[SCHEDULED FOR ORAL ARGUMENT SEPTEMBER 26, 2018]

No. 18-5093

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALEX M. AZAR II, Secretary of Health and Human Services; *et al.*
Defendants-Appellants,

v.

ROCHELLE GARZA, as guardian *ad litem* to unaccompanied minor JANE DOE, on behalf of herself and others similarly situated; *et al.*,
Plaintiffs-Appellees

APPELLANTS' BRIEF

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State of Michigan: Amici

State of Missouri: Amici

State of Nebraska: Amici

State of Ohio: Amici

State of Oklahoma: Amici

State of South Carolina: Amici

State of Texas: Amici

State of West Virginia: Amici

RULINGS

March 30, 2018 Opinion & Order, Judge Tanya S. Chutkan, United States District Court for the District of Columbia, *Garza, et al. v. Hargan, et al.*, --- F. Supp. 3d ---, 2018 WL 15676000 (March 30, 2018), GAAPPX 000238-GAAPPX000267

April 16, 2018 Amended Order, Judge Tanya S. Chutkan, United States District Court for the District of Columbia GAAPPX 000274-GAAPPX000275

RELATED CASES

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Doe v. ORR, 884 F.3d 269 (5th Cir. 2018)

Garza, et al. v. Hargan, et al., 874 F.3d 735 (DC Cir. 2017)

DATED: June 29, 2018

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INTRODUCTION

The district court's order, through the guise of affording preliminary relief, requires the Department of Health and Human Services' ("HHS") Office of Refugee Resettlement ("ORR") to facilitate pre-viability abortions in *every* circumstance when requested by a child who is in this country illegally without her parents or other caregiver, and without any opportunity to consult with the child's parents or make any judgment with respect to the child's maturity or her prospects to leave government custody. That extraordinary order must be vacated for three independent reasons.

First, this putative class action is moot. The two class representatives – Doe and Roe – received full relief and were released from ORR custody months before the district court certified a class action here. The Supreme Court has now recognized that Doe's individual claim for abortion access is moot, and Roe's claim is moot for the same reason. Any remaining claim regarding ORR information policies became moot when the two plaintiffs were released, months before the class was certified. And this is not the type of claim that is so "inherently transitory" that an exception to the mootness doctrine applies – as is shown by the district court's ability to consider and grant relief on the merits for both class representatives.

Second, the district court's class certification decision is plainly erroneous for several reasons. Doe and Roe are not adequate class representatives given their short

involvement in this case (and Roe was never a minor, making her particularly inappropriate). And they are not adequate to represent the broad class certified here – all pregnant minors, the vast majority of whom choose to carry their pregnancies to term. Their claims are not common or typical, given the many factual issues that are relevant to whether declining to facilitate an abortion on demand would constitute an undue burden – such as the ease of finding a sponsor, the child's ability to return to a home country, and her age and maturity. Even the en banc Court, in its now vacated opinion, recognized that these facts are relevant to the legal analysis. And a properly tailored class – of minors who actually seek abortion services while in ORR custody – is much too small to support a class action, and instead the small number of plaintiffs can readily be joined, as this case has shown.

Third, even if the district court appropriately reached the merits, it abused its discretion by preemptively awarding permanent relief to any unaccompanied minor who requests a pre-viability abortion, regardless of the relevant factual distinctions. To be sure, an unaccompanied alien minor who has crossed the border illegally and is pregnant faces extraordinarily challenging circumstances. But the Supreme Court has consistently held that the government may protect its legitimate interest in potential life by declining to facilitate abortion when a woman's right to choose to terminate her pregnancy is not unduly burdened. That principle permits the government to refuse to facilitate an abortion for a minor who illegally crosses the

border, even where the minor creates a difficult choice for herself by continuing to seek entry to the United States rather than returning to her country of nationality or helping promptly identify a sponsor. Such a self-imposed obstacle through illegal entry does not, in every situation, constitutionally require the government to provide a mechanical offer of abortion on demand or to facilitate an abortion. Instead, the ability to return home, and the prospects of finding a sponsor in the United States, are highly relevant to the inquiry. Moreover, ORR's ability to freely communicate with parents, caregivers, and potential sponsors, is a critical component of this process which the District Court improperly enjoined across the board.

STATEMENT OF JURISDICTION

The district court entered its order certifying a class and granting a class-wide preliminary injunction on April 2, 2018. ECF No. 127. The district court's jurisdiction was invoked under 28 U.S.C. § 1331. The government's notice of appeal was timely filed on April 9, 2018. ECF. No. 132. This Court has jurisdiction to review the grant of a class-wide preliminary injunction and the class certification decision that is inextricably bound up with the issuance of class-wide injunctive relief under 28 U.S.C. § 1292(a)(1); *see* Order Denying Stay 1 (June 4, 2018).

STATEMENT OF THE ISSUES

I. Whether this putative class action is moot where no class representative retained a personal stake in the case at the time of class certification and

the district court acknowledged that the claims are not so inherently transitory as to prevent the court from ruling on class certification before an individual plaintiff's claim expires.

II. Whether the district court erred in certifying a class of all pregnant minors in ORR custody where, at the time of class certification, the named class representatives were no longer members of the class and otherwise failed to satisfy the rigorous requirements for class certification under Federal Rule of Civil Procedure 23.

III. Whether the district court erred in granting a class-wide preliminary injunction ordering the government to facilitate any request for a pre-viability abortion by an unaccompanied minor alien in its custody and enjoining it from communicating that request to anyone without the minor's consent, regardless of the circumstances.

STATUTES AND REGULATIONS

The relevant statutes and regulations are included in an addendum to this brief.

STATEMENT OF THE CASE

This case arises from a complaint filed by Rochelle Garza, guardian *ad litem*, on behalf of Jane Doe, who, at the time the complaint was filed, was a pregnant, unaccompanied alien minor and in ORR custody, seeking to compel the government to facilitate her efforts in obtaining an elective abortion and to facilitate similar

requests from another unaccompanied minor alien in similar circumstances. As the case reaches this Court, it is a certified class action brought by two class representatives, Doe and Jane Roe, both of whose individual claims have been fully resolved. Indeed, by the time the district court certified a class, both named representatives had obtained abortions, turned eighteen, and had been released from ORR custody for months. In the nearly nine months since this case has been filed, no other plaintiff has joined this action as a class representative.

I. Statutory Framework

Congress set forth the special admissions and custody provisions for unaccompanied alien minors arriving in the United States through the Trafficking Victims Prevention Reauthorization Act ("TVPRA"), Pub L. No. 110-457, 122 Stat. 5044 (principally codified in relevant part at 8 U.S.C. § 1232), which places the care and custody of those children with HHS. 8 U.S.C § 1232(b)(1). The TVPRA was enacted to serve the legislative goals of ensuring that these children "are safely repatriated to their country of nationality or of last habitual residence" and avoiding incentives that would lead to alien smuggling and dangerous travel for minor children. 8 U.S.C. § 1232(a). The Act applies to aliens who are under eighteen years old, lack lawful immigration status in the United States, and for whom there is no parent or guardian either in the United States or available to provide care and physical custody. 6 U.S.C. § 279(g)(2). Alien minors apprehended at the border

from contiguous countries may be repatriated if there is no evidence they have been trafficked, they do not have a credible fear of persecution or torture in their home country, and they are capable of making an independent decision to withdraw their application for admission to the United States. *Id.* § 1232(a)(2)(A)-(B). Minors from noncontiguous countries cannot be immediately repatriated and are placed into HHS custody. See *id.* § 1232(a)(3)-(4), (a)(5)(D).

While in HHS custody, HHS is directed to place children "in the least restrictive setting that is in the best interest of the child," 8 U.S.C. § 1232(c)(2)(A), until they can be released to a suitable sponsor, obtain lawful status, or are repatriated to their country of nationality. *See* 6 U.S.C. § 279(g); 8 U.S.C § 1232(b)(1), (g). Once a child attains the age of eighteen, he or she is transferred to DHS custody, which then is directed to consider placement in the "least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight." 8 U.S.C § 1232(c)(2)(B).

Within HHS, the Office of Refugee Resettlement is responsible for the care and placement of unaccompanied children who enter the United States illegally and are "in Federal custody by reason of their immigration status." 6 U.S.C. § 279(b)(1)(A). ORR's Director is charged by Congress with "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child," and for "implementing policies with

respect to the care and placement of unaccompanied alien children." 6 U.S.C. § 279(b)(1)(B), (E). ORR generally provides that care through state-licensed residential care providers that provide shelter and services to unaccompanied minor children at ORR's direction and in compliance with ORR policies and procedures. *See* ECF No. 10-1; *see generally* U.S. Department of Health and Human Services, ORR Guide: Children Entering the United States Unaccompanied ("ORR Guide") *available at* https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied (last visited May 9, 2018). Federal law provides that the Director "shall not release" unaccompanied minor children "upon their own recognizance." 6 U.S.C. § 279(b)(2)(B).

