[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.*
Defendant-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' REPLY BRIEF

CHAD A. READLER
Acting Assistant Attorney General

HASHIM MOOPPAN
Deputy Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel

ERNESTO H. MOLINA
Deputy Director

W. DANIEL SHIEH
SABATINO F. LEO
MICHAEL C. HEYSE
CHRISTINA P. GREER
Attorneys

Office of Immigration Litigation
Civil Division
U.S. Department of Justice
PO Box 878
Ben Franklin Station
Washington, DC 20044

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

PARTIES

Appellees/Plaintiffs & Counsel

American Civil Liberties Union Foundation: Counsel for Appellees/Plaintiffs

Doe, Jane: Appellee/Plaintiff

Garza, Rochelle: Appellee/Plaintiff/Guardian ad litem to Appellee/Plaintiff Jane Doe

Mach, Daniel: Counsel for Appellees/Plaintiffs

Michelman, Scott: Counsel for Appellees/Plaintiffs

Moe, Jane: Poe, Jane: Appellee/Plaintiff

Phillips, Carter G.: Counsel for Appellees/Plaintiffs

Roe, Jane: Appellee/Plaintiff

Spitzer, Arthur B.: Counsel for Appellees/Plaintiffs

Appellants/Defendants & Counsel

Azar II, Alex M: Appellant/Defendant (HHS Secretary)

Cook, Caroline, A.: Counsel for Appellants/Defendants

Consovoy, William S.: Counsel for Appellants/Defendants

Darrow, Joseph A.: Counsel for Appellants/Defendants

Dorsey, Catherine: Counsel for Appellants/Defendants

Fabian, Sarah B.: Counsel for Appellants/Defendants

Flentje, August H.: Counsel for Appellants/Defendants

Francisco, Noel: Counsel for Appellants/Defendants (U.S. Solicitor General)

Greer, Christina P.: Counsel for Appellants/Defendants

Haas, Alexander K.: Counsel for Appellants/Defendants

Hargan, Eric: Appellant/Defendant* (former Acting HHS Secretary)

Heyse, Michael C.: Counsel for Appellants/Defendants

Leo, Sabatino F.: Counsel for Appellants/Defendants

Lloyd, Scott: Appellant/Defendant

Molina, Ernesto H.: Counsel for Appellants/Defendants

Mooppan, Hashmi: Counsel for Appellants/Defendants

Park, Michael H.: Counsel for Appellants/Defendants

Readler, Chad A.: Counsel for Appellants/Defendants (Acting Ass't U.S. Atty. Gen)

Shieh, Daniel W.: Counsel for Appellants/Defendants

Stewart, Scott G.: Counsel for Appellants/Defendants

Strawbridge, Patrick N.: Counsel for Appellants/Defendants

Wagner, Stephen: Appellant/Defendant

Amici & Counsel

Bevin, Matthew G.: Amici (Governor of Kentucky) for Appellant

Commonwealth of Kentucky: Amici for Appellant

Keller, Scott A.: Counsel for Amici Arkansas, Gov. Bevin, Kentucky, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, & West Virginia

Schlafly, Andrew L: Counsel for Amici for Appellant, Legal Center for Defense of Life

State of Arkansas: Amici for Appellant

State of Louisiana: Amici for Appellant

State of Michigan: Amici for Appellant

State of Missouri: Amici for Appellant

State of Nebraska: Amici for Appellant

State of Ohio: Amici for Appellant

State of Oklahoma: Amici for Appellant

State of South Carolina: Amici for Appellant

State of Texas: Amici for Appellant

State of West Virginia: Amici for Appellant

American College of Obstetricians and Gynecologists: Amici for Appellee

American Academy of Pediatrics: Amici for Appellee

Medical Society of the District of Columbia: Amici for Appellee

American College of Physicians: Amici for Appellee

Society for Adolescent Health and Medicine: Amici for Appellee

Reproductive Rights, Health, and Justice Organizations: Amici for Appellee

Allied Organizations: Amici for Appellee

Asylum Access: Amici for Appellee

National Immigration Law Center: Amici for Appellee

Public Counsel: Amici for Appellee

Legal Aid Society: Amici for Appellee

Washington Office on Latin America: Amici for Appellee

State of New York: Amici for Appellee

State of California: Amici for Appellee

State of Connecticut: Amici for Appellee

State of Delaware: Amici for Appellee

State of Hawaii: Amici for Appellee

State of Illinois: Amici for Appellee

State of Iowa: Amici for Appellee

State of Maine: Amici for Appellee

State of Maryland: Amici for Appellee

State of Massachusetts: Amici for Appellee

State of New Jersey: Amici for Appellee

State of New Mexico: Amici for Appellee

State of North Carolina: Amici for Appellee

State of Oregon: Amici for Appellee

State of Pennsylvania: Amici for Appellee

State of Vermont: Amici for Appellee

State of Virginia: Amici for Appellee

State of Washington: Amici for Appellee

District of Columbia: Amici for Appellee

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

Azar, et al. v. Garza, 138 S. Ct. 1790 (2018)

