farias, *Meet the Texas Lawyer Who Helped an Undocumented Teen Fight for an Abortion*, CUT (Nov. 3, 2017), <https://www.thecut.com/2017/11/this-lawyer-helped-undocumented-teen-fight-for-an-abortion.html> [<https://perma.cc/855Q-HFS7>].

31. *Garza*, 304 F. Supp. 3d at 151.

32. *Id.*

33. *See id.*

34. *Id.*

35. 925 F.3d 1291 (D.C. Cir. 2019).

Jane's constitutional right to get an abortion.³⁶ Following the court's ruling, ORR changed its internal policy to be consistent with the holding.³⁷

When the Supreme Court overturned the right to abortion in *Dobbs v. Jackson Women's Health Organization*,³⁸ it also necessarily overturned *J.D. v. Azar*.³⁹ Although there was international outcry about the overturning of this decision affecting women,⁴⁰ little appears to have been said about it overturning *J.D. v. Azar* and its effect on detained immigrant youth. With this silence, UCs have been excluded from many of the proposed state remedies in the wake of *Dobbs*. State laws and policies

36. *Id.* at 1337; *see also id.* at 1328 (rejecting ORR's "undue burden" defense, which derives from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992)); *id.* at 1331 (rejecting ORR's argument that the undue burden imposed by ORR's ban could be "alleviate[d]" by voluntarily departing from the United States for one's country of origin to receive an abortion there).

37. *See* OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., POLICY MEMORANDUM: MEDICAL SERVICES REQUIRING HEIGHTENED ORR INVOLVEMENT 1 (2020), <https://www.aila.org/aila-files/860336D9-0F2F-46FF-9A56-887691FF5FE6/20100204.pdf?1697590236> [<https://perma.cc/HKJ9-U4YU>] [hereinafter POLICY MEMORANDUM].

38. 597 U.S. ___, 142 S. Ct. 2228 (2022).

39. *See id.* at 2242 (overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which therefore must overrule *J.D. v. Azar*).

40. *See, e.g.*, FÒS FEMINISTA, THE GLOBAL IMPACT OF THE DOBBS DECISION ON ABORTION LAWS, POLICIES, LEGISLATION, NARRATIVES, AND MOVEMENTS: FINDINGS FROM COLOMBIA, INDIA, KENYA, AND NIGERIA 2 (2023) (explaining that across Colombia, India, and Kenya, interviewees worried about how the *Dobbs* decision would affect sexual and reproductive healthcare in their respective countries); John Paul Tasker, *Trudeau Calls U.S. Court Decision Overturning Roe v. Wade 'Horrific'*, CBC (June 24, 2022), <https://www.cbc.ca/news/politics/trudeau-horrific-us-court-abortion-1.6500475> [<https://perma.cc/3BN9-U9F9>] ("Prime Minister Justin Trudeau weighed in Friday on the U.S. Supreme Court's decision to overturn decades-old jurisprudence on abortion, calling what's unfolding south of the border a 'horrific' development that threatens the right of women to choose what to do with their own bodies."); Karla Adam, *Macron Moves to Add Abortion to France's Constitution, Reacting to U.S.*, WASH. POST (Nov. 3, 2023), <https://www.washingtonpost.com/world/2023/11/03/abortion-constitution-france/> [<https://perma.cc/W5ER-2DGE>] ("Macron has declared on social media that by next year 'the right of women to choose abortion will become irreversible.'"); Kaly Soto, *World Leaders React to Roe Ruling*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/world-leaders-react-to-ro-e-ruling.html> (last visited Feb. 5, 2024) ("Verónica Cruz, the leader of Las Libres, a prominent reproductive rights group [in Mexico], said that after the Supreme Court's ruling on Friday, she plans to redouble [her efforts to help Americans continue to have abortion access]."); Arturo Zaldivar (@ArturoZaldivarL), TWITTER (June 24, 2022), <https://twitter.com/ArturoZaldivarL/status/1540348763964813318> [<https://perma.cc/F78A-P9A3>] (commenting that the day of the *Dobbs* decision was one of his proudest to be a member of Mexico's Supreme Court (SCJN), referring to the SCJN's earlier ruling to decriminalize abortion); Press Release, U.N. Hum. Rts. Off. of the High Comm'r, Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade (June 24, 2022), <https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down> (last visited Feb. 23, 2024) (criticizing the *Dobbs* decision, calling it "a serious regression of an existing right that will jeopardize women's health and lives").

protecting abortions do not cover immigrants detained in federal custody.⁴¹

Since *Dobbs*, ORR is still not allowed to interfere with a UC's ability to get an abortion. Even though *J.D. v. Azar* was overturned, President Biden reaffirmed that ORR's internal policy remains.⁴² However, without the support of court precedent, this policy can be changed at the whim of the agency or the election of a new president.⁴³ States must find ways to protect abortion rights for all persons, including detained immigrant youth.

It is important to emphasize that protecting abortion rights for UCs is only a part of what it means to achieve reproductive justice. The detention of immigrant children itself violates their right to bodily autonomy. The rampant sexual assault that takes place in detention centers violates their bodily autonomy. The disregard of individual children's medical needs violates their bodily autonomy. In addition to advocating for the inclusion of detained immigrant youth into discussions on reproductive rights, this Comment is also a plea for the abolition of our harmful immigration systems that do nothing but cause more harm.

Part I of this Comment provides a background on the rights of both immigrants and children under the Constitution, differentiating them from an adult United States citizen. Part II describes the treatment of children in immigrant detention. Part III details the history of abortion rights in the United States and how detained immigrants exercised these rights until the *Dobbs* decision. Part IV argues that the current efforts by some states to protect abortion rights post-*Dobbs* do not effectively ensure that those rights are available to minors in immigrant detention, and proposes that states incorporate abortion protections into child welfare laws.

I. THE RIGHTS OF CHILDREN AND IMMIGRANTS UNDER THE CONSTITUTION

Part I of this Comment examines the constitutional rights of immigrants and the constitutional rights of children to provide an overview of the rights of unaccompanied migrant children and their unique status under the custody of the federal government.

41. See *infra* section IV.A.

42. OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., FIELD GUIDANCE – REVISED NOVEMBER 10, 2022 (FIRST ISSUED OCTOBER 1, 2021): RE: FIELD GUIDANCE #21 – COMPLIANCE WITH *GARZA* REQUIREMENTS AND PROCEDURES FOR UNACCOMPANIED CHILDREN NEEDING REPRODUCTIVE HEALTHCARE (2022) [hereinafter FIELD GUIDANCE #21].

43. See *infra* section IV.A; *infra* note 327 and accompanying text.

A. *The Plenary Power Doctrine and the Rights of Immigrants*

The federal government determines the rights of immigrants.⁴⁴ Legal scholars widely view *Chae Chan Ping v. United States*⁴⁵ as the birth of the plenary power doctrine,⁴⁶ or the idea that the legislative and executive branches have broad control and power to enforce immigration and permit foreign people to enter the United States.⁴⁷ *Chae Chan Ping*, a Chinese immigrant residing in California, challenged the constitutionality of the Chinese Exclusion Act of 1882 after he was denied reentry to the United States after a trip abroad.⁴⁸ The Supreme Court, however, upheld the Chinese Exclusion Act, reasoning that Congress had the authority to exclude noncitizens as an essential element of national sovereignty.⁴⁹

Following *Chae Chan Ping*, the Court continued to be deferential to Congress and the executive branch about immigration matters.⁵⁰ In *Fong Yue Ting v. United States*,⁵¹ the Court upheld legislative and executive authority to deport noncitizens who were already settled in the United States.⁵² Justice Gray, writing for the Court, stated,

“[t]he power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.” . . . The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and

44. See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

45. 130 U.S. 581 (1889).

46. E.g., David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015); Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 555 (2008); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 13 (2003); see also, e.g., Margaret H. Taylor & Kit Johnson, *"Vast Hordes . . . Crowding in upon Us": The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 185 (2015) (explaining how *Chae Chan Ping* is known for laying the foundations of the plenary power doctrine); Victor C. Romero, *Elusive Equality: Reflections on Justice Field's Opinions in Chae Chan Ping and Fong Yue Ting*, 68 OKLA. L. REV. 165, 165 (2015) (saying *Chae Chan Ping* is “credited for introducing the plenary power doctrine to immigration law”).

47. Thamkul, *supra* note 46, at 555.

48. *Ping*, 130 U.S. at 582.

49. *Id.* at 603–04, 609.

50. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893) (explaining that whether a noncitizen is allowed to stay in the United States is for Congress and the executive to answer, not the Court).

51. 149 U.S. 698 (1893).

52. *Id.* at 713–15; *id.* at 728–29.

unqualified as the right to prohibit and prevent their entrance into the country.⁵³

Chae Chan Ping and *Fong Yue Ting* have a lasting legacy and are notorious among legal scholars.⁵⁴ These cases cemented Congress' ability to create immigration laws with very little judicial oversight or constitutional scrutiny.⁵⁵ Since these decisions, the Court has seldom reigned in the other branches' ability to regulate immigration as they see fit.⁵⁶ These decisions also cemented the idea that the very foundations of U.S. immigration law are rooted in discrimination on the basis of both citizenship and race.⁵⁷ To this day, the legislative and executive branches have practically absolute power to exclude and deport noncitizens.⁵⁸

Congress has authority over naturalization⁵⁹ and laws governing the right to admit noncitizens under Article I, Section 8 of the United States Constitution.⁶⁰ It shares governance of immigration matters and

53. *Id.* at 707 (quoting *Ping*, 130 U.S. at 606–07).

54. See Sam Erman, *Status Manipulation in Chae Chan Ping v. United States*, 121 MICH. L. REV. 1091, 1091 (2023) (“[T]his so-called *Chinese Exclusion Case* upheld the unfair and racist Chinese Exclusion Act of 1888. Today, that precedent insulates governmental discrimination against [noncitizens] at borders from meaningful constitutional scrutiny.”); see also Rose Cuisson-Villazor, *Chae Chan Ping v. United States*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 74 (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig eds., 2022) (rewriting the *Chae Chan Ping* decision under a critical race theory lens and holding the Chinese Exclusion Act unconstitutional for violating the Fifth Amendment’s Due Process Clause); Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1098 (2021) (“Justifying deportation as incident to sovereignty in the United States requires a return to nineteenth century legal arguments, made by Supreme Court justices in the 1880s in [*Chae Chan Ping* and *Fong Yue Ting*] that sought to justify the racist exclusion of Asian nationals from the United States.”); Romero, *supra* note 46, at 166–67 (“Most students of immigration law remember *Chae Chan Ping v. United States* for the proposition that Congress has plenary power to exclude noncitizens—including returning residents—for any reason, including race.”).

55. Sixteen years after *Fong Yue Ting* was decided, Justice Harlan wrote in *Oceanic Steam Navigation Co. v. Stranahan* that “over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of noncitizens].” 214 U.S. 320, 339 (1909). In *Boutilier v. I.N.S.*, the Court reaffirmed plenary power over immigration: “It has long been held that the Congress has plenary power to make rules for the admission of [noncitizens] and to exclude those who possess those characteristics which Congress has forbidden.” 387 U.S. 118, 123 (1967).

56. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) (“Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”).

57. See *supra* note 54 and accompanying text.

58. Cházaro, *supra* note 54, at 1099.

59. Martin, *supra* note 46, at 34.

60. U.S. CONST. art. I, § 8, cl. 4; *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003).

enforcement of immigration laws with the executive branch.⁶¹ The executive branch has the authority to enact and enforce the immigration policy through the President's role as Commander in Chief, their power over foreign affairs, and general enforcement powers outlined in Article II.⁶² Today, this executive power takes form through actions by DHS, HHS, Department of State (DOS), and Department of Justice (DOJ).⁶³

Since Congress first started to formally regulate immigration, noncitizens have not been afforded the same rights as U.S. citizens.⁶⁴ When examining Congress' disparate treatment of noncitizens, courts do not consider the permissibility of discrimination against noncitizens generally, but instead determine the permissibility of discrimination within a specific category of noncitizens.⁶⁵ Since its inception, immigration law has viewed noncitizens as a subordinate class.⁶⁶ The United States' historic bias against immigrants is important to keep in mind when thinking about the evolution of U.S. immigration policy and how changes to the norms governing immigration can be pursued.

B. *The Rights of Children*

As discussed in the previous section, the government has more authority to regulate immigrant noncitizens than it does to regulate citizens.⁶⁷ Similarly, the government has more authority to regulate

61. U.S. CONST. art. II, § 2, cl. 1 (granting the President foreign policy powers as "Commander in Chief"); *id.* § 3 (granting the President the right to "receive Ambassadors and other public Ministers" and "take Care that the Laws be faithfully executed"); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir.), *superseded*, 932 F.3d 742 (9th Cir. 2018) ("The Constitution also vests power in the President to regulate the entry of [noncitizens] into the United States.").

62. *See* U.S. CONST. art. II.

63. STRAUT-EPPSTEINER, *supra* note 11, at 1; WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2021).

64. *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). For example, Congress has no duty to provide all noncitizens with welfare benefits that are given to citizens. *Id.* at 80. Because the federal government holds such broad power over immigration, there are times where detained noncitizens have not been guaranteed the ability to exercise certain rights that are afforded to citizens of a particular state. *See infra* section IV.B (explaining litigation over abortion access for detained immigrant children even though at the time abortion access was a constitutional right).

65. *See id.* at 78–83 (holding that Congress has the authority to provide welfare benefits to legal permanent residents who have been in the United States for five years and not other noncitizens without violating the Due Process Clause).

66. *See supra* note 54 and accompanying text.

67. *See supra* section I.A.

children than adults.⁶⁸ UCs fall into both categories. Therefore, in order to understand the law governing the treatment of UCs, it is important to understand the legal standards regarding children's rights in addition to understanding those of noncitizens.

Law surrounding child welfare dates back to English common law and the *parens patriae* doctrine.⁶⁹ *Parens patriae*, meaning “parent of the country or homeland” in Latin, was the idea that the Crown had the duty and authority to protect people who were incapable of caring for themselves, including children.⁷⁰ Under this doctrine, the government has an inherent interest in protecting the safety and welfare of children.⁷¹

The “best interests of the child” standard is an outgrowth of the *parens patriae* doctrine, which has become engrained in American jurisprudence.⁷² Like *parens patriae*, the “best interest” standard is founded on a view of children that emphasizes their vulnerability and dependence on others.⁷³ Although originally the standard was used in family law,⁷⁴ now the “best interests” standard has been expanded to criminal,⁷⁵ immigration,⁷⁶ and abortion rights⁷⁷ cases involving children. While this standard is pervasive, it is ill-defined.⁷⁸ Much like the elusive “reasonable person” standard in tort law,⁷⁹ the ambiguity of “best

68. Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 11 (2004).

69. Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 284 (2021); DOUGLAS E. ABRAMS, SUSAN VIVIAN MANGOLD & SARAH H. RAMSEY, CHILDREN AND THE LAW IN A NUTSHELL 10–11 (7th ed. 2021).

70. *Parens Patriae*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/parens_patriae [<https://perma.cc/84FH-5CQK>] (last updated May 2022).

71. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57–58 (1890).

72. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 345–47 (2008).

73. *See id.* at 340–48.

74. *Id.* at 351.

75. *E.g., id.* at 350.

76. *E.g., Reno v. Flores*, 507 U.S. 292, 303–04 (1993); 8 U.S.C. § 1232(c)(2)(A) (requiring UCs to be placed in the “least restrictive setting that is in the best interest of the child”).

77. *E.g., Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (plurality opinion).

78. *See Kohm, supra* note 72, at 337; Hon. Carl Funderburk, *Best Interest of the Child Should Not Be an Ambiguous Term*, 33 CHILD.’S LEGAL RTS. J. 229, 229 (2013).

79. Mayo Moran, *The Reasonable Person: A Conceptional Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1240 (2010) (“[A]s every first-year torts student soon learns, the actual configurations of the reasonable person standard are . . . complex Most obviously perhaps, the standard is always calibrated by what is reasonable ‘under [the] circumstances.’ . . . [W]hat the case law reveals is not a uniform norm of reasonableness applied to all but rather a standard that is often, though not inevitably, adjusted to mirror the actual qualities of the litigant in question.” (fourth alteration in original) (citation omitted)).

interests” leaves a lot of discretion to “decision makers.”⁸⁰ Whether it be family court judge,⁸¹ administrative officer,⁸² or even Supreme Court justice⁸³ deciding, a child’s best interests are informed by each person’s “own set of values, thoughts, and practices regarding child-rearing.”⁸⁴

Because a child is dependent on an adult to fulfill their basic needs, child welfare laws are often phrased as positive rights.⁸⁵ Development of positive rights echoes the *parens patriae* doctrine and the “best interests” standard—the government has an affirmative duty to protect children, even if it means curbing parental rights.⁸⁶ Positive rights “provide something that people need to secure their well being.”⁸⁷ They impose a minimum duty on a child’s parents or guardians to provide things like shelter, food, and care.⁸⁸ This is in contrast to negative rights, which are more commonly applied to adults and only “prevent the state from violating individual autonomy.”⁸⁹ For example, the State may not be able to interfere with an adult’s property interests but also has no duty to ensure every adult has a property interest.⁹⁰

Most child welfare laws are determined by individual states and localities.⁹¹ At the federal level, the

80. See Funderburk, *supra* note 78, at 229.

81. See, e.g., Kohm, *supra* note 72, at 350–51 (noting the prevalence of this standard in family law).

82. See, e.g., FIELD GUIDANCE #21, *supra* note 42, at 3 (describing how ORR’s transfers of pregnant youth will consider the “best interest[s]” of each child).

83. See, e.g., *Reno v. Flores*, 507 U.S. 292, 303–04 (1993) (using the “best interests of the child” standard to evaluate the constitutionality of children in immigrant detention).

84. Funderburk, *supra* note 78, at 229.

85. See, e.g., Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 3 (2004) (“[Children’s] very dependence and capacity for growth call for a positive right to protection and to the means necessary for their development.”).

86. See *id.* at 13.

87. Manuel Velasquez, Claire Andre, Thomas Shanks & Michael J. Meyer, *Rights*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Aug. 8, 2014), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights/> [https://perma.cc/8XT6-F3UP].

88. See Lee E. Teitelbaum, *Children’s Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 804 (1999) (“All children are entitled to a variety of what might be called ‘welfare rights,’ such as to nutrition, food, shelter, education, and the like.”); see also Ezer, *supra* note 85, at 15 (“The parental best interest presumption . . . can be rebutted by a showing that the parent is unfit and that it is necessary for the state to step in and protect the child from harm.”); Funderburk, *supra* note 78, at 245–46 (writing that parents, and if not parents, the State, must act in the best interest of the child, establishing a positive right for children to grow up with certain welfare standards).

89. Ezer, *supra* note 85, at 4.

90. See *id.* at 7.

91. See CHILD WELFARE INFO. GATEWAY & CHILD’S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 1–2 (2020), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cpswork.pdf> [https://perma.cc/KT2W-FFX8].

Child Abuse Prevention and Treatment Act (CAPTA)⁹² establishes minimum guidelines and evaluates state child welfare programs, leaving states responsible for setting most standards and specific practices.⁹³ For example, to comply with CAPTA, states must create a child welfare system and laws to protect children from abuse or neglect,⁹⁴ but get to decide what constitutes “abuse” or “neglect.”⁹⁵ By not defining these terms, CAPTA leaves it to the states to determine some of the minimum duties parents or custodians owe to children.⁹⁶ Other federal statutes require states to decide the minimum requirements for services and support that must be provided to children by licensed foster care⁹⁷ and childcare facilities.⁹⁸

The government’s duty to protect children puts them in a unique place in the law.⁹⁹ While the law grants children certain assurances in some contexts, it also limits their autonomy and choice in others.¹⁰⁰ This tension

92. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 5 (codified as amended at 42 U.S.C. §§ 5101–5116i).

93. See *id.* § 5106; CHILD WELFARE INFO. GATEWAY & CHILD.’S BUREAU, *supra* note 91, at 2.

94. 2.1 CAPTA, *Assurances and Requirements*, CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS. (2019), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=64 [<https://perma.cc/484V-66YA>] (“There are five assurances in CAPTA that require provisions in State law. Those are: 1) a law for mandatory reporting by individuals required to report child abuse and neglect; 2) provisions for immunity from civil or criminal liability under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect, or who otherwise provide information or assistance . . . ; 3) upon implementation of provisions, procedures or mechanisms to assure that the State does not require reunification of a surviving child with a parent who has committed certain felonies, that conviction of any one of those felonies constitute grounds under State law for the termination of parental rights of the convicted parent as to the surviving children; 4) authority under State law for the State CPS system to pursue any legal remedies . . . ; and 5) authority under State law to permit the State’s CPS system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, to provide medical care or treatment for a child when such care or treatment is necessary to prevent or remedy serious harm to the child, or to prevent the withholding of medically indicated treatments from disabled infants with life-threatening conditions.” (citations omitted)).

95. CHILD WELFARE INFO. GATEWAY & CHILD.’S BUREAU, *supra* note 91, at 2 (“Each state has its own laws that define abuse and neglect, the reporting obligations of individuals, and the required State and local child protective services (CPS) agency interventions.”).

96. See CHILD WELFARE INFO. GATEWAY & CHILD.’S BUREAU, *DEFINITIONS OF CHILD ABUSE & NEGLECT* 3 (2022) (explaining how different states might impose a duty on caregivers to ensure a child goes to school or receives adequate medical care).

97. U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-104670, *HHS SHOULD FACILITATE INFORMATION SHARING BETWEEN STATES TO HELP PREVENT AND ADDRESS MALTREATMENT IN RESIDENTIAL FACILITIES* (2022).

98. *Id.* at 9–10.

99. See Funderburk, *supra* note 78, at 245–46.

100. *Id.* at 230.

and children's unique role in the legal landscape are fundamental to understanding the rights of unaccompanied immigrant children.

II. THE RIGHTS OF UNACCOMPANIED CHILDREN IN ORR DETENTION

Part II details the rights of unaccompanied migrant children. UCs are both children and noncitizens, and the laws governing their rights and freedoms incorporate the legal frameworks applied to both areas.

A. *Who Are Unaccompanied Migrant Children?*

In 2022, 152,057 UCs entered the United States at the Southwest border.¹⁰¹ This is 5,132 more than in 2021¹⁰² and 83,516 more than in 2014.¹⁰³ The high rate of unaccompanied youth crossing the Southwest border is part of a larger migration trend that has been unfolding since 2008.¹⁰⁴ The majority of unaccompanied youth entering the United States come from the “Northern Triangle” (Guatemala, Honduras, and El Salvador) and travel through Mexico.¹⁰⁵ From 2012 to 2017, affirmative asylum applications from people from the Northern Triangle increased from 3,523 to 31,066.¹⁰⁶ From 2012 to 2017, unaccompanied youth made up sixty-six percent of those applications.¹⁰⁷

Most asylum-seeking youth are fleeing epidemic levels of gender-based, domestic, and gang violence, as well as extreme poverty—while often trying to reunite with family members.¹⁰⁸ In more recent years, extreme and irregular weather patterns have caused agricultural industries to suffer, resulting in famine and increasing extreme poverty in the

101. *Southwest Land Border Encounters*, *supra* note 2.

102. *Id.*

103. *Southwest Border Unaccompanied Alien Children FY 2014*, U.S. CUSTOMS & BORDER PROT., <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014> [<https://perma.cc/V3SF-BKTG>] (last modified Oct. 13, 2016).

104. *Growing Numbers of Children Try to Enter the U.S.*, TRAC (June 28, 2022), <https://trac.syr.edu/immigration/reports/687/> [<https://perma.cc/G74K-HD2R>].

105. *Id.*

106. ACKERMAN ET AL., *supra* note 5, at 4.

107. *Id.*

108. In a report completed by Physicians for Human Rights from 2014 to 2018, seventy-eight percent of the evaluated children were direct victims of physical violence, and eighteen percent suffered sexual violence. *Id.* at 2; *see also* Diana Roy & Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (July 13, 2023), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle> [<https://perma.cc/Y3NS-UYFM>] (explaining that violence and poverty are some of the factors that push people to leave the Northern Triangle and immigrate to the United States).

Northern Triangle.¹⁰⁹ As long as violence, poverty, and these extreme weather patterns continue, youth are likely to continue making the choice to immigrate to the United States.¹¹⁰

The journey to the Southwest border is treacherous, especially for women and young girls.¹¹¹ Migrants traveling through Mexico are targeted by gang members, traffickers, other migrants, and corrupt officials who know that they are vulnerable.¹¹² About eighty percent of women and girls migrating from Central America are sexually assaulted.¹¹³ Sexual assault is so prevalent that some smugglers require women and girls to receive a contraceptive shot before beginning the journey to prevent unwanted pregnancy.¹¹⁴ The journey has gotten even more dangerous as the Mexican and United States governments have cracked down on Central American migrants coming to Mexico and imposed additional restrictions following the coronavirus (COVID-19) pandemic.¹¹⁵ Many of these policies have increased police presence at entry points, causing migrants to travel farther distances or on more remote routes, which increases their risk of encountering a crime group.¹¹⁶ Multiple organizations have reported that groups of migrants have been more frequently abandoned by their smugglers, further increasing their vulnerability.¹¹⁷ Despite the danger they face coming to the United States, many migrant youth come because it is their only option.¹¹⁸

When an immigrant child who is traveling alone is apprehended at the border by a CBP officer, they are first placed in a temporary holding facility.¹¹⁹ There, officers determine whether the child meets the legal definition of a UC: whether the child is under eighteen years old, is

109. LAURA SIGELMANN, *THE HIDDEN DRIVER: CLIMATE CHANGE AND MIGRATION IN CENTRAL AMERICA'S NORTHERN TRIANGLE* 1 (2019).

110. *See id.* at 2, 6–7.

111. *See* Koushik, *supra* note 10, at 258 (noting the high percentages of rape among women and girls migrating to the United States).

112. CENTRO DE DERECHOS HUMANOS FRAY MATÍAS DE CÓRDOVA A.C., *LA 72 HOGAR-REFUGIO PARA MIGRANTES & KIDS IN NEED OF DEFENSE, BLOCKED FROM PROTECTION: UNACCOMPANIED MIGRANT CHILDREN ON MEXICO'S SOUTHERN BORDER* 3, 7–9 [hereinafter *BLOCKED FROM PROTECTION*]; ISACSON ET AL., *supra* note 8, at 2.

113. Koushik, *supra* note 10, at 258–59; Bonello & Siegal McIntyre, *supra* note 19 (“A staggering 80 percent of Central American girls and women crossing Mexico en route to the United States are raped along the way That’s up from previous reports by non-profit organizations like Amnesty International that estimate the number at 60 percent.”).

114. Koushik, *supra* note 10, at 259; Bonello & Siegal McIntyre, *supra* note 19.

115. *See* *BLOCKED FROM PROTECTION*, *supra* note 112, at 3, 7–8.

116. *Id.*

117. *Id.* at 8.

118. *See* Koushik, *supra* note 10, at 259.

119. KANDEL, *supra* note 63, at 6–7.

without immigration status, and is accompanied by a parent or guardian.¹²⁰ During this time, the child may also make initial claims for asylum or a well-founded fear of persecution.¹²¹ Unlike adults in immigration detention, UCs are not held by DHS in long-term custody.¹²² After CBP determines a child is a UC, they must transfer the child to the custody of ORR, situated under HHS, within seventy-two hours unless there are “exceptional circumstances.”¹²³ At this same time, CBP must also give the child a formal notice to appear for removal proceedings.¹²⁴

ORR must “ensur[e] that the interests of the child are considered in decisions and actions relating to the[ir] care and custody.”¹²⁵ Considering a child’s best interest includes placing them in the least restrictive setting possible.¹²⁶ With this in mind, children who do not have an available parent, guardian, or licensed program willing to care for them remain in the custody of an ORR residential facility.¹²⁷ ORR uses multiple types of childcare facilities to detain UCs, which include: short-term and long-term foster care; shelters and group homes; therapeutic foster care and residential treatment centers; and staff-secure and secure facilities.¹²⁸

The *Flores* Agreement,¹²⁹ the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),¹³⁰ and the Homeland Security Act of 2002 (HSA)¹³¹ provide criteria to determine the kind of facility a child is detained in and regulate the conditions of each facility.¹³² These pieces of binding law are outlined in the following section.

120. *Id.*; 8 U.S.C. § 1232(a)(4).

121. Children who are from a contiguous country, including Mexico, *must* make a well-founded fear claim if they do not want to be returned to their home country. 8 U.S.C. § 1232(a)(2).