As part of fulfilling its custodial obligations, ORR policies provide for children in their care to obtain necessary medical treatment for medical emergencies, including transporting them offsite when necessary. *See* ORR Guide at § 3.4.5. The ORR Guide specifically addresses certain routine care, certain family planning services, medical examinations, appropriate mental health care, immunizations, and prescribed medications and special diets, but does not address serious elective medical procedures such as abortion. *See* ORR Guide at § 3.4. Under a policy that has been in effect since at least 2015, ORR must approve all significant, non-exigent medical procedures for minors in its custody including, but not limited to, abortion,

which must take into consideration the child's interests, including the child's health. ECF No. 10 at 4.

II. This Litigation

A. Jane Doe

This suit began when Doe filed the initial complaint through her guardian *ad litem*, Garza, on October 13, 2017. Doe was then a 17-year-old alien who had attempted to enter the country illegally, was apprehended near the border, and was placed in the care and custody of ORR in Texas. ECF No. 10, at 3. While in custody, Doe requested an elective abortion. *Id.* She obtained a judicial bypass of Texas' parental notification and consent requirement from a Texas state court. *Id.* On September 27, 2017, ORR, acting in its custodial capacity, denied Doe's request to transport her from her shelter to obtain an abortion, after considering all the relevant factors. *Id.* at 5. Doe filed suit as a putative class action on behalf of Doe and "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant." ECF No. 1 ¶ 47.

The same day, Doe also filed a request for a temporary restraining order ("TRO") and preliminary injunction, seeking her immediate release from government custody to obtain abortion counseling and an abortion, if she so elected. ECF Nos. 3, 5. And, on October 18, 2017, Doe filed a motion to certify the class, ECF No. 18, requesting the court certify a class of "of all pregnant UCs who are or

will be in the legal custody of the federal government." *Id.* at 1. Doe asserted that there were "hundreds" of such alien minors in federal custody each year. *Id.* at 4. And she maintained that "[i]n 2014, there were approximately 726 pregnant UCs in ORR custody; in 2015, there were 450; and in 2016, 682." *Id.* The government explained that during fiscal year 2017 (running October 1, 2016, through September 30, 2017) ("FY2017"), ORR had 420 pregnant unaccompanied alien minors referred to its custody. Declaration of Jonathan White, Dated Nov. 20, 2017, ("White Nov. 20 Decl.") at ¶ 4. Of those 420, only 18 requested abortion services. *Id.* at ¶ 5. Of those 18, 11 obtained abortions; 5 rescinded their requests; and 2 were released to sponsors. *Id.*

Following an emergency hearing on October 18, 2017, the district court granted Doe's individual request for a TRO. ECF No. 20. The court ordered the government to transport Doe (or allow her guardian ad litem or attorney ad litem to transport her) to the nearest abortion provider for counseling and an abortion. *Id.* at 2. Additionally, the court enjoined the government from forcing Doe to reveal her abortion decision to anyone, or revealing it to anyone themselves; retaliating against Doe for her decision to have an abortion; or retaliating or threatening to retaliate against the shelter for any actions it might take to facilitate Doe's access to counseling or an abortion. *Id.*

The government filed an emergency appeal of the order to facilitate the abortion and initially obtained a stay of the TRO from this Court. *See Garza v. Hargan*, No. 17-5236 (Oct. 20, 2017). But the *en banc* Court subsequently dissolved the stay and remanded the case to the district court. *Garza v. Hargan*, No. 17-5236 (Oct. 24, 2017) (recalling mandate).

On October 25, 2017, Doe obtained an abortion. *Azar v. Garza*, No. 17-654, slip op. at 3 (U.S. June 4, 2018) (per curiam). That action mooted the government's effort to seek relief from this Court's *en banc* ruling. *Id*. In mid-January 2018, Doe was released from ORR's care into the custody of a sponsor. ECF No. 115-1. Shortly thereafter, she turned eighteen years old. ECF No. 115-1 at 2, ECF No. 118-1 at 4, ¶ 17.

B. Jane Roe and Jane Poe

On December 15, 2017, plaintiffs filed a consent motion for leave to amend the complaint, seeking to add Jane Roe as an additional plaintiff and class representative and Jane Poe as an additional plaintiff. *See* ECF No. 61; ECF No. 83. Roe presented herself as a 17-year-old unaccompanied minor in ORR custody. ECF No. 63-2 (December 14, 2017 Jane Roe Decl.) at ¶¶ 3-4. Roe stated that she learned she was pregnant during a medical examination provided in ORR custody and requested an abortion. *Id.* at 5. According to ORR records, Poe was a 17-year-old unaccompanied minor in ORR custody. ECF No. 66-1 (December 16, 2017

Jonathan White Decl.) at ¶ 4. At the time of her placement into ORR custody, Poe "was estimated to be approximately 9 weeks pregnant," though it subsequently became clear her pregnancy was much further along. *Id.* at ¶ 5. Poe contemplated an abortion shortly after entering ORR custody. But after Poe spoke with her parents, she informed ORR on December 4, 2017, that "she no longer requested an abortion." *Id.* Sometime thereafter, Poe again changed her mind and renewed her request that ORR facilitate an abortion. *Id.*

On December 16, 2017, ORR affirmatively denied Poe's abortion request. *See* ECF No. 87. The ORR Director indicated in a separate note to file that the request was denied due to the late stage of Poe's pregnancy, which was estimated to be at nearly 22 weeks, and a determination that an abortion would not be in Poe's best interest. *Id.* Roe's abortion request was never approved. Like Doe, Roe and Poe sought a TRO to require ORR to immediately facilitate their access to abortion services. ECF No. 63-1. On December 18, 2017, the district court granted a second TRO. ECF No. 73. The government filed a second emergency motion for stay pending appeal with this Court seeking an order staying application of the TRO as to Roe. *See Garza v. Hargan*, No. 17-5276 (D.C. Cir. 2017), D.C. Cir. ECF No. 1709385.[1] This Court granted an administrative stay of the district court's order

[1] Because of the differing circumstances surrounding Poe's case, the government did not seek a stay of the TRO as it related to Poe.

until December 20, 2017. *Id.*, D.C. Circuit ECF No. 1709390. In the meantime, the government obtained a copy of Roe's birth certificate from her home country indicating that Roe was actually 19 years old and thus not properly in ORR's custody. ORR immediately transferred Roe into DHS custody as an adult. *Id.*, D.C. Cir. ECF No. 1709677 at 1-2. DHS, in turn, released Roe on her own recognizance. *See id*. On December 19, 2017, the government moved to voluntarily dismiss its appeal. *Id.*, D.C. Cir. ECF Nos. 1709679 and 1709941. The motion was granted on December 20, 2017. D.C. Cir. ECF No. 1709941.

C. Jane Moe

On January 11, 2018, plaintiffs filed a Second Amended Complaint via consent motion, adding Jane Moe as a plaintiff. ECF No. 104. Moe declined to serve as a class representative. ECF No. 118-1, at 1-2. Moe was a 17-year-old unaccompanied minor who arrived in the custody of ORR on December 22, 2017. ECF No. 108-1 (January 11, 2018 Jonathan White Decl.) at ¶ 4. She alleged that she requested an abortion approximately four days following her placement with ORR. ECF No. 105-2 (January 10, 2018 Jane Moe Decl.) at ¶ 6. ORR records indicated that Moe was approximately 17 weeks into her pregnancy when the Second Amended Complaint was filed. ECF No. 108-1 (January 11, 2018 Jonathan White Decl.) at ¶ 6. Shortly upon her arrival into ORR custody, Moe "identified a potential sponsor," and "[t]he prospects for possibly placing her with that sponsor [we]re

favorable." *Id.* at ¶ 5. Jane Moe's abortion request was never approved. Like the other named plaintiffs, Moe sought a TRO requiring the government to immediately facilitate her efforts to obtain an abortion. ECF No. 105-1. While the motion for a TRO was pending, however, Moe's sponsor completed all required documentation, including the submission of fingerprints and the completion of all background checks, and ORR successfully completed the vetting process within a week. On January 14, 2018, Moe was released to the custody of her sponsor. ECF No. 113-1 at ¶ 4, ECF No. 114, ECF No. 118-1 at 7, ¶ 45.

D. The District Court's Order

Two months later, the district court certified a class of "all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government[,]" and granted class-wide preliminary injunctive relief providing, among other things, that the government is:

> (1) Enjoined from interfering with or obstructing any class member's access to . . . an abortion . . . ;
>
> (2) Enjoined from forcing any class member to reveal the fact of their pregnancies and their abortion decisions to anyone, and from revealing those decisions to anyone themselves, either before or after an abortion;

ECF No. 127 (Order), at 1-2 (Mar. 30, 2018).