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: August 13, 2018

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

Counsel for Appellants/Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

GLOSSARY

CPC: Crisis pregnancy center

HHS: Health and Human Services

NILC: National Immigration Law Center

ORR: Office of Refugee Resettlement

INTRODUCTION

Plaintiffs have tried to make this case about a simple application of *Planned Parenthood v. Casey* to what they describe as a "government . . . ban [on] abortion." Pls' Br. 3. It is not. This case involves a court order requiring a government entity, the Office of Refugee Resettlement (ORR), and government officials and contractors to facilitate the termination of life through abortion by minor aliens. It requires that facilitation in every circumstance, regardless of the age or maturity of the minor and even when the child requesting abortion can promptly leave government custody through sponsorship or a return to her country of nationality. And it prevents ORR from exercising its custodial role – as Congress directed – in these circumstances by consulting with parents and determining what medical treatment is in the best interest of the child. The Supreme Court has upheld parental consent or judicial bypass regimes requiring similar involvement in the decisionmaking of children by parents or a court, but the district court order prevents the children's parents from having any role in this case, and precludes the government entity charged with the care of the child from evaluating the best interest or decisionmaking ability of the child. The order must be reversed.

To begin, the district court erred in certifying a class of all pregnant minors in ORR custody. First, Doe's and Roe's claims are moot, and the "inherently transitory" exception is inapplicable. Plaintiffs do not deny that the district court

had the capacity and ability to adjudicate a motion for class certification before the claims of class representatives became moot, and these are not claims that expired on their own, but only due to the court itself taking action. Here, where the court waited months after the class representatives had obtained abortions, left ORR care, and reached adulthood, the inherently transitory exception was not properly applied.

Second, Doe and Roe are not adequate representatives because they cannot vigorously prosecute the interests of the proposed class, and their interests are not aligned with other individuals in the class. When the class was certified, Doe and Roe were not pregnant, were not children, and were not in ORR care. Because they no longer maintain a legally cognizable interest in any aspect of this case, they cannot be vigorous advocates even for a class of minors in ORR care who seek abortion services. Moreover, Doe and Roe plainly cannot properly represent the large majority of class members in ORR custody who do not seek to terminate their pregnancies, but instead seek care and support during their pregnancies and after the birth of their children.

Third, Doe and Roe have failed to establish commonality and typicality because they have not articulated a question of law or fact capable of generating a common answer for the class as a whole. First, the vast majority of the class members are not even seeking access to abortions and related services. Second, even were the class narrowed to those seeking abortion access, applying the Due Process

Clause would require the consideration of the facts and circumstances of each child in ORR care who seeks to obtain an abortion, including their different ages and maturity levels, as well as their ability to obtain prompt sponsorship or the ability to depart from the United States.

Fourth, the district court's class-wide preliminary injunction—requiring ORR facilitation of abortions in every instance, and forbidding ORR communication with parents absent the child's consent—was an abuse of discretion. This is inconsistent with the established legal principles that the government is not required to facilitate an abortion and that whether government procedures "unduly burden" access to abortion will depend on the individual facts and circumstances. The injunction provides no justification for barring communications with parents or doctors absent consent from the child, and no such bar can fairly be derived from constitutional principles.

Finally, the remaining preliminary injunction factors also favor the government. The government's legitimate interests in protecting life, not facilitating the end of potential life; in preferring that a minor make her abortion decision with family or in her home country rather than while in government custody in a foreign land; and in disincentivizing illegal immigration, all weigh heavily in favor of lifting the district court's sweeping order that requires immediate government facilitation of abortion without regard to any of these factors. Similarly, the Constitution

imposes no gag rule on ORR in communicating with doctors or parents if it is in the child's best interests, and the district court's overbroad order unduly infringes on ORR's ability to perform its custodial functions.

ARGUMENT

I. Doe's and Roe's Claims Are Moot, and the "Inherently Transitory" Exception Is Inapplicable

All of the named class representatives' individual claims in this case have long been moot and no exception to mootness applies. Plaintiffs insist that the district court rightly concluded that the class claims are not moot, because they fall within the "inherently transitory" exception to mootness. That doctrine holds that mootness of the representative's individual claim is not a bar to class certification if it is "certain that other persons similarly situated will continue to be subject to the challenged conduct and the claims raised 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. v. Symczyk*, 569 U.S. 66, 76 (2013) (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991)). As explained in our opening brief, that is not true here.