122. *See id.* § 1232(b)(3).

123. *Id.*

124. *See* KANDEL, *supra* note 63, at 17 n.95.

125. 6 U.S.C. § 279(b)(1)(B).

126. 8 U.S.C. § 1232(c)(2)(A).

127. *See* KANDEL, *supra* note 63, at 12.

128. WOMEN’S REFUGEE COMM’N, STEP-BY-STEP GUIDE ON APPREHENSION AND DETENTION OF JUVENILES IN THE UNITED STATES 4 (2016), <https://firstfocus.org/wp-content/uploads/2016/09/Step-by-Step-Guide-on-Apprehension-and-Detention-of-Juveniles.pdf> [<https://perma.cc/49R7-LEM7>].

129. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *The Flores Agreement*].

130. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at 22 U.S.C. §§ 7101–7115).

131. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 101–681g).

132. KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., IFI 1799, CHILD MIGRANTS AT THE BORDER: THE *FLORES* SETTLEMENT AGREEMENT AND OTHER LEGAL DEVELOPMENTS 1 (2021).

B. *Laws and Policies Governing ORR Detention Conditions*

Laws governing UCs reflect their status as both children and immigrants. Like all children, UCs get special protections and considerations both regarding their custody and the adjudication of their immigration cases.¹³³ Like all immigrants, the laws governing the treatment and rights of UCs are determined by Congress; however, these laws are executed through regulations and the enforcement of the executive branch.¹³⁴ The agencies that divide these enforcement responsibilities for unaccompanied children are DHS, DOJ, and HHS.¹³⁵

DHS has multiple sub-agencies involved in immigration matters.¹³⁶ Under DHS is CBP, which is responsible for the apprehension of UCs at the border,¹³⁷ and U.S. Citizenship and Immigration Services (USCIS), which is responsible for adjudicating a UC's application or petition for immigrant and nonimmigrant status, permanent residence, or citizenship.¹³⁸ DOJ, through its sub-agency the Executive Office of Immigration Review (EOIR), governs the adjudication of cases in removal or deportation proceedings in immigration court.¹³⁹ HHS and ORR under it are responsible for the custody and care of UCs while they await the adjudication of their case.¹⁴⁰ This "alphabet soup"¹⁴¹ of federal

133. See 8 U.S.C. § 1158(b)(3)(C) (providing UCs with asylum application review by a neutral asylum officer, instead of removal proceedings in an adversarial setting); see also *id.* § 1232(c)(2)(A) (requiring UCs to be placed in the "least restrictive setting that is in the best interest of the child"); Jesse Imbriano, *From Humanitarian Crisis to Marauding Hordes: A Manufactured Outcome*, 50 CAL. W. INT'L L.J. 23, 47 (2019) ("Congress recognized that UACs require special protections when applying for asylum. . . . While Congress gave federal agencies discretion in the rulemaking process to develop such regulations, some considerations were so important that Congress incorporated them into the law.").

134. Imbriano, *supra* note 133, at 47.

135. KANDEL, *supra* note 63, at 1.

136. See *Homeland Security Department*, FED. REG., <https://www.federalregister.gov/agencies/homeland-security-department> [<https://perma.cc/4TWT-S88M>].

137. KANDEL, *supra* note 63, at 1, 6–7.

138. *Id.*

139. *Id.* It should be noted that due to the special protections granted to UCs, they often do not have to go through the process of having their cases adjudicated in an adversarial setting in immigration court. See *id.* at 15 (noting that USCIS has initial jurisdiction over an unaccompanied youth's asylum claim); ANDORA BRUNO, CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 4 (2019) (distinguishing the asylum interview process as being "nonadversarial" per federal regulations); 8 U.S.C. § 1158(b)(3)(C). They typically can have their case adjudicated before USCIS or an asylum officer. BRUNO, *supra*, at 4.

140. 6 U.S.C. §§ 279(a)–(b).

141. The "alphabet soup" of immigration oftentimes refers to the many agencies, statutes, and names of particular visas that contain an array of letters. See U.S. Citizenship & Immigr. Serv., *USCIS*

agencies that make up immigration enforcement are “confusing,”¹⁴² “difficult”¹⁴³ and “complex” for applicants.¹⁴⁴

The treatment of individuals in and conditions of ORR detention are determined by the *Flores* Settlement Agreement, the TVPRA, and the HSA.¹⁴⁵ These statutes and the *Flores* Agreement authorize HHS and ORR to enact policies to realize the goals of each statute.¹⁴⁶ HHS and ORR policies take multiple forms. As agencies,¹⁴⁷ they can issue a regulation or rule through notice and comment rulemaking.¹⁴⁸ To issue a regulation an

Plain Language: Acronyms, YOUTUBE (Aug. 13, 2018), <https://www.youtube.com/watch?v=IwHr4Bico2M> (last visited Feb. 6, 2024); Blair Wheat, *Employing Strategic Immigration Practices to Leverage U.S. Immigration Regulation & Policy to Gain Competitive Advantage in the 21st Century Age of Technology*, INT’L IN-HOUSE COUNS. J., <https://www.iicj.net/library/detail?key=952> [https://perma.cc/3SHF-J4EL] (“[I]mmigration law is affectionately referred to as the ‘Alphabet Soup of Visas’ and the ‘ABCs of Executive Agencies’ by those who practice this discipline.”); Koushik, *supra* note 10, at 261 (“[T]here is a veritable alphabet soup of agencies involved in the welfare of immigration detainees.”); Andrew Dressel, *U.S. Immigration Agencies – Understanding the Alphabet Soup of Immigration*, DRESSSEL/MALIKSCHMITT LLP (Nov. 2, 2018), <https://dresselmalikschmitt.com/u-s-immigration-agencies-understanding-the-alphabet-soup-of-immigration/> [https://perma.cc/8YCA-X583] (providing a “guide to the basics of th[e] alphabet soup of U.S. immigration agencies, courts and departments”); *see also* DHS, CIS, I-9, ICE, EAD, H1B, F1, OMG!: *FAQ’s About Immigration’s Alphabet Soup*, LIEBERT CASSIDY WHITMORE: CAL. PUB. AGENCY LAB. & EMP. BLOG (Nov. 20, 2020), <https://www.calpublicagencylaboremploymentblog.com/employment/dhs-cis-i-9-ice-ead-h1b-f1-omg-faqs-about-immigrations-alphabet-soup/> [https://perma.cc/DU9Y-BS8D] (“The world of immigration law can be a bewildering jumble of acronyms, statutes, regulations, and policy directives that leave many . . . exasperated and with whiplash.”).

142. *See, e.g.*, LawInfo Staff, *U.S. Immigration Agencies and Offices*, LAWINFO (July 20, 2022), <https://www.lawinfo.com/resources/immigration/us-immigration-agencies-and-offices.html> (last visited Feb. 6, 2024) (explaining that starting the immigration process “is often confusing because of the number of agencies involved”); *Introduction to Immigration Law Research*, CORNELL UNIV. LIBR., https://guides.library.cornell.edu/immigration_law [https://perma.cc/Y25D-YCFR] (last updated July 28, 2021) (“Perhaps the most confusing aspect of United States immigration law research to the beginner is the many different federal agencies that bear some responsibility for regulating and administering immigration matters.”).

143. *See, e.g.*, AM. IMMIGR. COUNCIL, *ASYLUM IN THE UNITED STATES 1* (2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_united_states_update_jan_2024.pdf [https://perma.cc/RJH6-S3KQ] (explaining how navigating the asylum process is “difficult and complex” because applicants often must submit documents to multiple agencies).

144. *Id.*

145. SANTAMARIA, *supra* note 132, at 1.

146. *See, e.g.*, 6 U.S.C. § 279(b)(1)(E) (authorizing ORR to “implement[] policies with respect to the care and placement of unaccompanied . . . children”); 8 U.S.C. § 1232(c)(2)(A) (requiring unaccompanied noncitizen child placement be “in the least restrictive setting that is in the best interest of the child”).

147. *A–Z Index of U.S. Government Departments and Agencies*, USAGOV, <https://www.usa.gov/agency-index/d#D> [https://perma.cc/69LQ-UKW4].

148. *See* 5 U.S.C. § 553; *see also id.* § 551(5) (“[R]ule making’ means agency process for formulating, amending, or repealing a rule . . .”).

agency must publish the proposed rule in the Federal Register¹⁴⁹ and give the public or interested parties meaningful opportunity to comment.¹⁵⁰ Once a rule is enacted, the only way it can be altered or rescinded is if the notice and comment process occurs again.¹⁵¹

While rules can take years to adopt and rescind, HHS and ORR can also create policies that do not have to go through notice and comment rulemaking.¹⁵² Nonlegislative rules, including general policy statements, rules that govern internal agency procedures, or interpretive rules do not require notice and comment periods.¹⁵³ Nonlegislative rules provide guidance and explain how the agency plans to enforce a particular law or regulation and often take the form of an agency manual, advisory notice, internal guidance to agency field inspectors, or a letter from government officials to regulated agencies.¹⁵⁴ Despite the ease of adopting guidance documents and nonlegislative rules, they can be rescinded just as easily.¹⁵⁵

C. *The Flores Agreement*

The *Flores* Agreement is a consent decree that went into effect after twelve years of litigation.¹⁵⁶ The *Flores* Agreement resulted from a lawsuit in 1985 by Jenny Lisette Flores, the named party in a class action filed against Immigration and Naturalization Services (INS), the federal agency in charge of immigration at the time.¹⁵⁷ Plaintiffs asserted that the

149. *Id.* § 553(b).

150. *Id.* § 553(c).

151. *See id.* § 551(5). Because the definition of “rule making” includes amending existing rules, amending existing rules requires the same notice and comment procedures as a new rule. *See id.*

152. *See id.* § 553(b)(A).

153. *Id.*

154. Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 350–51 (2009).

155. *See* 5 U.S.C. § 553. Only legislative rules are subject to notice and comment rulemaking procedures. *Id.*; *see also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 83 (1995) (warning about the overuse of nonlegislative rules that “agencies [are] free to issue, amend, or rescind [nonlegislative] rules quickly, inexpensively, and without following any statutorily prescribed procedures”); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 285 (2010) (“In addition to being exempt from notice and comment, [nonlegislative] rules tend to be unencumbered by the other procedural requirements that have been imposed on the rulemaking process by Congress, the executive, and the courts.”); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1323 (2001) (calling a nonlegislative rule “a glorified press release”). In explaining the limitations of policy statements as legislative rules, scholar William Funk acknowledges how even though they are not legally binding, they allow agencies to adapt or change their policy if they receive new information. *Id.* at 1334.

156. *See* SANTAMARIA, *supra* note 132, at 1 (stating that the original lawsuit was filed in 1985 and that the agreement was not reached until 1997).

157. INS was the agency replaced by DHS. *Id.*

detention of UCs and the conditions of their detention violated the Due Process Clause.¹⁵⁸ Jenny and many other children were routinely strip searched¹⁵⁹ for no reason.¹⁶⁰ They were denied education, visitation, and recreation.¹⁶¹ They were also housed with “adults of both sexes.”¹⁶² In 1987, at the district court level, both parties agreed to improve INS detention conditions for minors in the Western Region;¹⁶³ however, the constitutionality of their detention itself remained in dispute and ultimately reached the Supreme Court in *Reno v. Flores*.¹⁶⁴

There, the Court maintained that if a child in immigrant detention has no parent or legal guardian who can take custody of them, it is constitutional and within the powers of the federal government to take custody of the child as long as “minimum requirements of child care are met.”¹⁶⁵ In the decision, the Supreme Court wrestled with the overlapping status UCs hold as children and non-citizens and determined what rights the UCs are entitled to.¹⁶⁶ The Court justified the detention of UCs by discussing the need for the government to assume custody of a child when their parents or relatives are unavailable.¹⁶⁷ Although the Court

158. *Flores ex rel. Galvez-Maldonado v. Meese*, 934 F.2d 991, 995 (9th Cir. 1990), *vacated on reh'g*, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

159. *Flores v. Meese*, 681 F. Supp. 665, 666 (C.D. Cal. 1988), *aff'd sub nom. Flores ex rel. Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

160. *Flores ex rel. Galvez-Maldonado*, 934 F.2d at 1014 (Fletcher, J., dissenting).

161. *Id.*

162. *Id.*

163. *See id.* (“The district court approved a partial settlement whereby the INS agreed to provide education, reasonable visitation rights, and recreation as well as to cease commingling detained minors with unrelated adult prisoners. Subsequently, without agreement of the INS, the court ordered the INS to cease strip searching the children unless it had reasonable suspicion to believe they were concealing weapons or contraband.”); *The Flores Agreement*, *supra* note 129, at 3 (“[O]n November 30, 1987, the parties reached a settlement agreement requiring that minors in INS custody in the Western Region be housed in facilities meeting certain standards, including state standards of the housing and care of dependent children.”).

164. 507 U.S. 292 (1993).

165. *Id.* at 303–04.

166. *See id.* at 303–05 (explaining the fundamental rights of children); *id.* at 305–06 (weighing a child’s best interest against Congress’ broad immigration powers).

167. *Id.* at 303. Although overturned, the Ninth Circuit decision gave more elaboration on how the rights of children informed the court. In the opinion, Judge Wallace rehashed the expansive power over immigration that belongs to the political branches of government and the limited opportunity for judicial review when analyzing whether substantive due process applied to Flores and the class. *See Flores ex rel. Galvez-Maldonado v. Meese*, 934 F.2d 991, 1004–08 (1990); *id.* at 1008 (“Recognizing that children possess ‘fundamental rights which the State must respect’ is ‘but the beginning of the analysis.’ The Supreme Court has often stated that constitutional rights of children are not coextensive with those of adults.” (citations omitted) (first quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*,

acknowledged the “best interests” standard,¹⁶⁸ in its view, the standard did not mean the government as custodians for UCs had to “provide the *best* schooling or the *best* health care available”¹⁶⁹ so long as conditions were “adequate.”¹⁷⁰ As long as immigration detention facilities followed a 1987 agreement between the parties, these facilities could restrain a UC’s autonomy, similar to a child in the legal custody of their parents.¹⁷¹ The Court also justified the detention of UCs via their immigration status,¹⁷² returning to the same rhetoric that it used in early immigration cases.¹⁷³ Citing Congress’ plenary powers to govern immigration, the Court quashed all arguments challenging the constitutionality of detaining UCs.¹⁷⁴

On remand from the Supreme Court, both parties drafted the *Flores* Agreement, which set a nationwide policy for the detention, release, and treatment of minors in INS custody.¹⁷⁵ The Agreement acknowledges that the states where the children are detained determine the minimum acceptable conditions for youth immigrant detention.¹⁷⁶ Because of this consent decree, detention facilities must comply with state child welfare laws and “building, fire, and health and safety codes.”¹⁷⁷ Under these requirements, detention facilities must provide physical care, individual and group counseling, recreation and leisure-time activities, family reunification services, religious accommodations, and they must facilitate access to visitors and legal services.¹⁷⁸ Detention facilities must also

393 U.S. 503, 511 (1969); and then quoting *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion)); *id.* at 1009 (“We view the INS’s regulation as an exercise of governmental power which takes into account the peculiar vulnerability of [noncitizen] children. The exercise of such power does not encroach upon a fundamental right. . . . But, once more, we must fashion our review based upon the type of case before us. Even where a fundamental right is arguably at stake, there is a strong presumption for rational basis review in the context of immigration cases.”).

