UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of J.D. and others similarly situated,	)	
Plaintiff,	)	Civil Action No. 17-cv-02122 (TSC)
v.	)	
ERIC D. HARGAN, *et al*.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR BRIEFING ON CLASS WIDE RELIEF AND STAY PENDING SUPREME COURT PROCEEDINGS

Defendants[1] request that this Court stay proceedings relating to class-wide prospective relief pending the conclusion of Supreme Court proceedings that were initiated today. In the alternative, Defendants request that this Court issue a briefing schedule for the parties to address class-wide relief after this Court has acted on Plaintiff's motion for class certification or provide Defendants with the opportunity to file an opposition to Plaintiff's motion for preliminary class-wide relief on November 20, 2017. Defendants have reached out to Plaintiff regarding the relief requested in this motion. Plaintiff opposes a stay or proceeding to brief this matter following an order on class certification. However, Plaintiff does not oppose permitting Defendants to file an opposition brief to their motion for preliminary class-wide relief by November 20, 2017, as long as Plaintiff is permitted to file by November 30, 2017, a unified reply brief addressing both Defendants' opposition to preliminary class-wide relief and Defendants' opposition to class certification.

[1] This motion is filed on behalf of Defendants in their official capacities only.

a. On October 14, 2017, Plaintiff filed motions for a temporary restraining order and preliminary injunction. ECF Nos. 3 & 5. The motion for a temporary restraining order addressed individual relief for Jane Doe and the motion for a preliminary injunction sought relief for Jane Doe and class-wide injunctive relief. ECF Nos. 3 & 5. Plaintiffs simultaneously asked this Court to shorten the time in which to respond to the motion for a temporary restraining order. ECF No. 5. This Court then entered minute order providing that "Defendants' response is due at 7:00 p.m. on 10/17/2017," allowing for a reply, and scheduling a "[p]reliminary [i]njunction hearing . . . for 10/18/2017." ECF, MINUTE ORDER/Set/Reset Deadlines.

Pursuant to the highly expedited deadlines called for by the circumstances and the Court's order, the government timely filed on October 17, 2017, a pleading styled as an "Opposition to Plaintiff's Application for a Temporary Restraining Order and Motion for a Preliminary Injunction." ECF 10. That pleading addressed the request for relief on behalf of Jane Doe, but did not address the request for class-wide relief. Indeed, plaintiff had not yet filed its motion for class certification, which was filed on October 18, 2017.

This Court held a hearing on October 18, 2017—*see* ECF, Minute Entry ("Preliminary Injunction Hearing held")—and entered an injunctive order later that day addressing Jane Doe's individual relief. *See* ECF 20. The government appealed that order, which the court of appeals treated as an appealable preliminary injunction. *See* Court of Appeals Order at 2 (remanding to district court to "amend the effective dates . . . of its injunction").

In the meantime, Defendants were not sure whether they were entitled to file a separate response to Plaintiff's motion for a preliminary injunction seeking class-wide relief. Defendants initially believed a separate response was due on October 27, 2017, *see* ECF No. 35 (seeking extension for such a response), but then determined that, given the government's response filed

on October 17, 2017, a second response would be improper absent further order of the Court, *see* ECF No. 36 (errata).

Additionally, the government has now requested Supreme Court review of the court of appeals ruling, and has asked the Supreme Court to, among other things, order this Court to dismiss Plaintiff's claims for class-wide prospective relief as moot. *See Hargan v. Garza*, No. ----, Pet. at 24-26, 29 (pet. filed Nov. 3, 2017) (attached as Exhibit A).

b. Defendants request that this Court stay proceedings relating to class-wide prospective relief pending the Supreme Court's consideration of the government's petition for certiorari. In the certiorari petition filed today, Defendants explained that because the appeal was mooted by Plaintiff—who had prevailed below—"this Court should apply its longstanding practice of vacating the judgment of the court of appeals and remanding the case to that court with instructions to direct the district court to dismiss all claims that are now moot, *i.e.*, all claims for prospective relief regarding pregnant unaccompanied minors." Pet. at 19. A ruling by the Supreme Court could resolve the aspects of this matter relating to the request for class-wide prospective relief, and given the pendency of that petition, we think it appropriate for this Court to await a determination by the Supreme Court of whether it will order dismissal of class-wide prospective claims based on mootness.

c. If this Court does not stay proceedings pending Supreme Court review, Defendants request that this Court issue a briefing schedule to the parties to address class-wide relief after this Court has acted on Plaintiff's motion for class certification. In the alternative, Defendants request the opportunity to file an opposition to Plaintiff's motion for preliminary class-wide relief on November 20, 2017.