Although both potential class representatives had been released from ORR custody for months and had long ago obtained the abortions they sought, the district

court reasoned that the class claims were not moot. ECF No. 126 (Op.) 17-19 (Mar. 30, 2018). First, the court observed that Poe, who never sought to represent a class, still had live claims by virtue of the fact she remained in ORR custody and asserted "claims arising out of Defendants' policies or practices that involve forced disclosure of her decision to obtain an abortion." *Id.* at 17.[2] Second, the court determined that, even if Poe's claims were moot, this case fit within the exception to the mootness doctrine for class claims that "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification." Op. 18 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)). That was so, the court reasoned, because the "case involves claims from unaccompanied minors in ORR custody, a transitory population whose membership is not fixed at any given time" and the "right of every pregnant minor in ORR custody to seek an abortion is necessarily time limited." Op. 18-19.

The district court also determined that the requirements for class certification under Federal Rule of Civil Procedure 23 were met. Op. 8-21. The court concluded that the class was sufficiently numerous to make joinder impractical by looking to

[2] Here and elsewhere, the district court appeared to believe that all four named plaintiffs—Doe, Roe, Poe, and Moe—would serve as "class representatives in this case," Op. 17; *see* Op. 19, despite the fact that neither Poe nor Moe ever expressed a desire to represent the class. In an amended order, issued after the government asked this Court for a stay, the court indicated that only Doe and Roe would serve as class representatives. ECF No. 136, at 1. It did not revise its opinion.

an estimate of the total number of pregnant minors in ORR custody at any given time, regardless of the number who actually sought an abortion (and therefore were subject to the challenged policy). Op. 9-11. It concluded that plaintiffs presented a common question of law—"the constitutionality of ORR's general policy regarding reproductive options"—that is capable of class-wide resolution. Op. 13. It found that the claims of the named plaintiffs were typical of the class, even those class members who did not seek an abortion, because plaintiffs allege that "ORR's policies and/or practices deprive pregnant UCs of the ability to make their own *choices* regarding whether to seek an abortion or disclose pregnancy-related information . . . , regardless of which option an individual class member might ultimately choose." Op. 15. It concluded that the named plaintiffs could adequately represent the class despite no longer possessing live claims or belonging to the class, because (1) "exceptions to the mootness doctrine apply" and (2) the named plaintiffs "have no conflicts of interest with the class and are capable of vigorously prosecuting class interests." Op. 19-20. And the court found that "'a single injunction or declaratory judgment would provide relief to each member of the class,' notwithstanding the fact that class members may make different choices." Op. 21 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011)).

Finally, the district court concluded that a class-wide preliminary injunction was appropriate. Op. 21-28. The court reasoned that ORR's policies effectively

created "an absolute veto over the reproductive decision of any young woman in [ORR] custody," prohibiting them from "'making the ultimate decision' on whether or not to continue their pregnancy prior to viability—a quintessential undue burden" under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Op. 23-24 (quoting *Casey*, 505 U.S. at 879). Relying on this Court's *en banc* order in Doe's case, which has subsequently been vacated, the court rejected the government's argument that ORR policies do not create such a veto or undue burden because unaccompanied minors may leave ORR custody by seeking voluntary departure to their home country or seeking placement with a sponsor. *See* Op. 26 ("In light of the court's previous orders and the D.C. Circuit's extensive examination of Defendants' contentions in its consideration of J.D.'s case, this court pretermits lengthy discussion of these arguments."). The court also reasoned that voluntary departure would require an unaccompanied minor to "relinquish any claim that may entitle [her] to remain in the United States" and sponsorship is "typically a lengthy, complex process" in which "ORR makes the final decision on whether to approve a particular sponsor." Op. 26-27. In addition, the court reasoned that the balance of equities favored an injunction because members of the class would face irreparable harm throughout the proceedings in the form of increased health risks and perhaps the inability to obtain an abortion, while the government, it reasoned, had not shown "any legitimate interest that will be harmed" by an injunction. Op. 27.

The district court subsequently denied the government's motion to stay its order pending appeal. ECF No. 128.

E. Subsequent Appellate Proceedings

On June 4, 2018, the Supreme Court vacated this Court's prior *en banc* order refusing to stay the TRO requiring the government to facilitate Doe's access to abortion services. *Garza*, slip op. 5. The Supreme Court explained that the government had planned to seek a stay of the *en banc* order and further review in that Court. *Id.* at 2. It further explained, however, that the government was prevented from doing so when "Garza and her lawyers . . . took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected." *Id.* at 3-4. On that basis, the Supreme Court vacated this Court's *en banc* order, and remanded the case with instruction to direct the district court to dismiss Doe's individual claim for injunctive relief as moot. *Id.* at 5.

Later on the same day, this Court granted in part and denied in part the government's request to stay the district court's class-wide injunction pending appeal. Stay Order (June 4, 2018). The Court granted a stay of the district court's order to the extent that it prevented ORR from communicating with a child's parents even "when a class member provides non-coerced consent to disclosure or when the class member needs emergency medical care and is incapacitated such that she is unable to inform a medical care provider herself." *Id.* at 2. The Court also clarified

that the district court's injunction requires ORR to facilitate only pre-viability abortions. See *id*. at 1-2 (Rogers, J., concurring); see *id.* at 1-2 (Srinivasan, J., concurring).

SUMMARY OF THE ARGUMENT

The district court's order that HHS facilitate pre-viability abortions in *every* circumstance when requested by a n unaccompanied minor who is in this country illegally, and without providing an opportunity to consult the child's parents, determine the child's maturity, or her prospects of leaving government custody, must be vacated for three reasons.

First, Doe and Roe's mooted claims cannot support class certification. The only two class representatives in this matter received full relief months before the district court certified a class. Indeed, the Supreme Court has now recognized that Doe's individual claim is moot, as is Roe's for the same reason. And their privacy interest claims regarding ORR's information policies were also moot when they were released, also months before certification. Further, the "inherently transitory" exception does not apply, given that the district court had ample time to rule on certification before Doe and Roe's claims were moot, as shown by its expeditious grant of injunctive relief on the merits for both.

Second, class certification was plainly erroneous under Rule 23. Doe and Roe cannot adequately represent a class of all pregnant minors in ORR custody. They

have divergent interests from the vast majority of whom choose to carry their pregnancies to term. Their short involvement in the case, and the fact that Roe was never a minor to begin with, also means they are not adequate. Doe and Roe's claims are also not common or typical, given the relevant factual questions surrounding whether declining to facilitate an abortion is unconstitutional, including the child's age, maturity, sponsorship prospects, and ability to return home. Indeed, these factors were deemed highly probative under this Court's vacated en banc opinion. Finally, a properly tailored class – minors who seek abortion services while in ORR custody – cannot establish numerosity. Instead, the small number of plaintiffs – so far four over the course of nine months -- can readily be joined as this action has already shown.

Third, the district court abused its discretion by awarding unqualified relief to *any* unaccompanied minor who requests a pre-viability abortion while in ORR custody, regardless of the circumstances. While a pregnant, unaccompanied minor who illegally enters the United States is in an extraordinarily difficult circumstance, it does not override the Supreme Court's recognition of the government's legitimate interest in protecting life by declining to facilitate abortion. Sponsorship and voluntary departure both have the benefit of surrounding a minor child with family members or other responsible adults to aid her in her decision-making process. The

district court's award of a mechanical abortion on demand eviscerates those legitimate government interests.

The district court's gag order preventing ORR from communicating with parents, sponsors, and medical personnel, absent the minor's express consent, was also an abuse of discretion. This prohibition against parental *notification* and consultation, not consent, is not like state laws that have been found to impose an undue burden. That is particularly true here, where ORR already possess the information about the request for an abortion so the child is not required to provide any notice, the parents play an essential and legitimate role in such a weighty decision involving their child, do not have custody of the child and therefore cannot obstruct the abortion, and ORR is ultimately in need of relevant information in action as the child's legal custody.

Finally, the remaining injunction factors counsel against class-wide relief because any harm to potential plaintiffs can be addressed in a timely manner on an individual basis, as this litigation has shown. On the other side of the balance, the government's interest in protecting potential life by declining to facilitate abortion is completely extinguished in each instance the government is required to facilitate a pre-viability abortion. For these reasons, the class should be de-certified and the class-wide preliminary injunction should be lifted.