168. *See Reno*, 507 U.S. at 303–05.

169. *Id.* at 304 (emphasis in original).

170. *Id.* at 304.

171. *Id.* at 298; *id.* at 302 (“[J]uveniles, unlike adults, are always in some form of custody,’ and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so.” (emphasis in original) (citation omitted) (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984))).

172. *See id.* at 305–06.

173. *See supra* section I.A.

174. *Reno*, 507 U.S. at 305.

175. The *Flores* Agreement, *supra* note 129, at 6 (“This Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS and shall supersede all previous INS policies that are inconsistent with the terms of this Agreement.”).

176. *See id.* at Ex. 1(A).

177. *Id.*

178. *Id.*

provide proper medical care to children in their custody, including “family planning services[] and emergency healthcare services . . . within 48 hours of admission.”¹⁷⁹ The Agreement loosely defines these medical terms, meaning that unless state child welfare laws elaborate more, INS, and today ORR, retain a lot of discretion over the medical care detained UCs are entitled to.¹⁸⁰

The *Flores* Agreement was meant to be a temporary fix and its conditions were meant to be codified into federal regulation.¹⁸¹ Parts of the Agreement that govern the standards of detention centers were codified and accepted by the court.¹⁸² However, despite the Agreement’s temporary nature, it continues to be a source of legal authority that requires ORR detention facilities to comply with state child welfare law and policy.¹⁸³

The TVPRA codified certain protections for detained UCs that were stipulated to in the *Flores* Agreement.¹⁸⁴ Under the TVPRA, UCs must be transferred to ORR custody within seventy-two hours,¹⁸⁵ and UCs must be placed within the “least restrictive setting that is in the best interest of the child.”¹⁸⁶ The TVPRA also grants UCs special protections by changing the way their cases are adjudicated. The TVPRA allows UCs seeking asylum to have their case go through a non-adversarial interview process with the asylum office instead of having to appear in immigration court.¹⁸⁷ At the border, immigrants who are apprehended typically go

179. *Id.* at Ex. 1(A)(2).

180. *See* The *Flores* Agreement, *supra* note 129, at 6 (noting how the federal agency charged with detaining unaccompanied migrant children is also charged with executing the terms of the *Flores* Agreement); *id.* at Ex. 1(A)(2) (noting how, in order to comply with the agreement, youth detention facilities must provide “[a]ppropriate routine medical and dental care” without defining “appropriate,” “routine,” or “medical care”); *see, e.g.,* Koushik, *supra* note 10, at 265–67 (discussing how, through different presidential administrations, INS/ORR has interpreted the requirement to include abortion as a part of “medical care” differently); *see also* *Reno v. Flores*, 507 U.S. 292, 304–05 (1993) (implying that “[s]o long as certain minimum requirements of child care are met” the federal government has broad discretion over the level of care they provide detained UCs).

181. *See Flores v. Rosen*, 984 F.3d 720, 727 (9th Cir. 2020).

182. *Id.* at 727, 736; KANDEL, *supra* note 63, at 5 n.33.

183. *See, e.g., Rosen*, 984 F.3d at 743 (showing the continuing authority of the Agreement absent federal regulations that comply with all of its terms); 45 C.F.R. § 410.402(b) (“Licensed programs must . . . [c]omply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes[.]”). This regulation overlaps with the Agreement. *Compare* 45 C.F.R. § 410.402(b), with The *Flores* Agreement, *supra* note 129, at Ex. 1(A).

184. *Rosen*, 984 F.3d at 728.

185. 8 U.S.C. § 1232(b)(3).

186. *Id.* § 1232(c)(2)(A).

187. *See* RUTH ELLEN WASERN, CONG. RSCH. SERV., R43664, ASYLUM POLICIES FOR UNACCOMPANIED CHILDREN COMPARED WITH EXPEDITED REMOVAL POLICIES FOR UNAUTHORIZED

through an expedited removal process,¹⁸⁸ but UCs are allowed to go through the regular removal process.¹⁸⁹ Further, UCs who arrive from either Mexico or Canada can choose to voluntarily return to their country instead of being removed, a process that does not reflect as negatively on their immigration records.¹⁹⁰ Although the TVPRA codifies many protections for UCs, it still does not address the conditions of the detention facilities themselves.¹⁹¹ Because neither the TVPRA nor any other legislation protects detained UCs to the same extent as the *Flores* Agreement, the Agreement remains in effect today.¹⁹²

D. *Current Detention Conditions for Immigrant Youth and the Need for Greater Protection*

Access to abortion and reproductive care is particularly important for youth in immigrant detention because UCs face high rates of abuse and sexual assault in their home countries and on their journeys to the United States.¹⁹³ Once in immigration custody, UCs continue to have limited

ADULTS: IN BRIEF 6–8 (2014); *see also* 8 U.S.C. § 1158(a)(2)(E) (providing that typical asylum and removal procedures do not apply to UCs); *id.* § 1158(b)(3)(C) (stating that, in the alternative, UCs may have their asylum application reviewed by an asylum officer).

188. *See* 8 U.S.C. § 1225 (regarding expedited removal).

189. *See id.* §§ 1232(a)(5)(D), 1229a (regarding removal proceedings that occur in front of an immigration judge).

190. *Id.* § 1232(a)(2); *see Dada v. Mukasey*, 554 U.S. 1, 11–12 (2008) (“Benefits to the [noncitizen] from voluntary departure are evident as well. [They] avoid[] extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); and can select the country of destination. And, of great importance, by departing voluntarily the [noncitizen] facilitates the possibility of readmission. . . . The current statute likewise allows a[] [noncitizen] who voluntarily departs to sidestep some of the penalties attendant to deportation. Under the current Act, a[] [noncitizen] involuntarily removed from the United States is ineligible for readmission for a period of 5, 10, or 20 years, depending upon the circumstances of removal.”).

191. *See generally* 8 U.S.C. § 1232 (requiring generally that UCs be placed in the “least restrictive setting that is in the best interest of the child” by HHS and creating general policies to prevent child trafficking and abuse).

192. *See* Stipulation Extending the Settlement Agreement and for Other Purposes; and Order Theron, *Flores v. Reno*, No CV 85-4544-RJK(Px) (C.D. Cal. Dec. 7, 2001); *see also, e.g., Flores v. Sessions*, 862 F.3d 863, 867, 881 (9th Cir. 2017) (holding that neither the TVPRA nor the HSA fully “supersede[s], terminate[s], or take[s] away” from the *Flores* Agreement’s bond-hearing requirement and therefore left that requirement enforceable). Other attempts to terminate the Agreement through enacting equivalent regulations have also failed. *See, e.g., Flores v. Rosen*, 984 F.3d 720, 736 (9th Cir. 2020) (rejecting the Trump administration’s arguments that regulations it promulgated terminated the *Flores* Agreement and holding that the Agreement remained in effect).

193. It is important to acknowledge that patients should have access to abortions regardless of their reasoning. In writing this section, I was hesitant to detail the high rates of sexual assault amongst UCs because sexual assault is not the only reason a patient might need an abortion. Ultimately, I chose to include this information to stress the vulnerability of pregnant UCs and the increased likelihood that they may choose to terminate a pregnancy. *See Koushik, supra* note 10, at 258–59.

agency over their bodies. Many UCs are confined to detention,¹⁹⁴ often separated from any family or loved ones that may already be in the country, and are solely reliant on the federal government for their safety and healthcare.¹⁹⁵ Many migrant children face additional abuse and sexual violence while they are in immigrant detention, either by other children or by the federal workers charged with their care.¹⁹⁶

Despite the terms of the *Flores* Agreement¹⁹⁷ and provisions of HHS regulations,¹⁹⁸ children are sometimes kept in CBP or DHS custody for longer than seventy-two hours before they are transferred to ORR detention.¹⁹⁹ CBP and ORR's inability to handle the number of children crossing the border has led to this widespread practice, which is contrary to federal law.²⁰⁰ Children often remain in CBP custody for weeks before

194. See Aura Bogado & Melissa Lewis, *US Detained Migrant Children for Far Longer Than Previously Known*, REVEAL (Oct. 29, 2020), <https://revealnews.org/article/thousands-migrant-children-languished-in-us-detention/> [<https://perma.cc/3BQ7-2K8E>] (“[In ORR shelters,] [a]side from the occasional field trip, every part of a child’s day – from breakfast to school, to counseling, to recreational activities – takes place within a shelter.”); see also *ORR Unaccompanied Children Program Policy Guide: Guide to Terms*, OFF. OF REFUGEE RESETTLEMENT, U.S. DEP’T OF HEALTH & HUM. SERVS. (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-guide-terms> [<https://perma.cc/3MCM-3VPD>] (defining some types of foster care as ORR placements where a child would attend a local school); *ORR Unaccompanied Children Program Policy Guide: Section 3*, OFF. OF REFUGEE RESETTLEMENT, U.S. DEP’T OF HEALTH & HUM. SERVS., §§ 3.3.4, 3.3.10 (June 15, 2023), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-3> [<https://perma.cc/57BE-GYBR>] [hereinafter *ORR Policy Guide*] (noting that leaving or having visitors requires permission from the care provider); Taylor Dolven, *Here’s What Happens When a Child Escapes a Migrant Detention Facility*, VICE NEWS (June 26, 2018), <https://www.vice.com/en/article/59qvjq/heres-what-happens-when-a-child-escapes-a-migrant-detention-facility> [<https://perma.cc/VEV8-8S79>] (“ORR shelters vary in security levels, but even the least secure facilities have a guard and some kind of fence. Children’s days are meticulously scheduled and movements monitored during their stay: They wake up early to bathe and eat, then go to classes and possibly an outing, then eat lunch, and lastly have an afternoon activity before dinner and bedtime, a former ORR official told VICE News. Their contact with the outside world is restricted, and If they need to leave the facility for any reason, they have to be escorted.”).

195. See 45 C.F.R. § 410.402 (describing what ORR must provide UCs in its care); Bogado & Lewis, *supra* note 194.

196. Bogado et al., *supra* note 16.

197. The *Flores* Agreement established minimum standards of care for youth immigrant detention. See *supra* note 129 and accompanying text.

198. Some of the provisions of the *Flores* Agreement have been codified as federal regulations. See The *Flores* Agreement, *supra* note 129.

199. The *Flores* Agreement, *supra* note 129, at 8; Julie M. Linton, Marsha Griffin & Alan J. Shapiro, *Detention of Immigrant Children*, PEDIATRICS, Apr. 2017, at 1, 4; see also 8 U.S.C. § 1232(b)(3) (requiring that UCs are transferred to ORR custody within seventy-two hours); *id.* § 1232(c)(2)(A) (requiring children to be transferred to ORR within a seventy-two-hour time period).

200. Compare Linton et al., *supra* note 199, at 4 (“At times children and families are kept longer than 72 hours, denied access to medical care and medications, separated from one another, or

being transferred.²⁰¹ In CBP custody, children have been denied access to healthcare and medicine, isolated, and emotionally abused.²⁰² Investigations have revealed there is a lack of bedding and children must sleep on concrete floors.²⁰³ Many children were given small amounts of food and water; had all of their possessions confiscated; had nowhere to bathe or shower; and resorted to using open toilets.²⁰⁴ The American Academy of Pediatrics described DHS's treatment of children in CBP facilities as failing to "meet the basic standards for the care of children."²⁰⁵

In recent years, the federal government has responded to the increase in unaccompanied youth arriving at the border²⁰⁶ by creating emergency shelters. The conditions in emergency shelters²⁰⁷ are even worse than traditional ORR detention facilities.²⁰⁸ Unlike permanent shelters, emergency shelters do not need to be licensed by the state where they are

physically or emotionally abused."), with 8 U.S.C. § 1232(b)(3) ("Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied . . . child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied . . . child.").

201. KANDEL, *supra* note 63, at 9, 18.

202. Linton et al., *supra* note 199, at 4.

203. *Id.*

204. *Id.*

205. *See id.* at 1.

206. *See Southwest Land Border Encounters, supra* note 2; *Southwest Border Unaccompanied Alien Children FY 2014, supra* note 103; ACKERMAN ET AL., *supra* note 5, at 4; *supra* note 108 and accompanying text.

207. "Emergency shelters" in this Comment refers to two types of temporary shelters managed by ORR: Influx Care Facilities (ICF) and Emergency Intake Sites (ESI). Both types of emergency shelters can be unlicensed by the State and both have been criticized by child welfare advocates. KANDEL, *supra* note 63, at 31–32.

