

[NOT YET SCHEDULED FOR ORAL ARGUMENT]
No. 18-5093, 18-8003

**UNITED STATES CIRCUIT COURT
FOR THE DISTRICT OF COLUMBIA**

ROCHELLE GARZA, as guardian ad
litem to unaccompanied minor JANE
DOE, on behalf of herself and others
similarly situated; JANE ROE and
on behalf of herself and others
similarly situated; and JANE POE
and JANE MOE,

Plaintiffs,

v.

ALEX M. AZAR II, *et al.*,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF STAY
PENDING APPEAL

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INTRODUCTION

A stay is warranted. As an initial matter, mootness bars certification of a class in an action brought by two plaintiffs whose claims were resolved months before certification. Plaintiffs also fail to address fatal problems of adequacy, commonality, and typicality created by certification of a class comprised of *all* pregnant minors in ORR custody, the vast majority of whom do not want abortions.

Second, by rejecting sponsorship and voluntary departure as viable alternatives to government facilitation of abortion – even when release will occur imminently or return is safe – the injunction is inconsistent with this Court’s stated view that the obligation to facilitate an abortion depends on the individual facts and circumstances. *See Garza v. Hargan*, 874 F.3d 735, 738-40 (D.C. Cir. 2017). The district court’s injunction, on the other hand, mandates the kind of “immediate abortion on demand” that Judge Kavanaugh warned is inconsistent with constitutional principles. *Id.* at 752 (dissent). Further, the injunction provided no justification for barring communications with parents or doctors absent consent from the child. The Constitution imposes no gag rule on ORR in performing its custodial functions and communicating with doctors or parents in the child’s best interests.

Third, the orders have already harmed ORR's ability to fulfill its custodial role. The order bans ORR from speaking to the parents of dozens of minors about their pregnancies absent the minor's consent. And on April 13, 2018, with no opportunity for the government to weigh in, the district court indiscriminately ordered class notice about abortion to *all* minors in ORR-funded shelters, regardless of age, gender, or pregnancy status. ECF 135. This causes irreparable harm by forcing ORR to favor abortion over life. It also infringes on the conscientious objections of those grantees who do not want to communicate a pro-abortion message to minors, especially to minors who are very young or uninterested in abortion. Sualog Decl.2 ¶¶5-6.

ARGUMENT

I. The Government Is Likely to Succeed in its Challenge to Class Certification.¹

A. Mootness

The district court erred in certifying the class in this case because the only representatives – Ms. Doe and Ms. Roe – had already obtained court-ordered abortions, were adults, and were out of ORR custody months before the court certified a class of pregnant minors in ORR custody with only those two class representatives. In their opposition, plaintiffs assert that “at the time the class was

¹ Plaintiffs “agree that class certification is ‘bound up’ with the preliminary injunction.” Opp. 5.

certified” Doe and Roe in fact “had live claims, such as their informational privacy claim.” Opp. 6. But Doe and Roe were adults – and thus out of ORR custody – by the time the district court certified the class, so even their informational privacy claim was moot. Plaintiffs do not allege that ORR violates the informational privacy of *adults* released from its custody. ECF 118-1, ¶94 (ORR requires “unaccompanied immigrant minors to disclose . . . their decisions to seek . . . abortion”). Nor do they provide evidence showing ORR has *ever* violated the privacy rights of adults who have left its care. Thus, all of Doe and Roe’s claims were moot when the district court granted class certification.

Additionally, as we explained in our stay motion, the district court nowhere provided a basis for imposing information restrictions on ORR. There is no basis for such an order, and a meritless claim cannot preserve jurisdiction to require class-wide abortion facilitation.

Plaintiffs argue that the “‘transitoriness’ exception to mootness applies, and is measured by how long the *merits* are pending, not the motion for class certification.” Opp. 8. That is not correct. The exception applies when claims “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.” *Gerstein v. Pugh*, 420 U.S. 103, 110 (1975) (emphasis added).

Here, plaintiffs filed their motion for class certification on October 18, 2017, and it remained pending through the merits consideration with respect to each of four plaintiffs seeking relief, which provided ample time to act. The court acted on three out of four of those plaintiffs' claims prior to their claims becoming moot. Further, the transitory exception looks to whether a claim expires on its own terms, not to whether the claim is mooted out because full relief was granted by the court. *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975). That is perfectly logical. A court that grants complete relief on the merits necessarily has adequate time to act on the class certification motion, and the cases that have considered the issue have involved mootness that arose for reasons other than a grant of relief on the merits. *See, e.g., Sosna*, 419 U.S. at 403 (statutory deadline); *Gerstein*, 420 U.S. at 110 n.11 (pretrial detention).