The district court relied solely on analyzing whether the class undergoes some level of transition; whether members may come in and out of the class. Gov't App. 255-57. But, as even Plaintiffs concede (*see* Appellees Br. at 23-26), the critical question is whether "*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 (quoting *McLaughlin*, 500 U.S. at 52) (emphasis added). And although Plaintiffs echo the standard throughout their brief, they fail to ask the actual question posed by the standard: Is the nature of the class such that the court cannot adjudicate the class certification motion before the representative's claims became moot? Here, as played out in the current litigation, there was sufficient time for a court to rule on class certification prior to the expiration of the individual claims, and the nature of the class is not so inherently transitory that the court could not rule on such a motion. Importantly, the claims here did not expire of their own accord like in the cases relied on by Plaintiffs (Br. at 21-22) – like a short period of pre-arraignment detention at issue in *County of Riverside* or the loan discharge claim in *Salazar v. King* where "discharge applications [were processed] relatively quickly" by the defendant. 822 F.3d 61, 74 (2d Cir. 2016). Instead, they expired only due to the court's acting on the merits of the claim.

Unlike *Gerstein* – another case invoked by Plaintiffs involving criminal detention prior to a judicial probable cause determination – the circumstances will vary in these cases and there will generally be ample time for the court to rule on a motion for class certification early during a pregnancy. Indeed, given that three of four plaintiffs have obtained court-ordered relief on the merits, the court necessarily

has time to take action prior to the claim being extinguished in the ordinary course. This is not a situation as in the cases cited by Plaintiffs (Br. 22) where the government has "unilaterally grant[ed] relief to an individual once litigation begins" such that the claim otherwise will evade review or is of uncertain duration. *Unan v. Lyon*, 853 F.3d 279, 287 (6th Cir. 2017); *see King*, 822 F.3d at 74 (observing that claims will always moot out because it was defendant's policy to "promptly . . . grant discharges" once identified among 61,000 potential claimants); *Wilson v. Gordon*, 822 F.3d 934, 946 (6th Cir. 2016) (citing example of defendant being "able to process a delayed application before plaintiff can obtain relief through litigation") (quotations omitted). And as we have explained, the class certification motion was pending during this full period, and remained pending for months after every claim in this case had become moot. To be sure, a pregnancy is fixed, ending a pregnancy can moot out a claim, and there is understandably an interest in resolving those issues quickly in any individual case. But these concerns cannot justify disregarding the limits of Article III.

Under these circumstances there is nothing to suggest that ORR's "policy" would be "effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare Corp.*, 569 U.S. at 76. In *McLaughin*, for example, the Court addressed Riverside County's practice of detaining all individuals arrested without a warrant, *i.e.*, without a

judicially-approved declaration of probable cause for their arrest, until their bail hearing, which coincided with their arraignment. *Id.* at 49. This potentially resulted in individuals being held for up to a week without a hearing. *Id.* Such a claim – that always lasted at most a week, and expired on its own terms without court involvement – is the type of claim that can evade review. A claim here, that has not escaped review for three of the four named plaintiffs, that does not quickly end of its own accord, and where court review of the merits has been conducted in each of those cases, will not evade review and the exception is not properly applied here.

Plaintiffs also half-heartedly assert that, even if the inherently transitory exception does not apply, some of the named plaintiffs possess some live claims. They first rely on the fact that "Ms. Poe remains in ORR custody" and therefore ORR could "violate her right to information privacy by telling others about her pregnancy." Br. at 27. But Ms. Poe is not a class representative, so even if she had a still-live claim regarding informational privacy, a class (with no representative) could not be certified on this basis. Plaintiffs also argue that Doe and Roe may have lingering informational privacy claims because HHS "could reveal . . . abortion decisions in [ongoing immigration proceedings]" even though they will never again be in HHS custody. Br. 27. Such a rationale is entirely speculative. It also would not give rise to class relief that extends beyond such an informational privacy claim.

Cf. Daimler Chrysler v. Cuno, 547 U.S. 332, 353 (2006) ("[S]tanding is not dispensed in gross.") (quotations omitted).

II. The District Court Abused Its Discretion in Finding Plaintiffs to Satisfy the Requirements of Rule 23.

Plaintiffs seek access to abortion for all pregnant unaccompanied alien children in ORR custody, but their contention that "factual differences [among class members] . . . are irrelevant" is meritless and a misapprehension of Rule 23. Pls' Br. 28. Material factual differences among the vastly overbroad class of all pregnant minors in ORR custody are relevant to each of the class certification factors – and are precisely why the district court's certification ruling cannot stand.[1] Doe and Roe are not adequate representatives of the overbroad class, nor could they adequately represent a narrowed class given the mootness of their claims. The claims of Doe and Roe are not common or typical 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. And a tailored class of minors seeking abortion services is not sufficiently numerous to justify class action treatment.