The issue of class-wide relief is significant, and given the exigency of proceedings relating to Jane Doe, the Defendants have not yet had the opportunity to brief the issues relating to class-wide relief. Defendants are also concerned that they are not entitled to file a second pleading addressing class-wide relief given that Defendants' initial responsive pleading was styled as an "Opposition to Plaintiff's Application for a Temporary Restraining Order and Motion for a Preliminary Injunction" (ECF 10); Plaintiff's reply and this Court's hearings were described as addressing the request for a preliminary injunction (ECF 15; ECF Set/Reset Deadlines/Hearings (10/17/2017); ECF Minute Entry (10/18/2017)); and the court of appeals asserted jurisdiction by treating this Court's order as a preliminary injunction. Court of Appeals Order at 2.

Absent a stay, the best way to address class-wide relief, we submit, would be for this Court to first address Plaintiff's request for class certification and, if that class is certified, for the parties to then address the propriety and nature of appropriate relief for that class through a new request for preliminary relief and a response thereto. The scope and nature of the certified class—and whether it is appropriate to certify a class in the first instance—is highly relevant to the briefing of preliminary remedies for that class, and we think the parties and the Court would benefit from briefing that addressed class relief once this Court acts on the class certification motion. If the Court agrees, we request that it issue a schedule following its ruling on the motion for class certification.

In the alternative, Defendants request the opportunity to file an opposition to Plaintiff's motion for preliminary class-wide relief on November 20, 2017, simultaneously with our response to the request for class certification. As discussed, the request for class-wide preliminary relief is significant, and the Defendants should have a full opportunity to respond to

that request. At the same time, because the issues will be related to the request for class certification, if this Court determines that it will consider both requests simultaneously, it should give the Defendants up until the time of its response to class certification to address the motion seeking preliminary class-wide relief.

Dated: November 3, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

ERNESTO H. MOLINA
Deputy Director
Office of Immigration Litigation

PAPU SANDHU
Assistant Director
Office of Immigration Litigation

BY: /s/ *Joseph A. Darrow*
JOSEPH A. DARROW
Trial Attorney
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
P: (202) 598-2445, F: (202) 305-7000
joseph.a.darrow@usdoj.gov

Attorneys for Defendants

No.

In the Supreme Court of the United States

ERIC HARGAN, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
ALEX K. HAAS
CATHERINE H. DORSEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment and instruct that court to remand the case to the district court with directions to dismiss all claims for prospective relief regarding pregnant unaccompanied minors.

PARTIES TO THE PROCEEDING

The petitioners are Eric D. Hargan, Acting Secretary, U.S. Department of Health and Human Services; Stephen Wagner, Acting Assistant Secretary, Administration for Children and Families; and Scott Lloyd, Director, Office of Refugee Resettlement, in their official capacities.

The respondent is Rochelle Garza, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 17
Conclusion 29
Appendix A — Court of appeals order (Oct. 20, 2017) 1a
Appendix B — Court of appeals order (Oct. 20, 2017) 4a
Appendix C — Court of appeals order (Oct. 24, 2017) 18a
Appendix D — Amended temporary restraining order (Oct. 24, 2017) 65a
Appendix E — Findings of fact in support of amended temporary restraining order (Oct. 24, 2017) 68a
Appendix F — Temporary restraining order (Oct. 18, 2017) 72a
Appendix G — Constitutional and statutory provisions 75a

TABLE OF AUTHORITIES

Cases:

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 21
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 7, 23, 24
Board of Sch. Comm'rs v. *Jacobs*, 420 U.S. 128 (1975) 25
Burke v. *Barnes*, 479 U.S. 361 (1987) 20
Camreta v. *Greene*, 563 U.S. 692 (2011) 20, 23, 24
County of Riverside v. *McLaughlin*, 500 U.S. 44 (1991) 25
Davis v. *Federal Election Comm'n*, 554 U.S. 724 (2008) 24