That does not 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. v. Symczyk*, 569 U.S. 66, 76 (2013).² Were another plaintiff to come forward ample time would

² *Genesis Healthcare* is a leading case addressing mootness in collective actions, and Plaintiffs are wrong to suggest that it is irrelevant in Rule 23 class actions. *Opp.* at 7. The case they cite for this point, *DL*, addresses the relation back doctrine – whereby mootness arises *after* a district court has acted on a class motion, not before such action. 860 F.3d at 722 (relation back applies “when a district court . . . erroneously certifies . . . while plaintiffs’ claims are live”).

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.³

B. Adequacy

Plaintiffs do not contend with the district court's failure to separately address the adequacy of Doe and Roe given that their claims are moot, they are adults (and Roe was always an adult), they only briefly had live claims, and they are not in ORR custody. They are not adequate representatives given that constellation of differences between their circumstances and the circumstances of the class they seek to represent.

The district court's fundamental flaw here was certifying a class of *all* pregnant minors in ORR custody. Most of that class do not want an abortion and have never requested an abortion, and all will now be represented by class counsel who seek the facilitation of a procedure they may strongly oppose. This is fatal to adequacy.

In response, plaintiffs simply argue without support that minors “who choose not to exercise their right to an abortion are not harmed in any way by being class members; thus, there is no conflict between their decisions and the

³ And on Plaintiffs' erroneous theory—whereby their facilitation claim remained live even after they obtained court relief so long as they remained in ORR custody—the case cannot plausibly qualify as sufficiently transitory.

class members.” Opp. 14. But as Defendants previously argued, minors who want to give birth will want pregnancy-related care and support, not the abortion-focused remedy ordered by the court, or representation from class counsel. The injunction ensures that minors who want to continue their pregnancies will be put in the untenable position of defending their decision to avowed abortion advocates purporting to represent the minors’ interests.

The conduct of class representative Rochelle Garza in *Doe v. ORR*, 884 F.3d 269 (5th Cir. 2018), illustrates this point. Garza insisted on representing a pregnant minor in a judicial bypass proceeding in state court, even after the minor twice indicated in writing that she wanted neither an abortion nor representation by Garza. It took an appeal by ORR as the girl’s proper custodian—and an *ex parte* interview of the minor by the court—for the Garzas to relent. A process that requires a minor to involuntarily prove that she does not want an abortion cannot be reconciled with *Casey*. Plaintiffs have not shown why pregnant minors who wish to carry their babies to term can be adequately represented by counsel seeking to “extend abortion rights.” *Id.* at 275 (5th Cir. 2018) (Jones, concurring).

C. Commonality and Typicality

Plaintiffs’ argument that commonality and typicality are met is unsupported by law and fact. Plaintiffs claim that “potential factual differences between class members” are “irrelevant.” Opp. 10. That is legally incorrect. Unless due process

requires abortion facilitation “on demand” – which the *Garza* majority disavowed, 874 F.3d at 738 – the *Garza* ruling requires different action by ORR depending on the circumstances presented, as is explained below in addressing the merits.

Plaintiffs argue they are challenging “a uniform policy of ensuring that UCs continue their pregnancies while in government custody.” Opp. 10. But plaintiffs have not established such a blanket policy, only that the ORR director reviews significant medical procedures like abortion.⁴

II. The Government is Likely to Succeed on its Challenge to the Preliminary Injunction.

A. Facilitation

Sponsorship and voluntary departure are valid alternatives to government facilitation of abortion. In this facial challenge, plaintiffs must show these policies violate the Constitution in all or a large fraction of their applications. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007); *Reno v. Flores*, 507 U.S. 292, 301 (1993). Such challenges are “disfavored” because they “often rest on speculation” and “run contrary to the fundamental principle of judicial restraint.” *Washington State*

⁴Plaintiffs’ challenge to ORR’s *general* policy of requiring “visits to crisis pregnancy centers . . . to steer pregnant UCs away from abortion” has already been rejected by Judge Millett for the *Garza* Court. *See* 874 F.3d at 741 (“The government unquestionably is fully entitled to have its own view preferring the continuation of pregnancy, and to even require the disclosure of information expressing that view.”).

Grange v. Washington State Republican Party, 552 U.S. 442, 451 (2008). Here, plaintiffs cannot meet their burden.

By rejecting sponsorship entirely, the injunction mandates the kind of “immediate abortion on demand” warned of by Judge Kavanaugh. *See Garza*, 874 F.3d at 752 (dissent). As shown by two of the four named plaintiffs here, sponsorship or release often occurs before any need to facilitate abortion arises. Plaintiffs set forth no acceptable waiting period in their opposition, and instead rely on *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Opp. 17-18. But *Whole Woman’s Health* addressed the state’s admitting-privileges and surgical-center requirements, not a three-week waiting period. *Id.* at 2310-18. Instead, the Supreme Court has accepted procedures addressing parental involvement – which Judge Millett recognized is related to the goal of promptly finding a sponsor, 874 F.3d at 740 – that take over three weeks. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

This Court also recognized that the ability to timely locate a sponsor is significant to whether there is a right to court-ordered government facilitation of abortion. *See Garza*, 874 F.3d at 738-39. This is particularly true 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). Plaintiffs therefore cannot show sponsorship is an unconstitutional alternative in even a large fraction of cases.