[1] Indeed, the district court's class notice is even broader, requiring class notice to all minors in ORR-funded shelters (male or female, pregnant or not, of all ages).

A. First, Doe and Roe are not adequate representatives of every pregnant minor in ORR custody. The adequacy requirement 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); *see In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001) (representative plaintiffs in a class action must "have *incentives that align* with those of the absent class members so as to assure that the absentees' interests will be fairly represented") (citations omitted; emphasis added). Doe and Roe fail to meet either requirement.

As an initial matter, as we have explained, in addition to each having claims that were moot months before they were certified as class representatives, neither is a minor, and neither is in ORR custody. They will never again be in ORR custody or subject to its policies, have provided no factual support to show an ongoing legally cognizable interest in this matter, and therefore lack incentives that are aligned with the absent class members to ensure those minors have fair representation.

Moreover, unlike Doe and Roe, most pregnant minors in ORR custody are not seeking abortions. Plaintiffs' insistence that they seek protection for all "pregnancy related care" cannot be squared with the lack of any class representative who seeks care that will bring her pregnancy to term. Pls' Br. 31. For example, Roe was provided medical care, a medical examination where she learned she was pregnant, and access to counselors provided by ORR. *See* Gov't App. 92. It was not until she sought, and ORR declined to facilitate, an elective abortion, that a dispute arose. *Id.* There are undoubtedly minors in that position who would not object to ORR's purported policy, because they do not seek abortion but instead seek the medical care ORR provides to ensure a safe pregnancy that results in birth as well as support from groups that plaintiffs seek to silence. Pls' Br. 54. Doe and Roe plainly cannot be adequate representatives of minors seeking to carry their pregnancy to term, but the district court certified a class comprised of all such minors. It is this much larger group of children, who seek to carry their pregnancies to term, who are part of the class, yet are noticeably unrepresented by the class representatives. *See* Gov't App. 77 (of 420 pregnant minors in ORR custody, only 18 made initial abortion request).

Doe's and Roe's interests remain "antithetical to the interests of [other putative] class members." *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). In *Mayfield*, members of the United States Marine Corps sought certification of a class which included all members of the military to contest a DNA collection policy.

Id. at 1423-24. The Ninth Circuit held that class certification was not appropriate on grounds of adequacy because there were "undoubtedly" people in the class who would not oppose the DNA collection policy and who, in fact, sought to have the requirement enforced. *Id.* 1427. Here, as discussed *infra*, there are "undoubtedly" minors in the class who do not object to Defendants' purported policy. *See Shulman v. Ritzenberg*, 47 F.R.D. 202, 207 (D.D.C. 1969) (named plaintiffs' claims found to be in conflict with potential class members where affidavits were submitted establishing "that they d[id] not believe plaintiff's conduct [wa]s consistent with the best interests of the joint ventures of which they [we]re members"); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1116-17 (7th Cir. 1970) (named plaintiffs' claims found to be in conflict with potential class members where vast majority of stockholders approved of preferred stock distribution being challenged); *Spano v. Boeing Co.*, 633 F.3d 574, 587 (7th Cir. 2011) (class too broad where potential class members may be actually harmed by relief sought). In sum, Plaintiffs' attempt to define the proposed class in terms of "pregnancy-related care[,]" only underscores the reality that the district court certified a class – of all pregnant minors in ORR custody – that was vastly overbroad given that only a handful seek to abort their pregnancies. Plaintiffs have not put forth a class representative who sought pregnancy related services, other than elective abortion, and whose access to those

services was somehow "interfer[ed]" with or "obstruct[ed]" by an alleged policy. Pls' Br. 31.

B. Plaintiffs also cannot establish commonality or typicality with respect to the certified class – or even a narrowed class seeking abortion facilitation – because such a class encompasses a broad range of minors and assessing ORR's obligation to facilitate an abortion would require an inquiry into the facts and circumstances presented in an individual case. Plaintiffs misapprehend this test in arguing that it is met because, they assert, there is a "uniform policy or practice" which subjects all class members to "the same alleged harm." Pls' Br. 25, 33. Not only is that assertion unsupported by the record, even were there such a policy, it would not mean that each class member's effort to obtain a government-facilitated abortion presents the same common legal issue.