ARGUMENT

The district court's class certification and sweeping class-wide preliminary injunction order should be vacated for three independent reasons. First, the class claims in this case are moot. Both class representatives' individual claims were mooted well before a class was certified after the district court granted them full relief, and this case does not fit into any exception to mootness that might allow the plaintiffs to continue to seek class certification even after their individual claims expired. Second, even if the class claims were not moot, the district court's class certification is plainly wrong. The class definition is vastly overbroad and plaintiffs have failed to make the demanding showing for numerosity, commonality, typicality, and adequacy that Rule 23 requires. Finally, the district court's class-wide preliminary injunction order is erroneous, because, among other reasons, plaintiffs are unlikely to succeed on their claim that the Fifth Amendment requires the federal government to facilitate any pre-viability abortion requested by a pregnant unaccompanied minor in ORR custody, regardless of the circumstances of the pregnancy, the prospects for sponsorship, or the consequences of voluntary departure.

I. STANDARD OF REVIEW

This Court reviews a district court's determination of mootness *de novo*. *See Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059, 1063 (D.C. Cir. 2005). The Court

reviews a district court's class certification decision for abuse of discretion. *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006). But the court also reviews de novo "erroneous application of legal criteria" in a certification decision. *Id*.

In reviewing the district court's issuance of a preliminary injunction, "[t]his Court reviews the district court's legal conclusions as to each of the four factors *de novo*, and its weighing of them for abuse of discretion." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (citation omitted).

II. PLAINTIFFS' CLASS CLAIMS ARE MOOT

Under Article III, federal courts are limited to "the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks and citation omitted). A putative class action generally will become moot once the named plaintiff's claims no longer present a live controversy. *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 129 (1975) (per curiam).

Here, as the Supreme Court has now recognized, Doe's individual claim for injunctive relief was mooted when she obtained the abortion she sought in October 2017. *See Garza*, slip op. 3 ("The abortion rendered the relevant claim moot."). Any remaining claims for injunctive relief concerning ORR information policies and

practices for minors in its custody were mooted when she left ORR custody in January 2018. *Cf.* Op. 17 (reasoning to Poe's individual claims were not moot because she remained in ORR custody). And, while Roe's individual claims were not before the Supreme Court, her individual claims against ORR policies were similarly mooted in December 2017, when she, like Doe, left ORR custody and obtained an abortion. Op. 6. Absent an exception to the ordinary rules of mootness, the district court therefore erred in certifying a class in March 2018, more than two months after the last individual claim by a class representative expired.

The Supreme Court has recognized an exception to mootness in the class action context when "the named plaintiff's individual claim becomes moot *after*" the district court rules on class certification, *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 74 (2013) (emphasis in original), but that rule does not apply here because, as noted, both Doe and Roe left ORR custody, mooting all relevant individual claims, well *before* the class certification ruling.

Nor are the putative class claims saved by the further exception for claims that "are 'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Genesis Healthcare Corp.*, 569 U.S. at 76 (citation omitted); *see County of Riverside* v. *McLaughlin*, 500 U.S. 44, 52 (1991) (applying exception in context of individuals held without probable cause determinations);

Gerstein v. *Pugh*, 420 U.S. 105, 110 n.11 (1975) (same). The "inherently transitory" exception applies only where a claim is so fleeting that "no plaintiff [will] possess[] a personal stake in the suit long enough" to obtain a decision on class certification. *Genesis Healthcare Corp.*, 569 U.S. at 76. Here, it is far from clear that the district court could not have ruled on plaintiffs' motion for class certification before the named plaintiffs' interest would have expired in the ordinary course—much less that "no plaintiff" in the future would be able to litigate a challenge through a class-certification decision. *Id.*

The district court reasoned that that the case fell within the "inherently transitory" exception because the case involves claims from "a transitory population whose membership is not fixed at any given time" and "the right of every pregnant minor in ORR custody to seek an abortion is necessarily time limited." Op. 18-19. But that is simply not the test. Cases that have applied the exception have not applied them in circumstances like this – there is no uncertainly about how long a claim that is presented to the Court will last and the Court has sufficient opportunity to act before that time expires. *See Gerstein*, 420 U.S. at 111 (finding a class to be inherently transitory because "[t]he length of pretrial custody cannot be ascertained at the outset"); *Wilson v. Gordon*, 822 F.3d 934, 945 (6th Cir. 2016) (claim transitory given "the uncertainty about how long an injury caused by ongoing conduct will persist"); *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (applying *Gerstein* to

hold that "the crux of the 'inherently transitory' exception is the uncertainty about the length of time a claim will remain alive"); *Zurak v. Regan*, 550 F.2d 86, 91-92 (2d Cir. 1977) (holding that "the relatively short periods of incarceration involved and the possibility of conditional release [created] a significant possibility that any single named plaintiff would be released prior to certification"). Here, there is no meaningful uncertainty about how long each plaintiff's pregnancy will last or the date on which an abortion becomes unlawful under state law. And, as demonstrated by the course of this litigation, the district court generally has adequate opportunity to act on those claims before they are mooted.

The district court itself concluded that "the proposed class likely includes a number of pregnant UCs who will remain in custody long enough for the court to rule on class certification." Op. 18. Indeed, the court likely could have ruled on class certification before the existing named class representatives' claims were mooted. The motion for class certification was filed in October 2017. *See* ECF No. 18. The government advised the district court of the mootness concerns shortly thereafter. *See* ECF No. 53, at 8-11 (Nov. 20, 2017). And the district court was able to act on an expedited basis for both named representatives prior to their claims becoming moot. The court declined to rule on the pending class certification motion while the named class representatives presented live claims, but the fact that it could have done so precludes the application of the "inherently transitory" exception here.

See Genesis Healthcare Corp., 569 U.S. at 76 (requiring that "no plaintiff" will possess a personal stake long enough to obtain a class certification ruling).

That does not suggest that ORR's policies would be "effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Id*. Were another plaintiff to come forward and simultaneously file both a motion for a TRO and a motion for class certification, ample time would likely exist for the court to consider the merits and rule on certification before her pregnancy reached viability. Given that most States permit elective abortion for a substantial period, the claims here are not inherently transitory, and the district court therefore should have dismissed the class claims as moot.

III. THE DISTRICT COURT ERRED IN CERTIFYING A CLASS OF ALL PREGNANT MINORS IN THE GOVERNMENT'S CUSTODY

Even if the class claims in this case are not moot, the district court's order should also be vacated because the plaintiffs have failed to satisfy the rigorous requirements of class certification under Federal Rule of Civil Procedure 23. For class certification to be proper under Rule 23, a plaintiff must establish four requirements: numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a); *Garcia*, 444 F.3d at 631. Failure to satisfy just one requirement is fatal. *Id*. Numerosity requires showing that the number of affected individuals is sufficiently large to render joinder impracticable. *Id.* Commonality involves

showing that the putative class members all share a common issue. *Id.* Typicality requires establishing that the class representatives' claims are sufficiently similar to, or typical of, the claims of non-class members. *Id.* And adequacy ensures that the named class representatives can fairly and adequately protect the interests of the class, without the presence of any conflict of interest. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

A. Plaintiffs Failed to Establish that Doe and Roe Can Adequately Represent the Interests of the Class

The adequacy requirement for class action certification serves to protect the due process rights of absent class members who will be bound by the judgment. *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002). A determination of legal adequacy is based on two inquiries: (1) "the representative must appear able to vigorously prosecute the interests of the class through qualified counsel," and (2) "the named representative must not have antagonistic or conflicting interests with the unnamed members of the class." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) (quoting *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)). Here, Doe and Roe cannot adequately serve as class representatives for two reasons—their ongoing connection to the litigation is not sufficiently strong given the mootness of their claims and they cannot properly represent the vast majority of the class, who are minors in ORR

custody seeking to carry their pregnancies to term and seek care oriented toward that goal, rather than terminating potential life.

First, because their individual claims are moot, the Court must specially assure itself of their adequacy under Rule 23. *Geraghty*, 445 U.S. at 404 (where class representative's claims are moot, court must determine "that vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'"); *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *see also DL v. Dist. Of Columbia*, 860 F.3d 713, 726 (D.C. Cir. 2017). Indeed, the Supreme Court has rejected class representatives on the basis of adequacy where the class representatives' claims became moot. *See, e.g.*, *Hall v. Beals*, 396 U.S. 45, 48-50 (1969); *Cf. Long v. Dist. of Columbia*, 469 F.2d 927 (D.C. Cir. 1972); *Spriggs v. Wilson*, 467 F.2d 382 (D.C. Cir. 1972).

The district court failed to address this aspect of adequacy. Doe and Roe no longer have a personal stake in the outcome of the claim, and unlike the class representatives found adequate despite mootness in *Sosna* and *DL*, they were only briefly involved with this case. *See Sosna*, 419 U.S. 393; *DL*, 860 F.3d 713. Doe had an abortion nearly nine months ago, within weeks of filing the complaint in this case, and was released from ORR custody nearly six months ago. Op. 4. Roe was an adult when she came into ORR custody—reason alone to find her an inadequate representative of all pregnant *minors* in ORR custody—and was released from ORR

care over three months ago, less than a week after joining the case. Op. 6. There is no colorable prospect that either class representative will again be in the custody of ORR as pregnant unaccompanied minors. And neither class representative provided any statement in their declarations indicating they would vigorously pursue class claims, but rather spoke only of furthering their own immediate interests in obtaining abortions. *See* ECF No. 5-2; 63- 2.

