

TO: Interested Parties
FROM: Helene Krasnoff, Vice President, Public Policy Litigation & Law, Planned Parenthood Federation of America
DATE: September, 5, 2018
RE: **Garza v. Hargan:** A closer reading of Judge Kavanaugh's Ruling Shows His Views on Abortion

As we analyze Kavanaugh's record on reproductive rights and abortion, a deeper look at his ruling in the Jane Doe case makes the question clear. The suggestion that Kavanaugh is moderate is just false. Judge Brett Kavanaugh's rulings in *Garza v. Hargan* reveals a dangerous interpretation of a women's right to access safe, legal abortion.

Less than a year ago, in that case, Judge Kavanaugh ruled twice to block a young undocumented woman's access to abortion.

What was really going on in that case? That young woman, Jane Doe, was a 17 year old who had travelled to the United States alone and was being held in a government-contracted detention facility. She found out she was pregnant and decided she wanted an abortion. Because she was in Texas and was unable to get the permission of a parent to have an abortion, the young woman had to go before a Texas state court judge and convince that judge that having the abortion was in her best interest or that she was mature enough to make the decision on her own. She did that, and received court approval to make her decision about her health care. However, even after that, the Trump-Pence administration refused to release her from their custody for the health case she desired.

The young woman had funds for an abortion. She had transportation for an abortion. All the government needed to do was unlock the doors --- but claimed it could not do so because that would amount to "facilitating" an abortion. The Trump-Pence administration took the position that this young woman had two options: (1) leave the country, giving up her claim to asylum, and returning to her home country from which she fled where abortion is illegal. Or (2) wait an indeterminate amount of time for the government could find a sponsor for her and then decided to release her to that sponsor. Note that Texas has laws that restrict access to abortion later in pregnancy, so delaying the abortion could amount to preventing her from accessing one at all. **The Trump-Pence administration argued that those options did not impose an "undue burden" on Jane Doe's access to abortion.**

By the time that Judge Kavanaugh heard Jane Doe's case, she had already been in U.S. detention for six weeks, and it was already three weeks after she had obtained the order from the Texas state-court judge allowing her to have the abortion, but the government still had not found a sponsor for her. She was weeks away from being in danger of exceeding Texas' deadline to access abortion.

Nonetheless, Judge Kavanaugh sided with the Trump-Pence administration, saying that it could continue to block her from getting the abortion she wanted. Judge Kavanaugh thought it was not an "undue burden" to block her for several more weeks, pushing her into the second trimester, and endangering her ability to access an abortion in Texas, due to the state's 20 week ban. But that's not all. Kavanaugh's decision would have allowed the Trump-Pence administration to continue to drag out the case by saying he would "consider any additional arguments from the Government if and when transfer to a sponsor is unsuccessful."

To recap: had the full court not intervened, Judge Kavanaugh would have continued to delay this young woman's ability to access abortion for an indefinite period of time, even after she had met all of the state

requirements to access one. And throughout it all, he insisted that this indefinite delay did not constitute an “undue burden” on the young woman’s ability to access abortion. To which we must ask: if barring a woman who has met all of the requirements of state law from getting one until she must seek a riskier procedure -- if she can get one at all -- is not an “undue burden,” what would?

This is far from an opinion of “caution and compromise” as described by Politico. In [his dissent](#), Judge Kavanaugh even used the [phrase popular with those opposed to abortion](#), “abortion on demand” to make his case, stating that the en banc court had created a “new right for unlawful immigrant minors in U.S. government detention to obtain abortion on demand.” Rather, as DC Circuit Judge Patricia Millett explained in response to Judge Kavanaugh’s dissent:

“Abortion on demand? Hardly. Here is what this case holds: a pregnant minor who (i) has an unquestioned constitutional right to choose a pre-viability abortion, and (ii) has satisfied every requirement of state law to obtain an abortion, need not wait additional weeks just because she—in the government’s inimitably ironic phrasing—“refuses to leave” its custody ... That sure does not sound like “on demand” to me. Unless Judge Kavanaugh’s dissenting opinion means the demands of the Constitution and Texas law.”