As we have explained, whether such a policy would impose an undue burden on any particular minor depends on facts and circumstances of an individual request for abortion. In some cases, sponsorship may be readily and promptly available. For others, a safe and quick return to their home country – where a parent may be waiting – may be realistic. A child's maturity and mental condition also may be relevant to the court's consideration of whether ORR's policies impose an undue burden in a specific case. *See, e.g.*, *Hodgson v. Minn.*, 497 U.S. 417, 444 (1990). By ordering the government to facilitate abortion on demand and without regard to

any of these individual considerations, the district court gave a "common answer," but one that disregards the government's legitimate consideration of individual circumstances that are plainly relevant here. See *Wal-Mart Stores, Inc.*, 564 U.S. 338, 350 (2011) ("common answers" must "drive the resolution of the litigation").

C. Finally, a tailored class is not sufficiently numerous to warrant class action treatment, as just a handful of children have raised claims regarding abortion services since this litigation began. Plaintiffs' primary argument is that class members might not decide to file suit or "inevitably fail to find counsel." Pls' Br. 36. But this is not the test for numerosity when a class is so small. *See Coleman v. District of Columbia*, 306 F.R.D. 68, 76-79 (D.D.C. 2015) ("[a]t the lower-end, 'a class that encompasses fewer than 20 members will likely not be certified absent other indications of impracticability of joinder'").

And in support of their contention, Plaintiffs cite a dissenting opinion, not a holding of this Court, reasoning that numerosity was satisfied for a claim involving "at least 39,000 recipients" where "500 to 800" claims were outstanding. *Council of & for the Blind v. Regan*, 709 F.2d 1521, 1543 n.48 (D.C. Cir. 1983) (en banc) (Robinson, J., concurring in part and dissenting in part). In contrast, looking at the other factors, this case has shown the "ability of claimants to institute individual suits" and each individual claim is important, not *de minimis*. *Coleman*, 306 F.R.D. at 80; *see Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1456 n.10 (D.C. Cir.

1988) (affirming denial of certification for class involving between 28 and 39 members). Indeed, the fact that many pregnant minors will not seek relief, and the reality that this is a difficult decision for minors, underscores the government's concerns about the adequacy of having them represented by abortion advocates, as well as the reality that the claims of each individual rise and fall based on the individual's specific circumstances.

III. The District Court's Sweeping Injunction is Overbroad and Constitutes an Abuse of Discretion.

A. Due Process Does Not Require Government Facilitation of Pre-Viability Abortions in Every Instance

The injunction constituted an abuse of discretion, not because (as Plaintiffs contend) it enjoined a purported ban on abortion (Pls' Br. 36-37), but because it categorically requires the government to facilitate elective pre-viability abortions by children without *any* limitation. The scope of the district court's injunction is sweeping: It enjoins Defendants "from interfering with or obstructing any class member's access to . . . an abortion[.]" Gov't App. 266. The order does not allow for any period to explore sponsorship or voluntary return; it allows no participation by parents; it does not consider the minor's age or maturity. In sum, it rejects *any* alternative by the government that would allow expression of its interest in potential life and in not facilitating the termination of such life. It therefore mandates a kind of abortion-on-demand tantamount to "an unqualified 'constitutional right to an

abortion'" that has never been recognized under the Due Process Clause, *Maher v. Roe*, 432 U.S. 464, 473-74 (1977), and "represents a radical extension of the Supreme Court's abortion jurisprudence." *Garza*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

1. Facilitation

Plaintiffs dismiss the government's expenditure of resources required to facilitate a minor's decision to obtain an abortion, but they provide no evidence to show such expenditures are *de minimis* or unnecessary. Pls' Br. 37-42. Plaintiffs claim that the need to "devote staff resources to 'maintain[] appropriate custody over the child during her absence' is nonsensical"; that while ORR shelters "receive government grants to care for unaccompanied minors, there is no evidence suggesting that government funds are their only funding source"; and that the expenditure of government resources in drafting approval documents "is a requirement of Defendants' own creation, and they could easily dispense with it." Pls' Br. 38.

Contrary to Plaintiffs' claim, ORR has provided ample support for these expenditures and for the notion that the district court's order required government officials to aid in the termination of potential life. ORR policies require transporting minors in its custody offsite for medical treatment when necessary, *see* ORR Guide at § 3.4.5, and reasonably require that "ORR and shelter staff . . . retain custody of

the minor during the procedure and appointments related to the procedure, and during transport to and from such appointments." Gov't App. 30. It makes no difference that some of this work would be completed by government contractors. Transport by shelter volunteers requires a background check under 45 C.F.R. § 311.16(d). Under a policy that has been in effect since 2015, ORR must approve all significant medical procedures for minors in its custody consistent with the Director's obligations under 6 U.S.C. § 279, including abortion, by taking into consideration the child's interests and health. *Id*. This approval process takes time and resources from ORR staff, devoted to "drafting approval documents and routing them through ORR leadership; reviewing the information about the minor relevant to the proposed procedure; providing pre-procedure direction to field and shelter staff; and providing and communicating ORR authorization for a procedure to take place." *Id.* The Supreme Court has long recognized that the government need not expend such resources to facilitate an abortion. *See Harris v. McRae*, 448 U.S. 297, 315 (1980).