Furthermore, whether the class representatives have a personal stake in the claim is particularly important in the abortion context and when dealing with children. The fact that Doe and Roe wanted abortions while they were pregnant does not mean that they are adequate representatives now that they are no longer in that position, given that positions on abortion are known to evolve over time and with changing circumstances. *See*, *e.g.*, *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004) (suit brought by "Jane Roe" from *Roe v. Wade* asking district court to revisit Roe). The potential for changed minds and the lack of any ongoing personal interest presents a real potential for a conflict of interest that implicates due process concerns. Specifically, any judgment or settlement that results from this litigation, at the direction of non-class members Doe and Roe, who are not children and not subject to ORR custody, will bind other young women who are depending on ORR to provide custody and care at a particularly vulnerable time.

Second, even if Doe or Roe could adequately protect the interests of minors in ORR custody seeking abortions, they certainly cannot adequately represent the interests of all pregnant minors in ORR custody. The district court failed to consider this fundamental flaw in its certification order. Members of such a broad class undoubtedly hold significantly divergent views on the controversial pro-choice claims being asserted on their purported behalf. The vast majority of pregnant minors in ORR custody do not request an abortion; many may strongly oppose abortions and, indeed, may support ORR's challenged policies and practices. *See* ECF No. 128-1 ¶13 ("Most UACs in ORR care and custody do not request abortions"); ECF 53-1 (out of 420 pregnant minors in ORR custody during fiscal year 2017, only 18 made a preliminary request for abortion services). Such minors likely want pregnancy-related, delivery, and post-partum care, not the abortion-focused remedy ordered by the court, or representation by pro-choice class counsel or organizations. *See Doe v. ORR*, 884 F.3d 269, 275 (5th Cir. 2018) (Jones, J., concurring in part).

Two adult women who are not currently pregnant and who are no longer in ORR custody and never will be again cannot fairly and adequately represent the interests of all pregnant minors in ORR custody, almost all of whom seek to carry their pregnancies to term. The district court thus erred in concluding that the class

representatives could "fairly and adequately protect the interests of the class." *Sosna*, 419 U.S. at 406.

B. Plaintiffs Failed to Establish Commonality or Typicality

Commonality requires that the class representatives' claims "be of such a nature that it is capable of classwide resolution." *Wal-Mart Stores*, 564 U.S. at 350. "[C]ommonality is . . . lacking where the case would 'turn on a series of individualized inquiries.'" *Disability Rights Council v. WMATA*, 239 F.R.D. 9, 26 (D.D.C. 2006) (quoting *Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006)). Typicality similarly looks at whether the "individual's claim will be typical of the class claims." *Wal-Mart Stores*, 564 U.S. at 353. The analysis typicality "tend[s] to merge" with the commonality requirement. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982).

Plaintiffs have failed to establish commonality and typicality because no single order can properly address all of the circumstances where ORR must, under the Due Process Clause, facilitate the termination of a pregnancy by a minor in their care. With respect to typicality, since the vast majority of pregnant minors in ORR custody do not seek abortions, the claims of class representatives Doe and Roe are not typical of that much larger group of class members who seek to carry their pregnancies to term.

The differing circumstances with respect to the four named plaintiffs in this case shows that there are no common due process claims here. Instead, each of their requests for abortion services implicated distinct circumstances that demonstrate the variability of the claims throughout the class. In assessing Jane Doe's individual claim, for example, this Court found it critical that the sponsorship search lasted for weeks. *Garza v. Hargan*, 874 F.3d 735, 739 (D.C. Cir. 2017), *vacated as moot*, *Azar v. Garza*, No. 17-654, slip op. at 3 (U.S. June 4, 2018) (per curiam). But Moe was released to a sponsor just days after filing her claim, permitting her to individually take steps toward her preferred choice. ECF No. 114. Roe, too, was released just days after seeking relief in district court and while the government's appeal of injunctive relief remained pending because she was found to be 19 years old. ECF No. 66-1.

Similarly, this Court found Doe's alleged inability to return to her country of nationality as a relevant factor in her right to relief. *Garza*, 874 F.3d at 740. Doe claimed she could not return to her country of nationality based on fears of abuse, but none of the other named plaintiffs has raised similar concerns about returning home. Relatedly, this Court flagged Doe's claim of an entitlement to remain in the United States as relevant to its analysis. *See Garza*, 874 F.3d at 740. But no other named plaintiff has made similar claims, as is undoubtedly true of a host of unnamed plaintiffs to whom the district court's ruling would apply.

That is to say nothing of the unique considerations that may be presented by the varying age and special needs of the minors that make-up the certified class. Very young teens would require special care in addressing their pregnancies—concerns that the district court did not even consider or discuss and which raise heightened concerns. *See, e.g.*, *Doe*, 884 F.3d at 275 (Jones, J., concurring in part) (describing events that led to Garza seeking a judicial bypass for a fourteen year old who did not want an abortion). These are concerns that the Supreme Court has upheld as appropriate in approving state judicial bypass regimes. *See Ohio v. Akron Center for Rep. Health*, 497 U.S. 502, 515-16 (1990) (a state may enact a bypass procedure that "require[s] a minor to prove maturity or best interests"). In light of these and other concerns, the district court was wrong to conclude that the question "whether ORR's policies and/or practices regarding the reproductive decisions of pregnant UCs violate their constitutional rights" presented a common legal question capable of resolution on a class-wide basis. Op. 13.

The district court dismissed these differences as "factual variations" that are not "fatal" to the commonality finding because "none diminish any of the key common circumstances that form the basis of the central question." ECF No. 126 at 13. But this cannot be correct given the reasoning adopted by this Court's now-vacated *en banc* order decision—which relied on the perceived inability of Doe to promptly find a sponsor or return home—as well as the ability of States to evaluate

the maturity level and best interests in individual cases through bypass regimes. As the Supreme Court has recently explained, class action treatment is normally inappropriate for due process clause claims, as the constitutional inquiry depends on the individual claimants' facts and circumstances. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 851-52 (2018) (remanding to reconsider "whether a Rule 23(b)(2) class action" is appropriate because "[d]ue process is flexible, we have stressed repeatedly, and it calls for such procedural protections as the particular situation demands") (internal quotations omitted). The same is true here. Plaintiffs cannot reasonably dispute that minors who enter immigration custody while pregnant do so at varying stages of their pregnancy, hail from different countries with different return prospects, have different ages and maturity levels, and have different potential to be promptly released to a parent or sponsor. The minors may also present distinct mental health issues that affect their decision-making abilities. This non-exhaustive list shows why no "single injunction or declaratory judgment" can address the due process claims of all pregnant minors in ORR custody. *Id.* at 852.

C. Even a Tailored Class Fails to Satisfy Numerosity

Finally, although the class of *all* pregnant alien minors in ORR custody likely would satisfy the numerosity requirement imposed by Rule 23, a tailored class would not. A class is "overbroad" when it is "'not limited to [a] specific policy or practice which is alleged to be'" illegal. *Chiang v. Veneman*, 385 F.3d 256, 270 (3d Cir.

2004) (quoting *Williams v. Glickman*, Civ. No. 95–1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997)). A class should not include "people not affected by Plaintiffs' core claim." *Murray v. Auslander*, 244 F.3d 807, 813 (11th Cir. 2001). The class is "overbroad [when it] . . . include[s] a great many people who have suffered no injury." *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010). A class is "flaw[ed]" if it includes "the existence of large numbers of class members who were never *exposed* to the challenged conduct to begin with." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016).

The district court's broad class definition sweeping "all pregnant, unaccompanied immigrant minor children . . . who are or will be in the legal custody of the federal government"—whether or not they seek abortion services—cannot be reconciled with these precedents. Order 1. So defined, the class comprises predominantly individuals who seek to bring their pregnancies to term. That large group thus "suffer[] no injury" from the challenged ORR policy, *Pella Corp.*, 606 F.3d at 394 and are never "exposed to the challenged conduct," *Torres*, 835 F.3d at 1136, and therefore cannot properly be included in the class definition.

A tailored class cannot satisfy numerosity requirements. To meet that requirement, plaintiffs must establish that the number of proposed class members is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). This standard involves no set numerical threshold, and numerosity is decided on a

case-by-case basis. *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 37 (D.D.C. 2007). Plaintiffs bear the burden of providing a reasonable basis for the estimated number of potential class members, *Lightfoot v. D.C.*, 246 F.R.D. 326, 335 (D.D.C. 2007), as well as that their joinder would be impracticable. *Bynum v. D.C.*, 214 F.R.D. 27, 32-33 (D.D.C. 2003).