Similarly, plaintiffs provide no evidence that the vast majority of minors in ORR custody are “fleeing horrific circumstances in their home countries[,]” thereby invalidating voluntary departure as a viable option altogether. Opp. 17. 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. Not all minors present those circumstances, and no other plaintiff here asserted them. Plaintiffs’ assertion to the contrary “rest[s] on speculation” and does not justify the injunction. 552 U.S. at 451.

B. The Gag Order

The district court’s amended gag order lacks any legal basis. ORR’s communications with parents, medical personnel, and potential future sponsors – sometimes without the consent of the child, who may be as young as ten years of age – cannot violate Due Process. Congress has affirmatively charged ORR, in its custodial role, with communicating with parents and potential sponsors. See 6 U.S.C. § 279(b)(1)(H); 8 U.S.C. § 1232(c)(3)(A).

While a parental *consent* requirement with no bypass process might impose an undue burden, here the only issue is whether ORR may itself notify parents, doctors, or potential sponsors. As an initial matter, parental notification jurisprudence does not apply because the question here is not whether a minor must notify a parent to abort, but whether ORR may share information it possesses with a parent or doctors. But even under that law, “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*). 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, 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.” Sualog Decl. ¶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.

Plaintiffs allege that ORR did not follow this policy in the case of Poe, Opp. 20, but such a claim does not justify a class-wide injunction against a policy that is facially sound. Moreover, the 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. See ECF 64-1; 94 at 4.

III. The Remaining Factors Favor Granting a Stay

Plaintiffs cannot show irreparable harm. Rather, future class members can bring claims when those claims arise, as this litigation has shown. See *Whole Woman's Health*, 136 S. Ct. at 2311.

In contrast, the government is now constrained in consulting with the parents of the minors in its custody and, in some cases, must facilitate termination of life. The overbreadth of the district court's order regarding notice has compounded these harms. The court ordered class notice to all minors in ORR-funded shelters (male or female, pregnant or not, of all ages), which forces ORR to advertise abortion at the expense of its constitutionally legitimate interest in life. It also infringes upon the legitimate objections of grantees by forcing them to communicate an abortion-advocacy message they disagree with, especially to

young children (who may not even be old enough to read, much less become pregnant). Sualog Decl.2 ¶¶5-6. This district court is presently obstructing ORR from fulfilling its custodial role, and thus, the injunction should be stayed pending appeal.

CONCLUSION

Accordingly, the Court should stay the preliminary injunction and certification.

DATED: April 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I caused a copy of the foregoing Defendants' Reply to be filed with the Clerk of the Court using the Court's CM/ECF system. Counsel for plaintiffs are registered CM/ECF users, and will be served exclusively through that system.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2600 words. This Reply complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ August E. Flentje
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and JANE MOE,

Plaintiffs,

v.

ALEX M. AZAR II, *et al.*,

Defendants.

**DECLARATION OF JALLYN SUALOG, ACTING DEPUTY DIRECTOR
FOR CHILDREN’S PROGRAMS, OFFICE OF REFUGEE
RESETTLEMENT, ADMINISTRATION FOR CHILDREN AND
FAMILIES, UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

I, Jallyn Sualog, for my declaration pursuant to 28 U.S.C. § 1746, hereby state and depose as follows, based on my personal knowledge and information provided to me in the course of my official duties:

1. I am the Acting Deputy Director for Children’s Programs of the Office of Refugee Resettlement (“ORR”), an Office within the Administration for

Children and Families (“ACF”), U.S. Department of Health and Human Services (“HHS”).

2. I am familiar with ORR policies and procedures concerning the care of unaccompanied alien children (“UACs”) in ORR care and custody, including the medical care and the process of considering prospective sponsors for the UACs.

3. I am also familiar with the policies, procedures, decisions, case details, and care concerning UACs that are diagnosed as being pregnant, and that request abortions.

4. ORR complied with the District Court’s April 13, 2018 order by informing ORR-grantee shelters they must provide a specified notice to all UACs in various ways delineated in the District Court’s order.

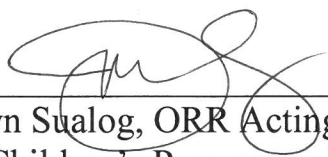
5. Thereafter, a religiously-affiliated shelter in Texas informed ORR that it cannot in good conscience provide the notice.

6. The shelter that raised this objection cares for 74 UACs at this time. Among those, there are 57 males and 12 females in the shelter itself, ranging in age from 5–17. The shelter is also responsible for 4 males and 1 female in transitional foster care, ranging in age from 0–12. None of the youths within this shelter’s responsibility are pregnant (accordingly, none have requested abortion). In

compliance with the District Court's order, ORR had directed this shelter to provide the notice to all the UACs in its care.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 26, 2018.



Jallyn Sualog, ORR Acting Deputy Director
for Children's Programs