Further, the mere fact that these expenditures may, in some cases, cost less than related life-affirming medical care does not render them "*de minimis* or nonexistent." Pls' Br. 39. Rather, the Supreme Court has made clear that the government may adopt policies that favor life. *Maher v. Roe*, 432 U.S. 464, 471-474 (1977) (rejecting claim that unequal subsidization for child birth, as opposed to

abortion, was unconstitutional). The government generally need not "commit any resources to facilitating abortions." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989). Therefore, the only question before this Court regarding government facilitation is whether the costs associated with an abortion itself—staffing, custody, paperwork, and background checks—are tangible. And they are.

2. Alternatives to Facilitation

Contrary to Plaintiffs' blanket rejection, sponsorship and voluntary departure are valid alternatives to government facilitation when they are expeditious and safe. Pls' Br. 42-47. To support the district court's broad injunction, Plaintiffs must show that these policies violate the Constitution in all of their applications. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Plaintiffs' reliance on *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), a case involving prisoner access to abortion services, to argue that ORR's policy is unconstitutional, is misplaced. Pls' Br. 42-43. If the government does not provide access to abortions for incarcerated prisoners – who have no means to leave custody during the prison term – the procedure would become "*entirely* unavailable." *Roe v. Crawford*, 514 F.3d 789, 796 (8th Cir.), cert. denied, 555 U.S. 821 (2008). In contrast, minors in ORR custody have alternative methods available to obtain release: release to a suitable sponsor and repatriation or other voluntary departure to their country of nationality (where most minors in this circumstance resided until only shortly before their apprehension).

i. Sponsorship

This Court has already noted that the ability to timely locate a sponsor is significant as to whether there is a right to court-ordered government facilitation of abortion. *See Garza*, 874 F.3d at 738-39. This is particularly salient in cases involving children, where "the Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes." *Id.* at 755 (Kavanaugh, dissenting). Such a permissible purpose would include, among other reasons, "that it would be good to put J.D. 'in a better place [outside of government custody] when deciding whether to have an abortion.'" *Id.* at 740 (Millett, concurring).

The mere fact that the sponsorship process, in *some* instances, "can take weeks or months" (Pls' Br. 45), does not invalidate it as a viable alternative to government facilitation of abortions when it is expeditious. Plaintiffs have not shown that "even when the sponsorship process works quickly," as was the case with Moe, "minors are subjected to unreasonable and unnecessary delay in seeking abortion" (Pls' Br. 46) that is also unconstitutional. Indeed, the Supreme Court has upheld a variety of state bypass procedures that involve up to a three week delay. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). Further, Plaintiffs' assertion that Moe's abortion request "would have likely languished longer" if she

had not obtained counsel is conjecture, not proof, particularly given her favorable sponsorship prospects and lack of adverse immigration factors, none of which the agency could have simply manufactured in order to thwart the issuance of a temporary restraining order. *See* Gov't App. 162 (ORR declaration noting that Moe's sponsor had submitted all the necessary documentation except fingerprints, and that no home study was required for this prospective sponsor). Plaintiffs therefore cannot show sponsorship is an unconstitutional alternative in all or even a large fraction of cases.

ii. Repatriation or other voluntary departure

Plaintiffs argue that voluntary departure is an unconstitutional alternative because it forces them to forego their "constitutional right to abortion" to press an immigration claim. Pls' Br. 43. But as we explained in our opening brief, immigration law can sometimes impose choices between foregoing liberty for a time and obtaining immigration relief, and this is an accepted aspect of the system when an individual requests entry into the United States. *See Demore v. Kim*, 538 U.S. 510, 530 n. 14 (2003) ("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'"); *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 216 (1953) (alien's continued exclusion on Ellis Island while seeking entry did not "deprive[]

him of any statutory or constitutional rights"). Plaintiffs' reliance on *Harris*, 448 U.S. at 317 n.19, where the Court opined that it would be unconstitutional to withhold Medicaid benefits from someone who exercised her right to an abortion, is misplaced, because voluntary departure is not punitive in nature. It is simply an alien's return to her country of nationality, where she likely resided until just a short time before coming into ORR custody.