Plaintiffs cannot satisfy numerosity based on a class of pregnant minors in ORR custody who sought or will in the future seek an abortion. Out of the 420 pregnant minors in ORR custody in 2017, only 18 requested abortions. *See* ECF No. 53-1, ¶¶ 4-5. Of those, eleven received the requested abortions, five rescinded their requests, and two were released to sponsors. *Id.* And there have been very few such requests since this litigation was filed nearly nine months ago—a handful at most. This number is far too low, well below the threshold appropriate for a finding of numerosity. *See, e.g., Coleman through Bunn v. District of Columbia*, 306 F.R.D. 68, 76 (D.D.C. 2015) (noting that generally, a class of less than twenty people will not satisfy the numerosity requirement); *see Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986) (explaining that "while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors") (internal quotations omitted). Importantly, even taking the high end of unaccompanied minor aliens requesting an abortion, the district court did not

conclude that joinder was impracticable, and joinder has been viable with respect to the small number of minors seeking an abortion during the course of this litigation over the past nine months. *See Coleman,* 306 F.R.D. at 68-69.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING A CLASS-WIDE PRELIMINARY INJUNCTION

Finally, even if the district court's certification decision can stand, its sweeping class-wide preliminary injunction cannot. A preliminary injunction is "an extraordinary remedy." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In deciding whether to grant such relief, the district court must balance four factors: (1) the movant's likelihood of success on the merits; (2) the irreparable harm to the movant in the absence of preliminary relief; (3) the balance of the equities; and (4) the public interest. *Id*. "A party seeking a preliminary injunction must make a 'clear showing that [these] four factors, taken together, warrant relief.'" *League of Women Voters*, 838 F.3d at 6 (citation omitted). The plaintiffs have not made the required showing on any of the four factors here, and the district court therefore abused its discretion is granting class-wide preliminary relief.

A. Plaintiffs Are Unlikely to Establish That the Fifth Amendment Requires the Government to Facilitate an Unaccompanied Minor's Request for a Pre-Viability Abortion in Every Instance

First and foremost, the plaintiffs have not remotely established a likelihood of success on their claim that the Fifth Amendment's Due Process Clause requires the government to facilitate every request for a pre-viability abortion by an

unaccompanied minor in ORR custody, regardless of the circumstances, and bars the government from communicating with anyone about such a decision without the minor's consent. The Due Process Clause has never been held to grant "an unqualified 'constitutional right to an abortion.'" *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). To the contrary, the Supreme Court has repeatedly recognized that the government has a substantial and legitimate interest in promoting childbirth and protecting the life of an unborn child. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("[T]he government has a legitimate and substantial interest in preserving and promoting fetal life."); *see also id.* at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). In light of that interest, the Supreme Court has upheld governmental restrictions on abortion under the framework established by *Casey* when those limitations do not impose an "undue burden" on a woman's right to choose to terminate her pregnancy prior to viability. *See, e.g.*, *Casey*, 505 U.S. at 876-877 (joint opinion of O'Connor, Kennedy, and Souter, J.J.); *Gonzales*, 550 U.S. at 157 (upholding Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. 1531); *Lambert* v. *Wicklund*, 520 U.S. 292, 293 (1997) (per curiam) (upholding Montana parental notification statute that had a judicial bypass provision). Under *Casey*, Governmental action imposes an "undue burden" if it has "the effect of placing a

substantial obstacle in the path of a woman's choice" to terminate her pregnancy. *Casey*, 505 U.S. at 877 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

Applying that framework, the Supreme Court has repeatedly made clear that the government does not impose an undue burden simply because it favors life or declines to facilitate an abortion. *See, e,g.*, *Harris v. McRae*, 448 U.S. 297, 315 (1980) (explaining that "[t]he Hyde Amendment places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, . . . encourages alternative activity"); *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989) (state's refusal to permit public facilities and staff to be used for abortions "'place[d] no governmental obstacle in the path of a woman'" because it "leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all") (citation omitted); *Maher*, 432 U.S. at 471-474 (rejecting claim that unequal subsidization for child birth, as opposed to abortion, was unconstitutional). "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *McRae*, 448 U.S. at 316. In this case, the government is not imposing any "undue burden" on the ability of the unaccompanied minors in ORR custody to obtain an abortion—and it is certainly not doing so for every pregnant minor in its custody.

1. Plaintiffs primarily contend that federal custody imposes such an undue burden by preventing pregnant unaccompanied minors from obtaining an abortion. But the plaintiffs in this case are in federal custody because they entered the United States illegally. They could have avoided that custody by declining to enter the United States unlawfully, and they may take steps to end that custody at any time by officially requesting voluntary departure from federal custody or by working with the government to identify, vet, and approve a sponsor. *Cf. Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) ("An alien in Parra's position can withdraw his defense of the removal proceeding and return home to his native land, thus ending his detention immediately. He has the keys in his pocket."). Plaintiffs have not pointed to any precedent holding that such a self-imposed obstacle, as opposed to a government-imposed one, can constitute an "undue burden."

At the same time, plaintiffs ask the government to facilitate the abortion of any pregnant minor in federal custody regardless of the circumstances—precisely what this Court's cases hold it need not do. Indeed, ample case law recognizes that the government need not provide funding or "commit any resources to facilitating abortions." *Webster*, 492 U.S. at 511. Yet even if HHS or the shelter did not need to transport an unaccompanied minor to the abortion clinic, approval would still require that HHS or its contractor devote time and staff towards maintaining appropriate custody over the child during her absence; would require staff to stay

abreast of the child's health and evaluate the propriety of her proposed procedure; would entail work by government staff to draft and execute approval documents and provide direction to the shelter on its role in connection with the procedure; and would require that HHS expend resources to monitor the child's health immediately after the abortion. *See* White Declaration, D.C. Cir. ECF No. 1699970. Contrary to the district court's assertion, see Op. 25, it makes no difference that some of this work would be completed by government contractors, rather than government officials. In either case, the district court's injunction would require government funds to be expended to provide the necessary procedures and care that the minor's need to obtain an abortion. The Supreme Court's cases are clear that the Due Process Clause does not require such facilitation. *See Harris v. McRae*, 448 U.S. at 315; *see also Webster v. Reproductive Health Servs.*, 492 U.S. at 509.

In Judge Millett's dissent in Doe's individual case, which later became the substantial basis for this Court's now-vacated *en banc* order, she relied on cases from other courts of appeals holding that the government must permit abortions in the prison context. *See* D.C. Cir. ECF No. 1700712 at 4. But that situation is quite different. If the government did not provide access to abortions for incarcerated prisoners, then the procedure would become "*entirely* unavailable." *Roe v. Crawford*, 514 F.3d 789, 796 (8th Cir.), cert. denied, 555 U.S. 821 (2008). By contrast here, there is no similar, government-imposed prohibition on abortion;

minors in ORR custody may end their custody – some will have a path to release to a suitable sponsor or by filing a request for voluntary departure. Until the minor ends their own custody—which adults in the custody of Immigration and Customs Enforcement or the Bureau of Prisons cannot do—the Director of ORR is charged by Congress with overseeing the minor's care and custody. *See* 6 U.S.C. 279. In that circumstance, the government should not be required to facilitate an abortion, whatever the level of time, attention, or resources it would have to devote. The district court's contrary conclusion "represents a radical extension of the Supreme Court's abortion jurisprudence." 874 F.3d at 752 (Kavanaugh, J., dissenting).

In Doe's individual case, Judge Millett also relied on Doe's assertion that she had a viable immigration-law claim based on abuse that could potentially permit her to remain in the United States, and that voluntary departure would require her to forgo that claim in order to seek an abortion. *Id.* at 740. The district court made a similar observation in support of class-wide relief. *See* Op. 26 (noting that voluntary departure would require unaccompanied minors to "relinquish any claim that may entitle them to remain in the United States"). However, it is not an undue burden for the government to refuse to facilitate an abortion even if that means an illegal alien may need to surrender a potentially viable immigration claim. There is no constitutional right to press such claims, and it is well established that immigration law can impose difficult choices between sacrificing liberty and obtaining

immigration relief. *See Demore v. Kim*, 538 U.S. 510, 530 n. 14 (2005) (rejecting argument that a release from immigration custody is required when "the length of detention required to appeal may deter aliens from exercising their right to do so" because "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow'"); *cf. Currier v. Virginia*, --- S. Ct. ---, 2018 WL 3073763, at *2 (June 22, 2018) (same). In any event, the district court's injunction applies to all pregnant minors in federal custody, irrespective of whether they have any potential immigration claims. Indeed, no named plaintiff other than Doe has claimed that she has suffered any abuse in her home country or has argued that she had any potential entitlement to remain in the United States. *See* ECF Nos. 63-2 (Roe); 64-1 (Poe); 105-2 (Moe). The plaintiffs have made no attempt to show that the same is not true for many pregnant minors in ORR custody.