208. *See* KANDEL, *supra* note 63, at 32 n.213. *Compare ORR Policy Guide, supra* note 194, at § 3.2 ("Care provider staff must be trained in techniques for child-friendly and trauma-informed interviewing, assessment, observation and other techniques."), with Aura Bogado, *Scores of Migrant Children Considered or Attempted Suicide in US Custody, Records Show*, REVEAL (June 22, 2022), <https://revealnews.org/article/migrant-children-suicide-thoughts-us-custody/> [<https://perma.cc/85J2-CR9F>] ("The emergency shelters, however, operate without a license and are often run by military contractors with experience in logistics, not necessarily in caring for migrant children."); NEHA DESAI, DIANE DE GRAMONT & ALLYSON MILLER, UNREGULATED & UNSAFE: THE USE OF EMERGENCY INTAKE SITES TO DETAIN IMMIGRANT CHILDREN 6 (2022) (noting influx facilities that were used by ORR between 2018 and 2019 raised child welfare concerns and emergency intake sites have even lower standards of care). A report by the National Center for Youth Law emphasized the importance of state licensing requirements to protect UCs. *Id.* at 9 ("State licensing is critical to protecting children's wellbeing because it ensures shelters are subject to regular independent oversight and comprehensive child welfare standards. Although state licensing cannot fully prevent the abuse and neglect of children in government custody, licensed facilities are subject to reporting requirements and accountability mechanisms that are absent in [Emergency Intake Sites] and Influx Care Facilities.").

located.²⁰⁹ ORR uses military contractors to manage emergency facilities because of their tactical experience.²¹⁰ Staff are often not experts in caring for children.²¹¹ Because emergency shelters do not need to comply with minimum state licensing standards,²¹² they lack the same accountability mechanisms as permanent shelters.²¹³

The conditions in licensed ORR facilities are still horrific despite the legal policies that are in place to protect UCs.²¹⁴ Children in licensed facilities have been sexually assaulted, physically and mentally abused, denied medical attention, and held down and drugged against their will.²¹⁵ State inspectors found that ORR staff at a detention facility in Texas denied multiple children—one having a burn, one having a broken wrist, and another having a sexually transmitted disease—necessary medical care.²¹⁶ Another shelter in Florida that housed 724 children failed to comply with ORR medical care policies to provide “appropriate clothing” or conduct background checks on staff in contact with children.²¹⁷ The findings from an investigative report documented the experiences of one girl who spent seven years in ORR detention:

She’d been shuttled around the country for a good part of her childhood, living in refugee shelters and foster homes in Oregon, Massachusetts, Florida, Texas and New York, inexplicably kept apart from the grandmother and aunts who had raised her. Cut off from contact with her family, she had begun to self-harm and was prescribed a cocktail of powerful psychotropic medications. She hadn’t been taught English or learned to read or acquired basic life skills like cooking. She hadn’t been hugged in years.²¹⁸

After seven years, the girl interviewed in the report chose to be deported to Honduras.²¹⁹ To her, “anything looked better than another year in a U.S. immigration shelter.”²²⁰ This girl is not alone.²²¹

209. Bogado, *supra* note 208; DESAI, *supra* note 208, at 6; *see also* The Flores Agreement, *supra* note 129, at 4 (the Flores Agreement does not include emergency shelters).

210. Bogado, *supra* note 208.

211. *Id.*

212. *Id.*

213. DESAI, *supra* note 208, at 19.

214. *See* Bogado et al., *supra* note 16.

215. *Id.*

216. *Id.*

217. *Id.*

218. Bogado & Lewis, *supra* note 194.

219. *Id.*

220. *Id.*

221. *See id.*

Children in ORR detention that come to the United States already are vulnerable.²²² Many children are survivors of violence and abuse and come into ORR detention with preexisting emotional trauma.²²³ UCs require care and attention that takes into account their specialized medical, emotional, and developmental needs resulting from trauma.²²⁴ Investigative reports have shown that ORR facilities and staff are ill-equipped to meet the needs of UCs.²²⁵ Many children have reported feeling isolated from family and friends.²²⁶ Of 600 records released by ORR of children between the ages of six to seventeen, about twenty-five percent reported instances of a child contemplating or attempting suicide while in ORR detention.²²⁷ On average these thoughts began after only thirty-seven days of detention.²²⁸

The experiences of detained migrant youth vary from neglect to egregious abuse. In 2014, *The Houston Chronicle* published an investigation disclosing that from March 2011 to March 2013, there were 101 reports of abuse by detention staff members.²²⁹ The findings did not include conduct that was unreported.²³⁰ *The Houston Chronicle* investigators found that ORR staff “shoved, kicked, punched,” “molested as they slept, sexually harassed,” and groomed children detained in a Texas detention facility.²³¹ Children were manipulated with threats of deportation.²³² The rampant sexual abuse of UCs has continued unabated

222. See *Southwest Land Border Encounters*, *supra* note 2; *Southwest Border Unaccompanied Alien Children FY 2014*, *supra* note 103; *Growing Numbers of Children Try to Enter the U.S.*, *supra* note 104; ACKERMAN ET AL., *supra* note 5, at 4; *supra* note 108 and accompanying text; SIGELMANN, *supra* note 109; Koushik, *supra* note 10, at 258–59; BLOCKED FROM PROTECTION, *supra* note 112; ISACSON ET AL., *supra* note 8, at 2; Bonello & Siegal McIntyre, *supra* note 19.

223. See *Southwest Land Border Encounters*, *supra* note 2; *Southwest Border Unaccompanied Alien Children FY 2014*, *supra* note 103; *Growing Numbers of Children Try to Enter the U.S.*, *supra* note 104; ACKERMAN ET AL., *supra* note 5, at 4; *supra* note 108 and accompanying text; SIGELMANN, *supra* note 109; Koushik, *supra* note 10, at 258–59; BLOCKED FROM PROTECTION, *supra* note 112; ISACSON ET AL., *supra* note 8, at 2; Bonello & Siegal McIntyre, *supra* note 19.

224. Linton et al., *supra* note 199, at 2.

225. Bogado & Lewis, *supra* note 194.

226. Bogado, *supra* note 208.

227. *Id.*

228. *Id.*

229. Susan Carroll, *Crossing Alone: Children Fleeing to U.S. Land in Shadowy System*, HOUS. CHRON. (May 29, 2014), <https://www.houstonchronicle.com/news/investigations/article/Crossing-alone-Children-fleeing-to-U-S-land-in-5503127.php> [<https://perma.cc/7B2C-28YG>].

230. Cf. Allen J. Beck, Marcus Berzofsky, Rachel Caspar & Christopher Krebs, U.S. DEP’T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 23 (2013) (finding that less than ten percent of incarcerated children reported sexual abuse by staff while incarcerated).

231. Carroll, *supra* note 229.

232. *Id.*

since this investigation.²³³ From October 2014 to July 2018, HHS received more than 4,000 sexual abuse allegations by both staff members and other youth.²³⁴

Detention itself—and the instances of abuse and neglect before and during detention—demonstrate a harrowing lack of agency of UCs over their own bodies. Despite the intentions and text of the *Flores* Agreement and the TVPRA, ORR has consistently failed to keep UCs safe.²³⁵ On top of the other harrowing conditions experienced by many children before and during detention, many pregnant UCs are also denied access to abortions.²³⁶

III. ABORTION RIGHTS FOR UNACCOMPANIED CHILDREN IN ORR DETENTION

Part III of this Comment introduces the legal framework for abortion and reproductive justice. Like immigrants and children, birthing people²³⁷ have historically been denied autonomy over their own bodies.²³⁸ This

233. See Haag, *supra* note 20 (suggesting that complaints of sexual abuse and harassment increased after the Trump administration's separation policy); see also Grabell & Sanders, *supra* note 20 (surveying seventy out of the approximately one hundred ORR shelters and finding evidence of "hundreds of allegations of sexual offenses, fights and missing children").

234. Haag, *supra* note 20.

235. See Bogado et al., *supra* note 16; Linton et al., *supra* note 199, at 1, 4; Bogado, *supra* note 208; Bogado & Lewis, *supra* note 194; Carroll, *supra* note 229; Haag, *supra* note 20; Press Release, Detention Watch Network, Biden Administration Doubles Down on Harmful Child Detention as ORR Looks to Expand Network of Sites (Mar. 17, 2022), <https://www.detentionwatchnetwork.org/pressroom/releases/2022/biden-administration-doubles-down-harmful-child-detention-orr-looks-expand> [<https://perma.cc/KW4T-CNC9>] (responding to the Biden administration's decision to keep large scale temporary shelters open by noting that large scale detention facilities harm children). See generally Hlass, *supra* note 1 (noting how "[t]he Immigration and Nationality Act (INA) was not designed to protect children" in discussing how the U.S. immigration system voids children of their agency and subjects them to harsh policies).

236. See *infra* Part III.

237. For the purposes of abortion and abortion rights, this Comment generally refers to "people," "youth" or "minors" as opposed to "women" and "girls." Pregnancy affects more people than just those who identify as women and not every woman can get pregnant. A study from Rutgers University found that "up to 30% of trans men experience unplanned pregnancies." Harmeet Kaur, *The Language We Use to Talk About Pregnancy and Abortion Is Changing. But Not Everyone Welcomes the Shift*, CNN (Sept. 4, 2022), <https://www.cnn.com/2022/09/04/us/abortion-pregnant-people-women-language-wellness-ccc/index.html> [<https://perma.cc/7UWP-FUYX>]. The Guttmacher Institute and Planned Parenthood "estimated between 462 and 530 trans and nonbinary people [had] abortions in 2017." *Id.* (citing Rachel K. Jones, Elizabeth Witwer & Jenn Jerman, *Transgender Abortion Patients and the Provision of Transgender-Specific Care at Non-Hospital Facilities that Provide Abortions*, 2 CONTRACEPTION: X, 2020, at 2). However, at times this Comment also uses the terms "women" or "girls" if a particular study or case referred specifically to women and/or girls.

238. Lucy Ogbu-Nwobodo, Ruth S. Shim, Sarah Y. Vinson, Elizabeth M. Fitelson, M. Antonia Biggs, Monica R. McLemore, Marilyn Thomas, Micaela Godzich & Christina Mangurian, *Mental*

section provides background on the history of abortion access. It assesses how intersecting identity features (e.g., age, immigration status, race, gender) create more barriers to abortion access for certain groups of people. It then highlights how a legal right to abortion does not necessarily equate to abortion access for detained immigrant children.

A. *Abortion Rights in the United States*

In 1974, *Roe v. Wade*²³⁹ decriminalized abortion in the United States.²⁴⁰ Although abortion remained controversial,²⁴¹ the protection of a person's right to choose²⁴² garnered support in the years leading up to *Roe*.²⁴³ Jane Roe, a pregnant woman,²⁴⁴ sued the State of Texas over Article 1196 of the Texas Penal Code, which only permitted abortions that were done to save the life of the mother.²⁴⁵ The United States Supreme Court held that a woman's choice whether to have an abortion was included in their fundamental right to privacy.²⁴⁶ Because *Roe* involved a fundamental right, the Court used a strict scrutiny standard to evaluate whether Texas' infringement on that right violated Jane Roe's due process rights under the Fourteenth Amendment.²⁴⁷ Under strict scrutiny, a state can only

Health Implications of Abortion Restrictions for Historically Marginalized Populations, 387 NEW ENG. J. MED. 1613, 1614 (2022).

239. 410 U.S. 113 (1973).

240. *Id.* at 165–66.

241. Stacy Weiner, *Abortion in America: From Roe to Dobbs and Beyond*, AM. ASS'N OF MED. COLL. (Sept. 21, 2023), <https://www.aamc.org/news/abortion-america-roe-dobbs-and-beyond> [<https://perma.cc/J689-79MZ>] (explaining how abortion, although widely supported, has been a contested partisan issue).

242. The “right to choose” is a common phrase that is in reference to a person's right to choose whether or not to have an abortion or to carry an unwanted pregnancy to term. See Caroline Fredrickson & Ilan Wurman, *Roe v. Wade* (1973), Nat'l Const. Ctr., <https://constitutioncenter.org/the-constitution/supreme-court-case-library/roe-v-wade> [<https://perma.cc/UG5Y-L8LP>]; *The Right to Choose at 25: Looking Back and Ahead*, ACLU (Jan. 31, 1998), <https://www.aclu.org/documents/right-choose-25-looking-back-and-ahead> [<https://perma.cc/3SK6-PGPS>].

243. See R. Sauer, *Attitudes to Abortion in America 1800–1973*, 28 POPULATION STUD. 53, 63–67 (1974); cf. Annalies Winny, *A Brief History of Abortion in the U.S.*, HOPKINS BLOOMBERG PUB. HEALTH (Oct. 26, 2022), <https://magazine.jhsph.edu/2022/brief-history-abortion-us> [<https://perma.cc/EJ3G-RYPU>] (noting that abortion was legal in seventeen states by 1973 when *Roe* was decided).

244. *Roe*, 410 U.S. at 120.

245. *Id.* at 117–18.

246. *Id.* at 155.

247. Under a “strict scrutiny” analysis “the government must justify its interference by proving that its action is necessary to achieve a compelling governmental purpose.” See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 856 (6th ed. 2019).

infringe on fundamental rights if there is a “compelling state interest.”²⁴⁸ Even if there is a compelling state interest to justify regulation, “legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”²⁴⁹ In *Roe*, the Court noted that the Texas law, by limiting abortions to only when the patient’s life was at risk, could not survive strict scrutiny.²⁵⁰ The patient’s right to privacy during the first trimester outweighed any potential government interests in regulating abortion.²⁵¹ The Texas law was too broad because it did not take into account the patient’s individual interests, including maternal health or the stage of pregnancy.²⁵²

The Court also determined that the State had an interest in the health and lives of the mother and the unborn fetus,²⁵³ and adopted a trimester analysis to balance the State’s interest and a woman’s right to privacy.²⁵⁴ During the first trimester, the Court explained, the State could not interfere with a woman’s ability to get an abortion.²⁵⁵ During the second trimester, up to the point of fetus viability (twenty-four to twenty-eight weeks),²⁵⁶ the State could regulate access to abortion to protect the health of the mother and the fetus.²⁵⁷ After viability, during the third trimester, the State could regulate and ban abortions, except in cases where the mother’s life was in danger.²⁵⁸

Just two years after abortion became a constitutional right, Congress enacted the Hyde Amendment, which later was upheld by the Supreme Court in 1980.²⁵⁹ The Hyde Amendment prohibits using federal funds to

248. *Roe*, 410 U.S. at 155 (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969)).

249. *Id.*

250. *Id.* at 164.

251. *See id.* at 163–64 (holding that although the state generally has a “compelling interest” in protecting potential life and people’s health, during the first trimester Texas could only regulate abortion in the context of protecting maternal health).

252. *Id.* at 164.

253. *See id.* at 162.

254. *Id.* at 162–63; *see also* CHEMERINSKY, *supra* note 247, at 893–94 (referring to how in *Casey*, the Court overruled *Roe*’s trimester framework).

255. *See Roe*, 410 U.S. at 163.

256. *Id.* at 160.

257. *See id.* at 163.

258. *See id.* at 163–64.