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. The *Garza* Court determined that voluntary return was overly-burdensome in Doe's case due to factual circumstances preventing prompt return. 874 F.3d at 740. Yet, out of the four plaintiffs in this litigation, only Doe has raised a persecution claim in her home country. *See* Gov't App. 92-95, 159-160. Plaintiffs make no attempt to show that a large percentage of pregnant minors in ORR custody have viable, or even plausible, immigration claims, asserting only that "many likely do." Pls' Br. 43. Such speculation cannot support a class-wide injunction. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). Indeed, the district court's injunction – which would tend to encourage minors to enter the country seeking abortion services to evade home country prohibitions on abortion (*see* NILC Amicus at 18) – both underscores the absence of an undue burden being imposed by the United States as well as the legitimacy of the government's foreign

policy concerns regarding a policy of facilitating abortion for children seeking entry to the country.

Plaintiffs suggest that voluntary departure is not expeditious based on backlogs in the immigration courts and the delay in placing Doe in removal proceedings. Pls' Br. 44-45. However, Plaintiffs' argument conflates the legal form of relief called "voluntary departure" with an individual's capacity to voluntarily leave the United States. As a general matter, an alien is free to leave the United States at any point in time – even when she is in removal proceedings.[2] Indeed, in the case of minors, ORR is fully authorized to assist in immediate repatriation. *See* 8 U.S.C. § 1232(a)(5)(A). The proceedings in Doe's case are a consequence of her choices. They do not show that voluntarily departing the United States, which for

[2] Once removal proceedings have commenced, an alien seeking to avoid the consequences that attach thereto may wish to obtain the relief known as "voluntary departure." *See* 8 U.S.C. § 1229c. That relief has two forms. Pre-final order voluntary departure is a separate mechanism under 1229c(a), where, "[t]he Attorney General may permit an alien voluntary to depart the United States at the alien's own expense under this subsection, *in lieu of being subject to proceedings* under section 1229a of this title or prior to the completion of such proceedings[.]" (Emphasis added). The other form of voluntary departure, discussed by Plaintiffs, is post-final order voluntary departure under 8 U.S.C. § 1229c(b). However, the presence of this relief does not change the fact that an alien remains free to depart the United States on her own volition at any time and that can be efficiently facilitated in cases like these.

many can be immediate, is an unconstitutional alternative in even a significant fraction of cases.

B. Due Process Does not Support a Blanket Gag Order

The scope of the district court's amended gag order is similarly sweeping: It enjoins Defendants "from forcing any class member to reveal the fact of their pregnancies and/or their abortion decisions to anyone, *and from revealing that fact or those decisions to anyone themselves, either before or after an abortion*, unless the class member provides non-coerced consent to such disclosure or needs emergency medical care and is incapacitated such that she is unable to inform a medical care provider herself[.]" Gov't App. 275 (emphasis added). That injunction sidesteps ORR's statutory custodial responsibilities, and conditions the agency's ability to involve a child's parents solely on the child's consent, without any consideration of other relevant factors. Contrary to the plaintiffs' assertion, the issue before the Court is not whether ORR may notify the child's parents "in *every* circumstance" (Pls' Br. 48), but rather, whether ORR may involve the child's parents in *some* situations when doing so would be in the child's best interests.

Plaintiffs argue that ORR claims it may notify parents "in *every* circumstance" and that "neither the Supreme Court nor any lower court has upheld a parental notification requirement for all minors that lacked a bypass." Pls' Br. 48. But ORR does not have a parental notification *requirement* for every pregnant minor in its

custody, and it is judicious in sharing its information concerning a child's pregnancy. Indeed, ORR decides on a case-by-case basis whether to involve the child's parents based on a consideration of the child's best interests. This is "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." Gov't App. 269. Importantly, ORR and its grantees do not disclose health situations to parents if doing so would "endanger the [minor's] health and well-being." *Id.* This policy of communicating with the child's parents and potential sponsors aids ORR in the discharge of its custodial role given by Congress. *See* 6 U.S.C. § 279(b)(1)(H); 8 U.S.C. § 1232(c)(3)(A). Because there is no parental notification *requirement*, there is similarly no need for "an alternative mechanism, such as a judicial bypass." Pls' Br. 48.

Additionally, parental notification jurisprudence does not apply because the question here is not whether a minor *must* notify a parent of her decision to abort, but whether ORR *may* share information it *already possesses* with a parent, sponsors, or doctors. And even under parental notification jurisprudence, "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*). As we have suggested, this is particularly

relevant where, unlike in state judicial bypass cases, the parents in this unique situation do not have custody of the child and therefore cannot prevent the abortion or harm the child.