The district court order similarly erred in categorically dismissing the relevance of the sponsorship process. *See* Op. 27. The court reasoned that "locating a sponsor is typically a lengthy, complex process" and that "ORR makes the final decision of whether to approve a particular sponsor." *Id.*; *see* D.C. Cir. ECF No. 1700712 (Millett, J., dissenting) (expressing similar concerns about Doe's sponsorship process); 874 F.3d at 738-39. As shown by two of the four named plaintiffs, however, sponsorship can often be completed expeditiously and ORR is committed to completely that process as quickly as it can consistent with its

obligations to ensure the minor's safety. Prior to the government learning that Roe was not a minor, Roe had already "identified a potential sponsor" who "[wa]s a family member, and U.S. citizen, and [who] . . . submitted an application" to sponsor her. ECF No. 66-1 at ¶ 4. She was only ten weeks pregnant at the time, and ORR "estimate[d] the process of reunification would be completed within two weeks." *Id.* There would have been ample time after completion of the sponsorship process for her to obtain an abortion, if she ultimately decided to seek one after released to the custody of a family member. As Judge Millett herself noted, "[c]hildren are presumably better off with family members or responsible adults than in the custody of a government contractor." D.C. Cir. ECF No. 170012 at 6. That is particularly true when considering and pursuing such a personal and sensitive decision as abortion. Similarly, Moe requested an abortion on January 11, 2018, just four days after entering ORR custody (ECF No. 105-2), and was approximately seventeen weeks pregnant at the time (ECF No. 108-1). Shortly upon her arrival, she "identified a potential sponsor," *id.* at ¶ 5, and that process was completed on January 14, 2018 while her motion for a TRO was pending before the district court, just three days later. *See* ECF No. 113-1, at ¶ 4, ECF No. 114, ECF No. 118-1 at 7, ¶ 45. Particularly in light of the benefits sponsorship provides, such a modest waiting period does not impose an undue burden on the minor's ability to pursue an abortion. D.C. Cir. ECF No. 1700712 at 6.

Ultimately, the United States is not required to encourage abortion by releasing abortion-seeking alien minors arriving at the border or captured shortly after crossing the border. Finding an undue burden here would constitutionally mandate what would amount to abortion tourism, where minors who cannot obtain abortions lawfully in their country of nationality demand abortion services at our border or upon illegal entry into our country. Not only is that not the sort of facilitation that the constitution imposes on the United States, it would present obvious foreign affairs concerns given the incentives it sets up and our contribution to foreign nationals' evasion of their home countries' abortion laws.

2. Plaintiffs similarly fail to show that communicating the fact of their pregnancy to parents, sponsors, and medical personnel, without the minor's express consent, imposes an undue burden. Regardless of whether a parental *consent* requirement with no bypass process might impose an undue burden in some circumstances, here the only issue is whether ORR may *notify* parents, doctors, or potential sponsors over a minor's objection. "[A] parental notice statute—unlike either a spousal notice or a blanket parental consent statute—has neither 'the purpose [n]or effect of placing a substantial obstacle in the path of a woman seeking an abortion,' and therefore cannot reasonably be said to unduly burden the minor's abortion right." *Planned Parenthood v. Camblos*, 155 F.3d 352, 367 (4th Cir. 1998) (*en banc*) (quoting *Casey*, 505 U.S. at 877). This is particularly true here, where

unlike in state judicial bypass cases, the parent does not have custody of the child and therefore cannot obstruct the abortion.

Further, even if there were concerns about notifying parents, ORR's practice of parental notification includes the sort of appropriate exceptions courts have pointed to in upholding parental notification laws. *See id.* at 372-74. Here, ORR and its grantees do not disclose health situations if doing so would "endanger the [minor's] health and well-being." ECF No. 128-1 ¶ 10. Rather, ORR seeks "to make parents aware of their child's status, to help lead to the best decisions for the child's health, and to advance the child's best interests." *Id*. ¶ 7. Especially where parents are physically remote, this constitutes the kind of reasonable parental notification policy that does not create an undue burden and is fully consistent with the type of bypass procedures the Supreme Court has approved.[3]

The Supreme Court has noted that the rights of children, while to an extent reflect those afforded to adults, are subject to limitations. *See Belloti v. Baird*, 443 U.S. 622, 634-40 (1979). Indeed, the situation ORR faces here is far different from a more-typical case, as was the situation in *Belloti*, where a parent remains in custody

[3] Plaintiffs allege that ORR did not follow this policy in the case of Poe. Docket No. 18-5093, ECF. No. 1725814 at 20. But that assertion is based not on evidence from Poe, who made no mention of this in her declaration, but on statements by attorneys in a district court brief, which are not evidence. *See* ECF No. 64-1; 94 at 4; *see also Walker v. Thomas*, 311 F.R.D. 3, 6 (D.D.C. 2015). In any event, plaintiffs' assertion would not justify a class-wide injunction.

of their child, and can thus exercise far more persuasive authority over the child's decision-making. The children here are sometimes thousands of miles away from their nearest relative, and located in another country. The minors typically lack financial resources to provide even basic care for themselves. The children often do not speak English, and lack the ability to join the workforce for lack of authority to do so, as well as for lack of job-skills. While they may have had at least some semblance of a support network in their home country, the children, upon arrival in the United States, rarely have anyone trustworthy to whom they can turn for assistance or guidance. As the Supreme Court recognized in *Belloti*, 443 U.S. at 641 n. 21 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)), the attending physician plays a crucial role in the abortion process, but children in general lack the means or experience dealing with medical professionals to select only ethical and competent medical care. These unaccompanied minors face the complications detailed above, on top of not knowing to whom they can turn and trust for professional medical care. Congress called upon HHS to step in to fill these voids. 6 U.S.C. § 279(b)(1)(A). HHS can reasonably attempt to support a minor's decision by informing her parents and other care providers that may assist her in making an informed and responsible decision.

B. The Remaining Preliminary Injunction Factors Counsel Against the Class-Wide Preliminary Injunctive Relief

Plaintiffs have similarly failed to make a "clear showing" that the remaining preliminary injunction factors counsel in favor of class-wide injunctive relief. As an initial matter, substantial deference to ORR's practices is warranted because "[j]udicial deference to the Executive Branch is especially appropriate in the immigration context," as "'officials exercise sensitive political functions'" involving foreign relations issues. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)); *see also Trump v. Hawaii*, --- U.S. --- , 2018 WL 3116337 *20 (2018). "The government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

The district court reasoned that class-wide injunctive relief was appropriate because, absent such relief, unnamed class members would face irreparable harm in the form of "increased health risks, and perhaps the permanent inability to obtain the abortion to which they are legally entitled." Op. 27. But the district court has shown itself more than capable in this case of ruling on individual claims in a timely manner as those claims arise, and ensuring an individual minor's access to abortion where it found the circumstances warranted.

On the other side of the balance, however, the government (and public) have a legitimate and significant interest in protecting potential life and therefore refusing to affirmatively facilitate abortions that the Constitution does not require. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (balance of equities and public interest factors "merge when the Government is the opposing party"). That interest would be completely extinguished if the government must affirmatively enable all unaccompanied minors to obtain pre-viability abortions the moment one is requested, without an opportunity to consider sponsorship or voluntary departure as viable alternatives or the facts of the individual case.

Moreover, the public interest also weighs against incentivizing illegal immigration. *Cf. Landon*, 459 U.S. at 34. By compelling the federal government to immediately facilitate an unaccompanied alien child's request for an elective abortion in every circumstance, pregnant unaccompanied minors may be incentivized to come to the United States to obtain an abortion, even if that minor has no plausible claim of entitlement to remain in the country and no extenuating circumstances from not returning home.

Finally, the public interest weighs heavily in favor of allowing ORR to fulfill its statutory obligations. Congress has charged ORR with caring for unaccompanied alien minors, essentially parentless children in need of care, providing for both their physical and mental well-being. 6 U.S.C. § 279(b)(1)(A). ORR must assume a *de*

facto parent role for these pregnant minors, who often lack the maturity to independently make such crucial life decisions, and are living in a foreign land, without a social support network or financial resources to care for themselves. It is in the public interest to allow ORR to fulfill that obligation, including by assisting these minors with navigating complex moral, mental, and physical issues they face. *Id.* at 638. The district court's order unreasonably impedes ORR's ability to fulfill its congressionally-mandated obligations to act in these minors' best interests. 6 U.S.C. §§ 279(b)(1)(A) & (B). Because the district court's order granting class-wide injunctive relief improperly impedes ORR's ability to do that, it should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the class-wide preliminary injunction and de-certify the class and remand with instructions to dismiss the class claims as moot.