259. *See Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding “that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment”).

pay for abortions,²⁶⁰ which includes funding for Medicaid programs,²⁶¹ certain public hospitals or facilities,²⁶² and medical care for immigrants detained in federal custody.²⁶³ The Hyde Amendment includes two exceptions: (1) if a pregnant person's life is in danger, or (2) if the pregnancy is the result of rape or incest and the pregnant person reported that rape or incest to law enforcement.²⁶⁴ Even with these exceptions, the Hyde Amendment effectively barred abortion for low-income people and decreased abortion access for birthing people.²⁶⁵

Nineteen years after *Roe* was decided, the Supreme Court opened the door to further restrict abortion access in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁶⁶ Plaintiffs challenged the Pennsylvania Abortion Control Act of 1982.²⁶⁷ The Act did not outlaw abortion, but it set certain regulations that the plaintiffs argued severely limited a pregnant person's ability to obtain an abortion.²⁶⁸

Five key provisions were at issue in *Casey*.²⁶⁹ First, the Pennsylvania statute defined a "medical emergency" in a way that the plaintiffs argued

260. *Id.* at 302.

261. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, GUTTMACHER INST. (July 14, 2016), <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters> [https://perma.cc/JF6S-3YWT].

262. Sarah Green Carmichael, *Abortion Clinics Shouldn't Have to Stand Alone*, BLOOMBERG (Dec. 16, 2022), <https://www.bloomberg.com/opinion/articles/2022-12-16/abortion-clinics-are-closing-hospitals-and-ob-gyns-should-step-up> (last visited Feb. 8, 2024).

263. See NORA ELLMANN, CTR. FOR AM. PROGRESS, IMMIGRATION DETENTION IS DANGEROUS FOR WOMEN'S HEALTH AND RIGHTS 21 (2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/10/WommenImmigrationHealth-report.pdf> [https://perma.cc/H9PG-4P4P].

264. *Harris*, 448 U.S. at 339 (Marshall, J., dissenting).

265. Cat Duffy, *Hyde Amendment Exacerbates Abortion Access Crisis but States Show Path Forward*, NAT'L HEALTH L. PROGRAM (Sept. 28, 2023), <https://healthlaw.org/hyde-amendment-exacerbates-abortion-access-crisis-but-states-show-path-forward/> [https://perma.cc/2X4L-4T9C] (calling the Hyde Amendment a "de facto abortion ban for people [on Medicaid]"). In a dissenting opinion in *Harris*, Justice Marshall opined that the impact of the Hyde Amendment, including its effects on indigent women, would be "considerable" for four reasons. 448 U.S. at 340 (Marshall, J. dissenting). First, the Hyde Amendment "prohibit[ed] federal funding for abortions . . . necessary . . . to protect the health and sometimes the life of the mother." *Id.* at 339. Second, the Hyde Amendment disallowed federal funds in cases where an "unwanted pregnanc[y]" could result in psychological effects that could amount to "suicide, attempts at self-abortion, or child abuse." *Id.* at 340. Third, the Hyde Amendment withheld federal funds for "the majority of women whose pregnancies [were] caused by rape or incest." *Id.* Fourth, the Hyde Amendment prohibited federal funds when "it [was] known that the fetus itself [would] be unable to survive." *Id.*

266. 505 U.S. 833 (1992).

267. 1 ABORTION IN THE UNITED STATES: A COMPILATION OF STATE LEGISLATION 465–85 (Howard Hood, Igor I. Kavass & Charles O. Galvin eds., 1991); *Casey*, 505 U.S. at 844–45.

268. *Casey*, 505 U.S. at 844–45.

269. *Id.*

was “too narrow.”²⁷⁰ Second, the statute required that informed consent²⁷¹ be obtained from patients seeking an abortion.²⁷² Patients had to wait at least twenty-four hours before a doctor could perform an abortion unless there was an emergency.²⁷³ The referring doctor or the doctor performing the abortion had to tell the patient the risks of having an abortion and the “probable gestational age of the unborn child.”²⁷⁴ Third, the statute required married people to obtain the consent of their spouse before obtaining an abortion.²⁷⁵ Fourth, the statute required youth to obtain parental consent before they could have an abortion.²⁷⁶ And finally, the statute imposed reporting requirements “[f]or each abortion performed” at “every facility” that performed them.²⁷⁷

In reviewing the constitutionality of the Pennsylvania abortion statute, the United States Supreme Court affirmed the essential holding of *Roe*,²⁷⁸ but abandoned the trimester framework.²⁷⁹ Whereas in *Roe* the Court placed a firm restriction on regulating abortion in the first trimester *because* it was before a fetus was viable,²⁸⁰ in *Casey*, the Court turned toward what it viewed as a simpler, more flexible pre- and post-viability distinction.²⁸¹ The majority opinion in *Casey* rejected the trimester framework because it placed too much emphasis on the pregnant person’s interest and not enough on the “State’s interest in potential life.”²⁸² Under its new framework, the Court still prohibited complete bans on abortion pre-viability, but permitted regulation as long as the regulation did not create an “undue burden” on the pregnant person.²⁸³

270. *Id.* at 879–80.

271. The statute defined “informed consent” as:

The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.

Id. at 881 (plurality opinion).

272. *Id.*

273. *See id.*

274. *Id.* at 881 (quoting 18 PA. CONS. STAT. § 3205).

275. *Id.* at 887–88 (majority opinion).

276. *Id.* at 899 (plurality opinion).

277. *Id.* at 900.

278. *Id.* at 869.

279. *See id.* at 873.

280. *Roe v. Wade*, 410 U.S. 113, 162–63 (1973).

281. *Casey*, 505 U.S. at 872–73.

282. *Id.* at 873.

283. *Id.*

This new “undue burden” standard replaced the “strict scrutiny” standard the Court applied in *Roe*.²⁸⁴ The undue burden standard allowed the State to regulate abortion in order “[t]o promote the State’s profound interest in potential life, throughout pregnancy” and “ensure that the woman’s choice [wa]s informed.”²⁸⁵ The measures could even be for the purpose of trying to persuade the woman to give birth instead of having an abortion, so long as its purpose or effect did not impose an undue burden on the patient’s right to choose to have an abortion.²⁸⁶ “Undue burden” was defined as “plac[ing] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”²⁸⁷

Casey made it easier for the government to regulate abortion before fetal viability.²⁸⁸ Under the undue burden standard, the government did not need a legitimate government interest or reason to regulate abortion.²⁸⁹ States could enact conditions that would make an abortion too difficult for most people to access.²⁹⁰ From this new framework came a plethora of new abortion regulations.²⁹¹ Many abortion clinics struggled to keep up with the onslaught of changing laws surrounding abortion and ended up closing as a result.²⁹²

B. *Emergence of Reproductive Justice*

Black women created the concept of “reproductive justice” in 1994.²⁹³ The term combines “reproductive rights” and “social justice” to advocate for people’s right to autonomy over their healthcare, well-being, families,

284. *Id.* at 876.

285. *Id.*

286. *Id.* at 878.

287. *Id.*

288. See Alison Gash, *How Planned Parenthood v. Casey Started the Attack on Abortion Rights*, PA. CAP. STAR (Oct. 29, 2021), <https://www.penncapital-star.com/commentary/how-planned-parenthood-v-casey-started-the-attack-on-abortion-rights-opinion/> [<https://perma.cc/F4SU-Q36T>].

289. See *Casey*, 505 U.S. at 886; see also Gash, *supra* note 288 (arguing that, compared to *Roe*, “[u]nder [*Casey*], states could . . . far more easily regulate abortions at any time during a person’s pregnancy”); CHEMERINSKY, *supra* note 247, at 898–909 (discussing other abortion cases before the Court).

290. See Gash, *supra* note 288 (noting how under *Casey* state regulations were presumed constitutional and states had a larger window of time during which they could restrict abortions).

291. Winny, *supra* note 208.

292. Gash, *supra* note 288.

293. *Reproductive Justice*, SISTER SONG: WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/C265-73A7>].

and communities.²⁹⁴ Reproductive justice includes “the right to have a child,” “the right not to have a child,” and “the right to parent [a child] in [a] safe and healthy environment[.]”²⁹⁵ The movement was a reaction to mainstream reproductive rights movements that centered around a woman’s choice to have an abortion.²⁹⁶ Instead of choice, reproductive justice focuses on access to abortion and bodily autonomy as a whole.²⁹⁷ “[Choice] is necessary, but not enough. Even when abortion is legal, many women of color cannot afford it, or cannot travel hundreds of miles to the nearest clinic. There is no choice where there is no access.”²⁹⁸ By focusing not only on choice but on access, reproductive justice acknowledges how reproductive freedom intersects with race, socioeconomic status, gender identity, and ability.²⁹⁹

Forced detention itself violates the core principles of reproductive justice and the right to one’s own bodily autonomy.³⁰⁰ This violation is compounded when detained individuals are forced to carry an unwanted pregnancy to term.³⁰¹ Detained pregnant people have increased health risks because the psychological stress of detention can negatively impact the pregnant person and the fetus.³⁰² Being forced to carry an unwanted pregnancy to term can have serious adverse health effects.³⁰³ One study

294. Lisa R. Fortuna, Carmen Rosa Noroña, Michelle V. Porche, Cathi Tillman, Pratima A. Patil, Ye Wang, Sheri Lapatin Markle & Margarita Alegría, *Trauma, Immigration, and Sexual Health Among Latina Women: Implications for Maternal–Child Well-Being and Reproductive Justice*, 40 *INFANT MENTAL HEALTH J.* 640, 643 (2019).

295. *Id.* (emphasis omitted) (quoting LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* (Rickie Solinger, Khiara M. Bridges, Zakiya Luna & Ruby Tapia eds., 2017)).

296. *Reproductive Justice*, *supra* note 293.

297. *See id.*; Fortuna et al., *supra* note 294, at 643.

298. *Reproductive Justice*, *supra* note 293.

299. A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE, ASIAN CMTYS. FOR REPROD. JUST. 1 (2005) [hereinafter *A NEW VISION*].

300. ELLMANN, *supra* note 263, at 2.

301. *Id.*

302. U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-330, *IMMIGRATION DETENTION: CARE OF PREGNANT WOMEN IN DHS FACILITIES 1* (2020).

303. Ogbu-Nwobodo et al., *supra* note 238, at 1613; *see also* Laura F Harris, Sarah CM Roberts, M Antonia Biggs, Corinne H Rocca & Diana Greene Foster, *Perceived Stress and Emotional Social Support Among Women Who Are Denied or Receive Abortions in the United States: A Prospective Cohort Study*, 14 *BMC WOMEN’S HEALTH* 1, 6 (2014) (finding that “women who were denied abortions experienced higher stress compared to women who received abortions”); *see also* M. Antonia Biggs, Ushma D. Upadhyay, Charles E. McCulloch & Diana G. Foster, *Women’s Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 *JAMA PSYCHIATRY* 169, 174 (2017) (finding that “[w]omen who were denied an abortion . . . had the most elevated levels of anxiety and lowest self-esteem and life satisfaction 1 week after being denied an abortion”).

showed higher rates of stress, anxiety, and low self-esteem amongst those individuals who had an unwanted pregnancy and were subsequently denied an abortion.³⁰⁴ These conditions are more likely to be experienced by individuals who were abused or neglected as children or had a history of mental health disorders.³⁰⁵ People who give birth after being denied abortions also have an increased risk of life-threatening complications, chronic pain, and health issues.³⁰⁶ To advocate for UCs to be free of forced detention is part of reproductive justice.³⁰⁷ To acknowledge and advocate for solutions that include detained UCs and allow them to have access is part of reproductive justice.³⁰⁸

C. *A Background on “Garza Rights”*

Even under *Roe*, detained UCs struggled to access adequate reproductive care.³⁰⁹ Although *Roe* protected a person’s right to have an abortion for almost fifty years, the right was not exercisable by youth in immigrant detention.³¹⁰ The *Flores* Agreement requires ORR facilities to provide UCs with medical care that includes “family planning services, and emergency healthcare services,” but there is no explicit protection of reproductive care.³¹¹ This stipulation, although protective, gives the director of ORR and those running the facilities significant discretion and control over UCs’ bodies.³¹² In 2008, Acting Director of ORR David Siegel set a norm of using the agency’s discretion to restrict abortion access for UCs.³¹³ He released a memorandum stating that children seeking abortions “require[d] heightened ORR involvement and limited

304. Ogbu-Nwobodo et al., *supra* note 238, at 1613.

305. *Id.*

306. ADVANCING NEW STANDARDS, *supra* note 22, at 3.

307. See ELLMANN, *supra* note 263, at 2.

308. See *supra* section III.B.

309. See *infra* section III.C.

310. See *infra* section III.C.

311. See The *Flores* Agreement, *supra* note 129, at Ex. 1(A)(2); see also 45 C.F.R. § 410.402(c)(2) (2021) (mirroring the language of the *Flores* Agreement).

312. The *Flores* Agreement, *supra* note 129, at Ex. 1(A)(2); see also 45 C.F.R. § 410.402(c)(2) (2021) (mirroring the language of the *Flores* Agreement).

313. See Memorandum from David Siegel, Acting Dir., Dep’t of Health & Human Servs. Off. of Refugee Resettlement, to DUCS Staff, DUCS Funded Shelters & DHS Service Providers 1 (Mar. 21, 2008), https://www.acf.hhs.gov/sites/default/files/documents/2008_medical_service_requiring_heightened_orr_involvement_memo.pdf [<https://perma.cc/7C4A-58FE>] [hereinafter Memorandum from David Siegel].

decision-making by grantees.”³¹⁴ Under this policy, if a UC required an abortion, their contracted caregivers or grantees had to immediately report the request to the Director of the Division of Unaccompanied Children’s Services.³¹⁵ Without the approval and instruction of ORR, caregivers and grantees could not “take any actions” related to the UC’s abortion.³¹⁶ In states that required parental consent for a minor to get an abortion, ORR could not act on the parent’s behalf.³¹⁷ If a child’s parents were unavailable, the child had to navigate the process of “judicial bypass”³¹⁸ granted by judges.³¹⁹ The memorandum also prohibited the use of federal funding for abortions or for helping a UC get legal representation to assist with a judicial bypass.³²⁰

In 2017, ORR’s Acting Director under the Trump administration, Kenneth Tota, released a memorandum stating that the ORR Director, through the authority granted to them by Congress, had complete control over a UC’s medical decisions while in ORR custody.³²¹ Later that year, President Trump appointed Scott Lloyd, an anti-abortion advocate, to the position of ORR Director.³²² As Director, Lloyd forbade detention centers from helping or “facilitating” UC’s access to abortion, directing them to push only “life-affirming options counseling.”³²³ Reports to the U.S. House of Representatives Committee on the Judiciary showed that, while serving as Director, Lloyd tracked pregnant youth, their menstrual cycles,

314. *Id.* “[G]rantees” is in reference to care providers that contract and work with ORR to take care of UCs in ORR custody. Federal Licensing of Office of Refugee Resettlement Facilities Request for Information, 86 Fed. Reg. 49549, 49549 (Sept. 3, 2021).