Plaintiffs' claim of harm from ORR's policy relies primarily on unestablished facts regarding one individual, Ms. Poe. They allege that "[w]hen Jane Poe was forced to tell her parents and sponsor that she wanted an abortion, they threatened to beat her[,]" and that "[t]his threat may turn into actual abuse when and if she sees her parents again[.]" Pls' Br. 49-50. In support of this claim, Plaintiffs cite to Jonathan White's memo, but that memo makes no mention of Poe being forced to tell her parents or sponsors anything. Pl. App. 17. Nor does Poe mention forced parental notification in her declaration. Gov't App. 94-95. These claims are advanced solely by statements of counsel. In any event, Plaintiffs' claim that ORR violated its own policy regarding parental notification in one instance does not justify a class-wide injunction against a policy that is facially sound.

Finally, Plaintiffs, as minor children in ORR custody, do not possess an unqualified "right to informational privacy" (Pls' Br. 51), particularly when ORR stands in the role of the child's legal custodian until they are released to a sponsor. *See* 8 U.S.C. § 1232(b); *cf. Parham v. J.R.*, 442 U.S. 584, 619 (1979) ("[T]he state agency having custody and control of the child in *loco parentis* has a duty to consider the best interests of the child . . . ."). The Supreme Court has long recognized "that

when a parent or another person has assumed 'primary responsibility' for a minor's well-being, the State may properly enact 'laws designed to aid discharge of that responsibility.'" *Hodgson v. Minn.*, 497 U.S. at 448 (*quoting Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). This is because a minor's "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Id.* at 444.[3] The government, while acting as the legal guardian of an unaccompanied minor, does not transgress the rights of a minor in its care by carrying out such legitimate custodial responsibilities based on information voluntarily conveyed.

---

[3] To the extent Plaintiffs claim that the district court enjoined ORR from "forcing minors to be 'counseled' by a CPC [crisis pregnancy center], in violation of their First Amendment free speech rights," (Pls' Br. 54), Plaintiffs are mistaken. There is no such holding of the district court. This was relief specifically requested in Plaintiffs' motion for a preliminary injunction, but is nowhere mentioned in either of the district court's orders. Gov't App. 23 (Plaintiffs' motion requesting that ORR be enjoined from requiring minors to "obtain 'counseling' from an anti-abortion entity, including a crisis pregnancy center or 'pregnancy resource center'"); Gov't App. 266-67, 274-75 (district court orders). Nor could the district court so hold, as it is well-settled that the government may require pregnancy-related counseling to ensure counselees understand the legal rights and requirements surrounding abortion procedures. *Texas Med. Providers Providing Abortion Servs.*, 667 F.3d 570, 574-80 (5th Cir. 2012) (rejecting First Amendment challenge by abortion providers to a Texas law that required them to provide a sonogram and other information to women seeking abortion services); *see also Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (upholding a state mandatory-information provision that required providing information regarding pregnancy, fetal development, child care, and child support among other things).

IV. The Remaining Factors Support Lifting the Injunction.

Plaintiffs have not made a "clear showing" that the remaining preliminary injunction factors support class-wide injunctive relief. Future class members can bring claims when they arise, which the district court can rule on in a timely manner. This would also allow an individualized consideration of the circumstances in each case, including the minor's sponsorship prospects, maturity, and situation at home. Not every delay in a minor's attempt to obtain an abortion rises to the level of a constitutional violation.

The government's and the public's interest in protecting life, however, would be completely extinguished if ORR must facilitate all pre-viability abortions the moment one is requested. *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"). These legitimate interests also include the preferability of making an abortion decision with a family member through completion of the sponsorship process, rather than in a government facility, *Garza*, 874 F.3d at 740 ("it would be good to put J.D. 'in a better place [outside of government custody] when deciding whether to have an abortion.'") (Millett, concurring), and the public interest in disincentivizing illegal immigration, *Cf. Landon v. Plascencia*, 459 U.S. 21, 34 (1982).

CONCLUSION

Accordingly, the Court should lift the preliminary injunction and de-certify the class.

DATED: 8/13/2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

HASHIM MOOPPAN
Deputy Assistant Attorney General

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

ERNESTO H. MOLINA
Deputy Director

W. DANIEL SHIEH
SABATINO F. LEO
MICHAEL C. HEYSE
Attorneys

Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 305-7002
Fax: (202) 616-4923
daniel.shieh@usdoj.gov
sabatino.f.leo@usdoj.gov
michael.heyse@usdoj.gov

Attorneys for Defendants-Appellants

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)(ii) for a reply brief because it contains 6459 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/ *August E. Flentje*
AUGUST E. FLENTJE
Special Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2018, I caused a copy of the foregoing Appellant's Brief to be filed with the Clerk of the Court using the Court's CM/ECF system. Counsel for Appellees are registered CM/ECF users, and will be served exclusively through that system.

/s/ *August E. Flentje*
AUGUST E. FLENTJE
Special Counsel