DATED: June 29, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,403 words. This Brief complies with the typeface and the type style requirements of Fed. R. App. P. 32(a)(5)(A) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Michael C. Heyse
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I caused a copy of the foregoing Defendants-Appellants' Brief to be filed with the Clerk of the Court using the Court's CM/ECF system. Counsel for Plaintiffs-Appellees are registered CM/ECF users, and will be served exclusively through that system.

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ADDENDUM OF RELEVANT STATUTES

8 U.S.C. § 1232 "Enhancing efforts to combat the trafficking of children"

(a) Combating child trafficking at the border and ports of entry of the United States

(1) Policies and procedures

In order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.

(2) Special rules for children from contiguous countries

(A) Determinations

Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the United States shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, on a case-by-case basis, that--

(i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence;

(ii) such child does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and

(iii) the child is able to make an independent decision to withdraw the child's application for admission to the United States.

(B) Return

An immigration officer who finds an unaccompanied alien child described in subparagraph (A) at a land border or port of entry of the United States and determines that such child is inadmissible under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) may--

(i) permit such child to withdraw the child's application for admission pursuant to section 235(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1225(a)(4)); and

(ii) return such child to the child's country of nationality or country of last habitual residence.

(C) Contiguous country agreements

The Secretary of State shall negotiate agreements between the United States and countries contiguous to the United States with respect to the repatriation of children. Such agreements shall be designed to protect children from severe forms of trafficking in persons, and shall, at a minimum, provide that--

(i) no child shall be returned to the child's country of nationality or of last habitual residence unless returned to appropriate employees or officials, including child welfare officials where available, of the accepting country's government;

(ii) no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and

(iii) border personnel of the countries that are parties to such agreements are trained in the terms of such agreements.

(3) Rule for other children

The custody of unaccompanied alien children not described in paragraph (2)(A) who are apprehended at the border of the United States or at a United States port of entry shall be treated in accordance with subsection (b).

(4) Screening

Within 48 hours of the apprehension of a child who is believed to be described in paragraph (2)(A), but in any event prior to returning such child to the child's country of nationality or of last habitual residence, the child shall be screened to determine whether the child meets the criteria listed in paragraph (2)(A). If the child does not meet such criteria, or if no determination can be made within 48 hours of apprehension, the child shall immediately be transferred to the Secretary of Health and Human Services and treated in accordance with subsection (b). Nothing in this paragraph may be construed to preclude an earlier transfer of the child.

(5) Ensuring the safe repatriation of children

(A) Repatriation pilot program

To protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.

(B) Assessment of country conditions

The Secretary of Homeland Security shall consult the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.

(C) Report on repatriation of unaccompanied alien children

Not later than 18 months after December 23, 2008, and annually thereafter, the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security, shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include--

(i) the number of unaccompanied alien children ordered removed and the number of

such children actually removed from the United States;

(ii) a statement of the nationalities, ages, and gender of such children;

(iii) a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot program created pursuant to subparagraph (A);

(iv) a description of the type of immigration relief sought and denied to such children;

(v) any information gathered in assessments of country and local conditions pursuant to paragraph (2); and

(vi) statistical information and other data on unaccompanied alien children as provided for in section 279(b)(1)(J) of Title 6.

(D) Placement in removal proceedings

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be--

(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);

(ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and

(iii) provided access to counsel in accordance with subsection (c)(5).

(b) Combating child trafficking and exploitation in the United States

(1) Care and custody of unaccompanied alien children

Consistent with section 279 of Title 6, and except as otherwise provided under subsection (a), the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.

(2) Notification

Each department or agency of the Federal Government shall notify the Department of Health and Human services[1] within 48 hours upon--

(A) the apprehension or discovery of an unaccompanied alien child; or

(B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.

(3) Transfers of unaccompanied alien children.

Except in the case of exceptional circumstances, any department or agency of the Federal

Government that has an unaccompanied alien 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 alien child.

(4) Age determinations

The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.

(c) Providing safe and secure placements for children

(1) Policies and programs

The Secretary of Health and Human Services, Secretary of Homeland Security, Attorney General, and Secretary of State shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including policies and programs reflecting best practices in witness security programs.

(2) Safe and secure placements

(A) Minors in Department of Health and Human Services custody

Subject to section 279(b)(2) of Title 6, an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

(B) Aliens transferred from Department of Health and Human Services to Department of Homeland Security custody

If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.

(3) Safety and suitability assessments

(A) In general

Subject to the requirements of subparagraph (B), an unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

(B) Home studies

Before placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary. A home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of Title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.

(C) Access to information

Not later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments from appropriate Federal, State, and local law enforcement and immigration databases.

(4) Legal orientation presentations

The Secretary of Health and Human Services shall cooperate with the Executive Office for Immigration Review to ensure that custodians receive legal orientation presentations provided through the Legal Orientation Program administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian's responsibility to attempt to ensure the child's appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.

. . .

(8) Specialized needs of unaccompanied alien children

Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.

. . .

CREDIT(S)

(Pub.L. 110-457, Title II, § 235, Dec. 23, 2008, 122 Stat. 5074; Pub.L. 113-4, Title XII, §§

1261 to 1263, Mar. 7, 2013, 127 Stat. 156-159.)

6 U.S.C. § 279 "Children's affairs"

(a) Transfer of functions

There are transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the effective date specified in subsection (d) of this section.

(b) Functions

(1) In general

Pursuant to the transfer made by subsection (a) of this section, the Director of the Office of Refugee Resettlement shall be responsible for--

(A) coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002;

(B) ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child;

(C) making placement determinations for all unaccompanied alien children who are in Federal custody by reason of their immigration status;

(D) implementing the placement determinations;

(E) implementing policies with respect to the care and placement of unaccompanied alien children;

(F) identifying a sufficient number of qualified individuals, entities, and facilities to house unaccompanied alien children;

(G) overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside;

(H) reuniting unaccompanied alien children with a parent abroad in appropriate cases;

(I) compiling, updating, and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children;

(J) maintaining statistical information and other data on unaccompanied alien children for whose care and placement the Director is responsible, which shall include--

(i) biographical information, such as a child's name, gender, date of birth, country of birth, and country of habitual residence;

(ii) the date on which the child came into Federal custody by reason of his or her immigration status;

(iii) information relating to the child's placement, removal, or release from each facility in which the child has resided;

(iv) in any case in which the child is placed in detention or released, an explanation relating to the detention or release; and

(v) the disposition of any actions in which the child is the subject;

(K) collecting and compiling statistical information from the Department of Justice, the Department of Homeland Security, and the Department of State on each department's actions relating to unaccompanied alien children; and

(L) conducting investigations and inspections of facilities and other entities in which unaccompanied alien children reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements.

(2) Coordination with other entities; no release on own recognizance

In making determinations described in paragraph (1)(C), the Director of the Office of Refugee Resettlement--

(A) shall consult with appropriate juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the Assistant Secretary of the Bureau of Border Security to ensure that such determinations ensure that unaccompanied alien children described in such subparagraph-

(i) are likely to appear for all hearings or proceedings in which they are involved;

(ii) are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and

(iii) are placed in a setting in which they are not likely to pose a danger to themselves or others; and

(B) shall not release such children upon their own recognizance.

(3) Duties with respect to foster care

In carrying out the duties described in paragraph (1), the Director of the Office of Refugee Resettlement is encouraged to use the refugee children foster care system established pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) for the placement of unaccompanied alien children.

. . .

(e) References

With respect to any function transferred by this section, any reference in any other Federal

law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to a component of government from which such function is transferred--

(1) to the head of such component is deemed to refer to the Director of the Office of Refugee Resettlement; or

(2) to such component is deemed to refer to the Office of Refugee Resettlement of the Department of Health and Human Services.

(f) Other transition issues

(1) Exercise of authorities

Except as otherwise provided by law, a Federal official to whom a function is transferred by this section may, for purposes of performing the function, exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function immediately before the effective date specified in subsection (d) of this section.

(2) Savings provisions

Subsections (a), (b), and (c) of section 552 of this title shall apply to a transfer of functions under this section in the same manner as such provisions apply to a transfer of functions under this chapter to the Department of Homeland Security.

. . .

(g) Definitions

As used in this section--

(1) the term "placement" means the placement of an unaccompanied alien child in either a detention facility or an alternative to such a facility; and

(2) the term "unaccompanied alien child" means a child who--

(A) has no lawful immigration status in the United States;

(B) has not attained 18 years of age; and

(C) with respect to whom--

(i) there is no parent or legal guardian in the United States; or

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.

CREDIT(S)

(Pub.L. 107-296, Title IV, § 462, Nov. 25, 2002, 116 Stat. 2202; Pub.L. 110-457, Title II, § 235(f), Dec. 23, 2008, 122 Stat. 5081.)