315. Memorandum from David Siegel, *supra* note 313, at 1.

316. *Id.*

317. *Id.*

318. Sarah Horvath & Susan Frietsche, *Judicial Bypass for Minors Post-Dobbs*, 19 WOMEN’S HEALTH 1, 2 (2023). “Judicial bypass” refers to “the process of asking a judge to grant the pregnant minor the right to obtain an abortion without the state-mandated parental involvement.” *Id.*

319. Memorandum from David Siegel, *supra* note 313, at 1 n.1.

320. *Id.* at 2. The memorandum, however, states two exceptions where ORR may provide funding for abortions: “(1) the pregnancy is the result of an act of rape or incest; or (2) [the person has] a physical disorder, physical injury, or physical illness . . . [that a physician found would] place the [individual] at danger of death unless an abortion is performed.” *Id.*

321. Koushik, *supra* note 10, at 269.

322. Prior to being appointed, Lloyd was an attorney at an anti-abortion law firm. *Id.* at 270; see *New Details About Trump-Era Efforts to Block Pregnant Minors in Immigrant Detention from Accessing Abortions*, AM. OVERSIGHT (May 6, 2021), <https://www.americanoversight.org/new-details-about-trump-era-efforts-to-block-pregnant-minors-in-immigration-detention-from-accessing-abortions> [https://perma.cc/5NPW-77E9] [hereinafter *New Details*].

323. Michelle Goldberg, *The Trump Administration’s Power Over a Pregnant Girl*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/opinion/trump-pregnancy-abortion-.html> (last visited Jan. 8, 2024); *New Details*, *supra* note 322.

and whether they had requested abortions.³²⁴ During his time as Director, Lloyd did not approve a single request for abortion,³²⁵ even in a case where the child had been raped.³²⁶

In fall 2017, Jane Doe, the original named plaintiff in *J.D. v. Azar* sued ORR after they refused to let her travel to medical visits to obtain an abortion.³²⁷ Jane was forced to go to a “religiously-affiliated pregnancy crisis center,” attend counseling, and look at a sonogram.³²⁸ ORR also contacted Jane’s mother in her home country to tell her that she was pregnant—even though Jane told ORR staff that her parents previously abused her and that telling her parents about her pregnancy could cause her future harm.³²⁹ Jane obtained her own private counsel for the judicial bypass, her own funding for the procedure, and her own transportation to travel to and from appointments.³³⁰ However, ORR refused to allow employees or other private actors to transport Jane to her abortion appointments because this would be considered “facilitating” her abortion.³³¹ ORR justified what was essentially a ban on abortion for UCs as withholding funding.³³² ORR also argued that its policy did not constitute an undue burden because Jane and the other members of her class could obtain an abortion by voluntarily returning to their countries of origin or by being released to a third-party sponsor.³³³

The United States Court of Appeals for the District of Columbia Circuit held that under *Casey*, ORR policies created an “undue burden” on Jane

324. Priscilla Alvarez, *House Judiciary Committee Asks Former ORR Director to Clarify Testimony on Pregnant Minors*, CNN (Mar. 22, 2019), <https://www.cnn.com/2019/03/22/politics/scott-lloyd-pregnant-minors/index.html> [<https://perma.cc/BNS4-TCQ2>].

325. Carter Sherman, *How the Trump Administration Tries to Stop Undocumented Teens from Getting Abortions*, VICE NEWS (Feb. 28, 2018), https://news.vice.com/en_us/article/xw5kvz/exclusive-how-the-trump-administration-tries-to-stop-undocumented-teens-from-getting-abortions [<https://perma.cc/ANM3-5NCF>].

326. Carter Sherman, *Undocumented Teen Wanting an Abortion Had Been Raped*, VICE NEWS (Dec. 21, 2017), <https://www.vice.com/en/article/bjynwv/undocumented-teen-wanting-an-abortion-had-been-raped> [<https://perma.cc/36VN-24MU>].

327. *J.D. v. Azar* was previously named *Garza v. Azar* and *Garza v. Hargan*. *Garza v. Hargan*, 304 F. Supp. 3d 145, 151 (D.D.C. 2018), *aff’d in part, vacated in part, remanded sub nom. J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *J.D.*, 925 F.3d at 1329; Appellants’ Reply Brief at 15–17, *J.D. v. Azar*, 925 F.3d 1291 (No. 18-5093) (D.C. Cir. 2019).

333. *Garza*, 304 F. Supp. 3d at 151.

Doe's ability to seek an abortion.³³⁴ The court upheld an injunction that barred interference with a UC obtaining an abortion.³³⁵ Following the D.C. Circuit decision, ORR changed its nationwide policy in September 2020 to comply with the court order.³³⁶ Although the final case name was *J.D. v. Azar*, abortion protections for detained immigrant youth are referred to as “Garza rights” or “Garza requirements” in subsequent literature and ORR statements.³³⁷ While the new ORR policy still requires care providers to notify federal ORR officers, it forbids ORR and care providers from interfering with a UC's ability to get an abortion.³³⁸ Further, care providers must “ensure [UCs] have access to medical appointments related to pregnancy in the same way they would with respect to other medical conditions.”³³⁹

In September 2021, the Texas State Legislature passed Senate Bill 8 (S.B. 8),³⁴⁰ which imposes a ban on abortions after a “fetal heartbeat”³⁴¹ is detected.³⁴² The law bans most abortions as early as six weeks, before many people even know that they are pregnant.³⁴³ S.B. 8 is unique.³⁴⁴ It

334. *J.D.*, 925 F.3d at 1331. The court rejected ORR's argument that Jane could leave the United States if she wanted an abortion because to voluntarily depart she would have to receive approval from the government and would have to “abandon[] potentially viable claims of entitlement to stay in the United States.” *Id.* It also rejected ORR's argument that Jane could be released to a nongovernment, third-party sponsor, stating “[t]here is then no reason to suppose that the search will happen to yield a sponsor in an additional three weeks often enough to justify imposing a blanket delay of that duration—and the government has not attempted to make any argument or showing to that effect.” *Id.* at 1334.

335. *Id.* at 1338.

336. See POLICY MEMORANDUM, *supra* note 37.

337. See, e.g., FIELD GUIDANCE #21, *supra* note 42 (titling memo including the words “Garza Requirements”).

338. POLICY MEMORANDUM, *supra* note 37, at 3.

339. *Id.*

340. S.B. 8, 87th Leg. Sess. (Tex. 2021).

341. A fetal heartbeat in early pregnancy is “clinically inaccurate” according to the American College of Obstetricians and Gynecologists. *ACOG Guide to Language and Abortion*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/contact/media-center/abortion-language-guide> [<https://perma.cc/LZ67-YSAW>]. The sound heard on ultrasound is “the . . . machine translating electronic impulses that signify fetal cardiac activity.” *Id.*; Roni Caryn Rabin, *Abortion Opponents Hear a ‘Heartbeat.’ Most Experts Hear Something Else*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/health/abortion-heartbeat-debate.html> (last visited Jan. 3, 2024) (“The consensus among most medical experts is that the electrical activity picked up on an ultrasound at six weeks is not the sound of a heart beating and does not guarantee a live birth.”).

342. S.B. 8, 87th Leg. (Tex. 2021).

343. *Id.*

344. JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10668, TEXAS HEARTBEAT ACT (S.B. 8) LITIGATION: SUPREME COURT IDENTIFIES NARROW PATH FOR CHALLENGES TO TEXAS ABORTION LAW 2 (2021).

does not criminalize a person obtaining an abortion.³⁴⁵ Instead, private citizens can sue physicians or anyone who aids in performing an abortion.³⁴⁶ People who aid in the abortion could potentially include clinics and their employees, receptionists, “friends, relatives[,] or strangers who pay for an abortion . . . people who donate to or administer abortion funds[,] insurers that approve a claim[,] ride-share drivers who drive a patient to a clinic[,] and anyone who shares information about abortion options.”³⁴⁷ Following the passage of S.B. 8, ORR quickly released a policy, announcing that it would transfer pregnant youth outside the State of Texas to a facility in another state.³⁴⁸ By doing so, it avoided potential conflicts between the holding of *J.D. v. Azar* and the new state law.³⁴⁹

Around the same time as both S.B. 8’s passage and ORR’s reactive field guidance, *Dobbs v. Jackson Women’s Health Organization* was being argued in front of the United States Supreme Court.³⁵⁰ Plaintiffs challenged Mississippi’s Gestational Age Act,³⁵¹ which banned abortions after fifteen weeks.³⁵² Mississippi did not argue that *Roe* needed to be overturned when the State first petitioned the Supreme Court in June 2020.³⁵³ However, after the death of Justice Ruth Bader Ginsburg and the

345. See S.B. 8, 87th Leg. § 171.207 (Tex. 2021) (noting that the law is enforced through civil penalties).

346. LAMPE, *supra* note 344, at 1 (2021).

347. Maggie Astor, *Here’s What the Texas Abortion Law Says*, N.Y. Times (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html> (last visited Mar. 1, 2024).

348. See FIELD GUIDANCE #21, *supra* note 42, at 1–2.

349. See *id.* at 1. At the time of this Comment’s publication, the author could not find any information regarding whether ORR has been following through with this policy in practice or what the transfer policy looks like.

350. See Transcript of Oral Argument at 1, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022) (No. 19-1392).

351. MISS. CODE ANN. § 41-41-191 (2018).

352. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2234 (2022).

353. Petition for a Writ of Certiorari at 5, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022) (No. 19-1392) (“To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*.”).

appointment of Justice Amy Coney Barrett,³⁵⁴ Mississippi made the additional ask for the Court to overturn *Roe*.³⁵⁵

On June 24, 2022, the Supreme Court overturned *Roe* and *Casey*,³⁵⁶ which together protected abortion rights for UCs in ORR custody.³⁵⁷ In the majority opinion in *Dobbs*, Justice Alito wrote that *Roe* was “egregiously wrong from the start” and the United States Constitution did not guarantee the right to abortion.³⁵⁸ The Court reasoned that abortion did not fall under the unenumerated fundamental rights in the Fourteenth Amendment because abortion is not “deeply rooted in this Nation’s history and tradition.”³⁵⁹ Under *Dobbs*, states now have more free reign to regulate abortion as they see fit.³⁶⁰

Since *Dobbs*, many states have passed new abortion laws. As of December 2023, fourteen states have banned abortions “in almost all

354. The appointment and confirmation of Justice Amy Coney Barrett changed the political dynamic of the Supreme Court, making it a six to three conservative majority. Abigail Abrams, *A Case that Could Overturn Roe v. Wade Goes Before the Supreme Court*, TIME (Nov. 30, 2021), <https://time.com/6122144/supreme-court-roe-v-wade-mississippi-abortion/> [<https://perma.cc/VX62-F6YB>]. In her confirmation hearing, Barrett said, she would “obey all the rules of stare decisis” for “any issue that comes up, abortion or anything else.” *Supreme Court Nominee Amy Coney Barrett Confirmation Hearing, Day 2, Part 1*, C-SPAN, at 39:34, (Oct. 13, 2020), <https://www.c-span.org/video/?476316-1/barrett-confirmation-hearing-day-2-part-1> (last visited Jan. 2, 2024). However, some professionals and reproductive rights leaders speculated she would rule in favor of overturning *Roe* given her personal beliefs regarding abortion, her track record in the Seventh Circuit, and the Court’s conservative majority. See, e.g., Kevin Freking, *What GOP-Nominated Justices Said About Roe to Senate Panel*, AP (May 7, 2022), <https://apnews.com/article/abortion-us-supreme-court-amy-coney-barrett-judiciary-dianne-feinstein-da274b6e8a86aa5435a0be6ce0a287c5> (last visited Jan. 3, 2024) (noting that she gave a noncommittal answer when asked about her views on *Roe*); Sarah McCammon, *A Look at Amy Coney Barrett’s Record on Abortion Rights*, NPR (Sept. 28, 2020), <https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights> [<https://perma.cc/H7CS-56X5>] (analyzing previous statements made by Barrett regarding abortion, statements from former colleagues to predict whether she would rule in favor of overturning *Roe*); Kevin Stawicki, *How Amy Coney Barrett Could Upend Abortion Rights*, LAW360 (Sept. 30, 2020), <https://www.law360.com/health/articles/1314333/how-amy-coney-barrett-could-upend-abortion-rights> [<https://perma.cc/7ANB-G32U>] (using Barrett’s history on the judicial bench to predict that she might rule in favor of overturning *Roe*).

355. See Brief for Petitioners at 1, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022) (No. 19-1392) (“*Roe* and *Casey* are thus at odds with the straight-forward, constitutionally grounded answer to the question presented. So the question becomes whether this Court should overrule those decisions. It should. The stare decisis case for overruling *Roe* and *Casey* is overwhelming. *Roe* and *Casey* are egregiously wrong.”).

356. *Dobbs*, 142 S. Ct. at 2242.

357. See *id.*

358. *Id.* at 2243.

359. *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

360. *Id.* at 2283–84.

circumstances”³⁶¹ and another two states banned abortions after six weeks.³⁶² Seven other states have banned abortions after fifteen, eighteen or twenty-two weeks.³⁶³ Arizona and Utah passed total abortion bans but they were blocked by the courts.³⁶⁴ In contrast, twenty-one states have enacted laws or enshrined abortion rights in their state constitutions.³⁶⁵ Seven states and the District of Columbia have ruled that pre-viability abortion restrictions are unconstitutional.³⁶⁶

In November 2022, ORR expanded its policy to transfer pregnant youth out of the State of Texas. The new policy urged ORR to transfer pregnant children out of *any* state that restricts abortion.³⁶⁷ ORR also retained its policy to not interfere with a UC’s access to an abortion to be “consistent with *Garza* requirements.”³⁶⁸ However, because the *Dobbs* decision overturned *J.D. v. Azar*,³⁶⁹ “*Garza* requirements” are now only agency policy.³⁷⁰ Because HHS did not go through notice and comment rulemaking when establishing abortion protections under *J.D. v. Azar*, ORR could technically change its stance and return to the Scott Lloyd-era policies at any time.³⁷¹

361. See *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (last updated Jan. 8, 2023) (last visited Jan. 11, 2024).

362. See *id.* (noting Georgia and South Carolina have banned abortions after six weeks).

363. See *id.* (noting Arizona and Florida have banned abortions after fifteen weeks, noting Utah has banned abortions after eighteen weeks, and noting Iowa, Kansas, Ohio, and Wisconsin have banned abortions after twenty-two weeks).

