

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17- 5276

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D.,
on behalf of herself and others similarly situated, JANE ROE on behalf of herself and
others similarly situated; and JANE POE,
Plaintiffs-Appellees,

v.

ERIC D. HARGAN, *et al.*,
Defendants-Appellants.

RESPONSE TO COURT ORDERS

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

AUGUST E. FLENTJE
Special Counsel
Civil Division

ERNESTO H. MOLINA
Deputy Director
Office of Immigration Litigation
Civil Division

CATHERINE H. DORSEY
Attorney, Appellate Staff
Civil Division

W. DANIEL SHIEH
SABATINO F. LEO
JOSEPH A. DARROW
Trial Attorneys
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Appellants Eric Hargan, Steven Wagner, and Scott Lloyd, in their official capacities, hereby respond to this Court's briefing order, its extension order, and its order regarding the ORR decision document.

As an initial matter, we understand that U.S. Immigration and Customs Enforcement (ICE), a component of the U.S. Department of Homeland Security (DHS), will imminently take custody of Jane Roe and, upon transfer, intends to process her for release on her own recognizance. That release may occur yet today. Once that release has occurred, the government intends to move the Court to dismiss this appeal. *See* Fed. R. App. P. 42(b).

I. Appellants' Responses to Extension Order

In this Court's extension order, it directed the government to provide a "precise timetable for when Jane Roe will be transferred to Homeland Security and specifically whether and precisely when, upon her transfer, she will be permitted to obtain an abortion."

This morning, ORR determined that Ms. Roe is, in fact, nineteen years old, not seventeen as previously believed. (Attached as Ex. 1). This determination was made after ORR obtained a copy of Ms. Roe's certificate of birth from her home country on December 18, 2017. Ms. Roe had previously represented that she was 17 years old. Once it determined that Ms. Roe was 19 years old, it immediately began the process to

transfer Ms. Roe to ICE custody.¹ That process has not quite concluded, but should conclude very soon. Once ICE takes custody, it intends to process Ms. Roe for release on her own recognizance, so she will no longer be in government custody. We will promptly advise the Court once that occurs, and anticipate it may occur tonight. Once she is released, her release will render moot the portion of the temporary restraining order requiring the government to “allow J.R. *** to be transported *** to an abortion provider,” TRO at 5 (ECF No. 73), and in any event the government has complied with that order by releasing Ms. Roe from custody.

II. Appellants Responses to This Court’s Three Questions Posed in its December 18, 2017 Briefing Order

In its briefing order, this Court asked the parties to address

(1) whether Jane Roe’s independent request for and decision to undergo an abortion fully complies with the relevant state law governing abortions by minors, and (2) whether the Office of Refugee Resettlement (ORR) has yet made an individualized decision regarding its view concerning why termination of the pregnancy would not, in its judgment, be in Jane Roe’s best interests and, if so, to submit that decision and analysis under seal with its reply brief, and (3) if no such individualized decision has been made (see DCT Tr. 19), identify on what basis ORR has concluded that an abortion would not be in Jane Roe’s best interests

In response to the Court’s three questions posed in its briefing order, the government provides the following information. First, we are neither aware of nor

¹ Plaintiff has advised the government that Ms. Roe maintains that she is 17 years old and reserves all rights to contest the government’s determination that she is an adult and any other rights she may have.

asserting any state-law impediment to Ms. Roe's request for an abortion. On the second and third questions, ORR has not yet determined whether – in considering the interests of the child in decisions relating to her care and custody – it would facilitate an abortion, because it was allowing the sponsorship process and other case management matters (including verification of age) to unfold before making such a determination.

III. Response to Order Regarding ORR Decision Document

In an order entered early this afternoon, this Court ordered that the “government either file on this court’s public docket, with redactions necessary to avoid revealing Jane Poe’s personal or identifying information, a copy of the ‘Decision by Director Scott Lloyd for Jane Poe with attached note to file’ that was filed under seal on the district court docket as ECF No. 72; or show cause why it cannot do so.”

Because the government intends to soon dismiss its appeal, we respectfully submit that the district court should be permitted to address issues relating to the public release of the sealed document in the ordinary course, and that this Court should not order the document’s release in the first instance. Importantly, the district court has moved promptly to address the public filing of the document. *See* Minute Order (Dec. 19, 2017) (requiring government to file redacted version of ORR decision); ECF 83 (government response to order requesting additional time to assert privilege, but stating that “the court can file the document on the public record with the redactions made by Plaintiff without disclosing personal privacy information relating to Ms. Poe”); ECF 85

(response by plaintiffs to government filing). We respectfully request that this Court allow the district court to address the issue in the first instance.

DATED: December 19, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BY: /s/ August E. Flentje
AUGUST E. FLENTJE
Special Counsel

ERNESTO H. MOLINA
Deputy Director
Office of Immigration Litigation

CATHERINE H. DORSEY
Attorney, Appellate Staff
Civil Division

SABATINO F. LEO
W. DANIEL SHIEH
JOSEPH A. DARROW
Trial Attorneys
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 305-9802
Fax: (202) 305-1890
daniel.shieh@usdoj.gov
sabatino.f.leo@usdoj.gov
joseph.a.darrow@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on December 19, 2017, I electronically filed the foregoing with the Clerk of Court by using paper copy, and will deliver a copy to all counsel of record.

/s/ August E. Flentje
AUGUST E. FLENTJE
Special Counsel
Civil Division

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 783 words. This Response complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

/s/ August E. Flentje
AUGUST E. FLENTJE
Special Counsel
Civil Division