364. See *id.* “Enforcement of a separate ban on abortion from 1864 is blocked by an appeals court.” *Id.* In Utah, “[a] judge temporarily blocked a law that would have halted most abortions in the state by requiring the procedure to be performed in hospitals,” and “[a] separate ban on most abortions was indefinitely blocked by a judge in 2022.” *Id.*

365. See *id.*

366. See *id.*

367. See FIELD GUIDANCE #21, *supra* note 42, at 3.

368. *Id.* at 3.

369. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 230, 142 S. Ct. 2228 (2022) (overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which therefore must overrule *J.D. v. Azar*).

370. See *id.*; FIELD GUIDANCE #21, *supra* note 42, at 3.

371. See Mantel, *supra* note 154, at 352; see also 5 U.S.C. § 553 (notice and comment rulemaking procedures only apply to legislative rules); Ryan Huynh, *Dobbs Restricts Access to Abortion for Asylum Seekers, Represses Reproductive Rights*, HUM. RTS. FIRST (2022), <https://humanrightsfirst.org/library/dobbs-restricts-access-to-abortion-services-for-asylum-seekers-represses-reproductive-rights/> [<https://perma.cc/9GLJ-TXEX>] (“Although ORR eventually amended its policies in 2020 to ensure access to confidential reproductive healthcare including abortion, *Dobbs* could be used by a future administration to prohibit access to abortion services for this population again. . . . Considering *Dobbs*, this guidance is in jeopardy if there is a change in administration.”).

IV. INSTABILITY IN ABORTION AND POSSIBLE PROTECTIONS POST-*DOBBS*

Part IV analyzes the instability of abortion access for detained migrant children post-*Dobbs* and calls on individual states to expand abortion protections in a way that includes UCs. This Part also draws on the reproductive justice framework and what that might look like for UCs.

A. *Dangers of the Current Status of “Garza Rights”*

Since *Dobbs*, individual states have decided whether persons located within their boundaries have the right to abortion.³⁷² Because governance over immigration matters is exclusively reserved to the federal government, state laws that protect abortion access may not have any effect on UCs who remain in federal custody.³⁷³ Any state laws or state constitutional amendments that guarantee abortion rights within a particular state would not have to be enforced by the federal government.³⁷⁴ While these state actions are helpful and necessary, they also continue a pattern of only guaranteeing abortion access for some people.³⁷⁵

372. See *Tracking Abortion*, *supra* note 361.

373. Cf. *GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 754 (9th Cir. 2022) (“As part of its protection of federal operations from state control, the Supremacy Clause precludes states from dictating to the federal government who can perform federal work. A state may not ‘require[] qualifications’ for those doing government work ‘in addition to those that the Government has pronounced sufficient.’ And ‘[a state] may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority.’” (alterations in original) (first quoting *Johnson v. Maryland*, 254 U.S. 51, 57 (1920); and then quoting *Sperry v. State of Fla. ex rel. Fla. Bar* 373 U.S. 379, 385 (1963))); Wendy Parmet, *The Plenary Power Meets the Police Power: Federalism at the Intersection of Health & Immigration*, 45 AM. J.L. & MED. 224, 226 (2019) (“Ever since, *Chae Chang Ping v. The United States*, the Supreme Court has viewed the federal government’s authority over immigration as exclusive, closely tied to the nation’s sovereignty, and the need for a single voice over foreign affairs.”).

374. *GEO Grp., Inc.*, 50 F.4th at 754.

375. See, e.g., *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (arising from ORR actively preventing pregnant immigrant children from exercising their right to an abortion); Duffy, *supra* note 265 (describing the barriers the Hyde Amendment created for people receiving public health insurance); A NEW VISION, *supra* note 299, at 3 (explaining the reasoning behind reproductive justice); Lauren van Schilfgaarde, *Native Reproductive Justice: Practices and Policies from Relinquishment to Family Preservation*, PETRIE-FLOM CTR., HARV. L. SCH.: BILL OF HEALTH (May 12, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/12/native-reproductive-justice-adoption-relinquishment-family-preservation/> [<https://perma.cc/24FF-VXFL>] (explaining the Hyde Amendment’s impact on Native American women); Nicquel Ellis & Nicole Chavez, *‘We Are Not Surprised’: Women of Color Say the Courts Have Never Served Their Communities*, CNN (June 26, 2022), <https://www.cnn.com/2022/06/26/us/women-of-color-roe-wade-decision/index.html> [<https://perma.cc/K3RT-2B6Q>] (explaining how even under *Roe* women of color did not have equal access to abortion).

The only current protection for abortion rights for detained UCs is ORR's internal agency policy.³⁷⁶ Unlike statutes or agency regulations, an internal agency policy functions as mere "guidance" and easily can change without typical lawmaking or regulatory practices.³⁷⁷ UCs are now entirely at the mercy of their direct caregivers and ORR leadership.³⁷⁸ A President could direct ORR to interfere with or obstruct detained UCs' ability to get an abortion, with little administrative hassle or judicial oversight.³⁷⁹

B. Using the Flores Agreement to Protect Abortion for Unaccompanied Children

Given the currently precarious state of abortion protections for UCs, interim solutions are necessary to mitigate harm until a more permanent solution can be reached. This Comment proposes that states incorporate abortion protections into their child welfare laws so that ORR facilities will be required to comply under the *Flores* Agreement.

Pursuant to the *Flores* Agreement, statutes, and federal regulation,³⁸⁰ ORR detention facilities that house children must comply with *state* child welfare laws, policies, and licensing requirements.³⁸¹ Even though state laws and constitutional protections do not guarantee abortion access to detained UCs, if states incorporate abortion rights into their child welfare laws, immigration detention facilities would have to ensure youth in their care have abortion access.³⁸²

Incorporating abortion rights into child welfare laws would improve the rights established in *Garza*. Whereas *Garza* rights were negative rights (i.e., ORR could not prevent an UC from obtaining an abortion),³⁸³ child welfare rights are often phrased as positive rights (i.e., ORR would be obligated to ensure an UC had abortion access).³⁸⁴ One of the flaws of abortion rights under *Roe* and *Garza* was that although individuals were

376. See *supra* section III.D.

377. Mantel, *supra* note 154, at 352.

378. See *supra* note 155 and accompanying text.

379. See *supra* note 155 and accompanying text. Several legal scholars comment on the ease of enacting and retracting procedural rules and policy statements (nonlegislative rules) because there are few procedural requirements. See *supra* note 155; Mantel, *supra* note 154, at 352. Only legislative rules are subject to notice and comment rulemaking procedures. 5 U.S.C. § 553.

380. Congress has explicitly delegated the licensure of ORR facilities to the states. See The *Flores* Agreement, *supra* note 129, at Ex. 1(A); 45 C.F.R. § 410.402.

381. See The *Flores* Agreement, *supra* note 129, at Ex. 1(A); 45 C.F.R. § 410.402.

382. See The *Flores* Agreement, *supra* note 129, at Ex. 1(A); 45 C.F.R. § 410.402.

383. See Velasquez et al., *supra* note 87.

384. See *id.*

protected from government interference with their ability to get an abortion, there was no assurance that a patient could access a medical provider that could perform an abortion.³⁸⁵ As the reproductive justice movement critiqued, “[t]here is no choice where there is no access.”³⁸⁶ Under *Roe* and *J.D.*, this meant that ORR staff could not lawfully prevent detained UCs from getting an abortion,³⁸⁷ but the UC had the burden to find a medical provider to perform the abortion and find a way to pay for their abortion.³⁸⁸ A child welfare law that protects abortion and that places a duty on ORR is better suited to protect UCs because it would take into account how children are dependent on their caregivers’ permission to exercise certain rights.³⁸⁹

C. *For There to Be Reproductive Justice, Abortion Access Must Be Expanded and Our Immigration System Must Be Abolished*

Strengthening abortion rights for UCs must be realized in conjunction with other legal and community-based organizing efforts to expand abortion access and immigration abolition.³⁹⁰ Abortion access is only a small aspect of achieving reproductive justice and immigrant justice. Expanding abortion access to include UCs would not change ORR’s horrific detention conditions or the United States’ harmful immigration policies. The basis of United States immigration law is rooted in the subjugation of people of color and noncitizens.³⁹¹ Government-sanctioned

385. See FIELD GUIDANCE #21, *supra* note 42; see also Duffy, *supra* note 265 (describing the barriers the Hyde Amendment created for people receiving public health insurance); A NEW VISION, *supra* note 299, at 3 (describing the gaps in reproductive health and reproductive justice for women of color).

386. *Reproductive Justice*, *supra* note 293.

387. *J.D. v. Azar*, 925 F.3d 1291, 1337 (D.C. Cir. 2019) (holding that ORR’s 2017 policies surrounding abortion created an undue burden for Jane Doe).

388. See FIELD GUIDANCE #21, *supra* note 42.

389. See *supra* section I.B.

390. There are concurrent efforts to expand abortion rights at the federal level. Democratic lawmakers introduced the Women’s Healthcare Protection Act (WHPA) in the U.S. House of Representatives on March 30, 2023. Women’s Health Protection Act, H.R. 12, 118th Cong. (2023); *Bill to Secure a Nationwide Right to Abortion Introduced in U.S. Congress*, CTR. FOR REPROD. RTS. (Mar. 30, 2023), <https://reproductiverights.org/rebuilding-rights-whpa-introduced/> [https://perma.cc/27KP-GRUU]. If enacted, the statute would protect a medical provider’s right to perform abortions and a patient’s right to obtain one. *Women’s Health Protection Act (WHPA)*, CTR. FOR REPROD. RTS. (June 23, 2023), <https://reproductiverights.org/the-womens-health-protection-act-federal-legislation-to-protect-the-right-to-access-abortion-care/> [https://perma.cc/ED6D-RR8T]. In October 2023, ORR published a notice of proposed rulemaking that would codify the agency’s current policy to facilitate abortions for detained, which includes transferring detained pregnant UCs to states that allow abortions. Unaccompanied Children Program Foundational Rule, 88 Fed. Reg. 68908 (proposed Oct. 4, 2023).

391. See *supra* Part I.

violence against immigrants in and out of detention is accepted³⁹² and deportation is legitimized³⁹³ because immigration law is founded on the idea that a person's worth is determined by citizenship status.³⁹⁴

While this Comment does not tear down our immigration system, it does suggest immediate relief options for UCs who are currently detained. Immigrant youth are survivors of sexual assault, extreme violence, and trauma.³⁹⁵ While detained, immigrant youth are denied medical care and food, and are exposed to violence, stress, and isolation.³⁹⁶ As much as it is important to work toward completely abolishing immigration detention and the United States immigration system in the future, it is equally important to expand abortion protections for UCs who are currently experiencing the horrific realities of detention.

CONCLUSION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade*, holding that individuals do not have a constitutional right to an abortion.³⁹⁷ The decision had widespread impacts on pregnant or birthing people across the world.³⁹⁸ These impacts extended specifically to unaccompanied immigrant children who are

392. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (justifying racial discrimination in the context of immigration matters); Linton et al., *supra* note 199, at 4 (describing how children are denied food, adequate bedding, and medical care in immigrant detention); Maria Verza & Valerie Gonzalez, *Mexico Recovers Body of Honduran Migrant in Rio Grande; Another Body Found Near Floating Barrier*, AP (Aug. 3, 2023), <https://apnews.com/article/rio-grande-mexico-texas-buoys-fdb59d6d39db90c5d2902dc7bcd1a960> [<https://perma.cc/FNE3-NG5Q>] (reporting that a person drowned while crossing the Rio Grande River and their body was found next to buoys with razor wire barriers designed to prevent migrants from entering the United States).

393. See STRAUT-EPPSTEINER, *supra* note 11, at 16–17 (describing the legal removal and deportation processes under U.S. immigration law); Cházaro, *supra* note 54, at 1043 (noting how deportation is rarely questioned by immigration advocates).

394. See, e.g., *Chae Chan Ping*, 130 U.S. at 609 (describing the government's broad power to exclude someone from the United States based on their citizenship); *Reno v. Flores*, 507 U.S. 292, 305 (1993) (explaining that the fact that UCs are noncitizens would quash “any doubts as to the constitutionality of [their] institutional custody”); Bogado et al., *supra* note 16 (describing horrific treatment and detention of immigrant children who are detained because of their immigration status); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (providing examples of how the government may treat immigrants in ways “that would be unacceptable if applied to citizens”); Cházaro, *supra* note 54, at 1051 (“The first models membership as a series of concentric circles, with U.S. citizens in the inner most ring and categories of noncitizens filling out the outer rings . . .”).

395. See *supra* section II.A.

396. See *supra* section II.D.

397. *Dobbs v. Jackson's Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2242 (2022).

398. See, e.g., *supra* note 40 and accompanying text (providing examples of the global impact of the *Dobbs* decision).

detained by the ORR.³⁹⁹ Post-*Dobbs*, ORR's internal policy still protects abortion rights for UCs.⁴⁰⁰ However, without the precedent of *Roe*, this policy is at risk of going away.⁴⁰¹

UCs are a vulnerable population, and it is vital that individual states take actions to expand abortion protections to include them. Current attempts by states to include abortion rights in their state constitutions and state laws are not enough to protect detained UCs. However, if states were to incorporate abortion protections into child welfare law, ORR detention facilities would be forced comply with state child welfare laws under the *Flores* Agreement and federal regulation. Using child welfare law to protect abortion for UCs is not a permanent solution, and in the larger scheme of immigration and reproductive justice its effects may seem trivial. However, for the individual children who could potentially benefit from this use of the law, the impacts are life changing.

399. See *supra* Part III.

400. See FIELD GUIDANCE #21, *supra* note 42, at 3.

401. See *supra* Part IV.