Cases—Continued: Page

Davis, In re, 289 U.S. 704 (1933) 26
Disbarment of Moore, In re, 529 U.S. 1127 (2000) 27
Discipline of Shipley, In re, 135 S. Ct. 779 (2014) 26
Duke Power Co. v. *Greenwood Cnty.*, 299 U.S. 259 (1936) 20
Genesis Healthcare Corp. v. *Symczyk*, 569 U.S. 66 (2013) 25
Gerstein v. *Pugh*, 420 U.S. 105 (1975) 25
Gilbert, In re, 276 U.S. 294 (1928) 26
Great W. Sugar Co. v. *Nelson*, 442 U.S. 92 (1979) 20
Hall, In re, 57 S. Ct. 107 (1936) 26
Harris v. *McRae*, 448 U.S. 297 (1980) 22
Karcher v. *May*, 484 U.S. 72 (1987) 20
Kingdomware Techs., Inc. v. *United States*, 136 S. Ct. 1969 (2016) 20
Maher v. *Roe*, 432 U.S. 464 (1977) 22
Moore, In re, 177 F. Supp. 2d 197 (S.D.N.Y. 2001) 26
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992) 22
Sibley, In re, 63 S. Ct. 203 (1942) 26
Town of Chester v. *LaRoe Estates, Inc.*, 137 S. Ct. 1645 (2017) 23
Trump v. *Hawaii*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017) 20
U.S. Bancorp Mortg. Co. v. *Bonner Mall P'ship*, 513 U.S. 18 (1994) 19, 20, 21
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 20, 23, 24
Webster v. *Reproductive Health Servs.*, 492 U.S. 490 (1989) 22

Constitution, statutes, regulation, and rule: Page

U.S. Const.:
Amend. I 6, 7
Establishment Clause 7
Amend. V ..... *passim*, 75a
8 U.S.C. 1229c 4
8 U.S.C. 1232(b)(1) 3, 81a
8 U.S.C. 1232(c)(3) 3, 84a
8 U.S.C. 1232(c)(3)(A) 4, 84a
8 U.S.C. 1232(c)(3)(B) 4, 84a
8 C.F.R. 1240.26 4
Sup. Ct. R. 8.2 26

Miscellaneous:

Email from Pets. Att'y to Resp. Att'y (Oct. 24, 2017, 18:26 EST) 13
Email from Resp. Att'y to Pets. Att'y:
(Oct. 24, 2017, 18:28 EST) 13, 17, 27
(Oct. 24, 2017, 19:17 EST) 13
(Oct. 25, 2017, 10:00 EST) 15
Letter from David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union, to Noel J. Francisco, Solicitor Gen. 2 (Oct. 30, 2017) 14, 15, 16, 17, 27, 28
Letter from Noel J. Francisco, Solicitor Gen., to David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union (Oct. 26, 2017) 16
Office of Refugee Resettlement, U.S. Dep't of Health & Human Servs., *Children Entering the United States Unaccompanied* (Jan. 30, 2015):
Section 1, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1 3

Miscellaneous—Continued: Page

Section 2, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 3

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 23

In the Supreme Court of the United States

No.

ERIC HARGAN, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 18a-64a) is not published in the Federal Reporter, but is available at 2017 WL 4791102. A prior opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. Another prior opinion of the court of appeals is not published in the Federal Reporter but is available at 2017 WL 4707112.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 75a-94a.

STATEMENT

On the afternoon of October 24, the lower courts held that the government had to immediately facilitate the pre-abortion counseling and abortion sought by an unaccompanied alien minor who was apprehended unlawfully entering the United States, who has declined to request voluntary departure to her home country, and who thus is in the government's custody. Under Texas state law, the counseling and abortion must be performed by the same physician and separated by at least 24 hours. When Ms. Doe could not receive counseling from a physician on the evening of October 24, her representatives informed the government that her appointment would be moved to the morning of October 25, pushing the abortion procedure to October 26. The government asked to be kept informed of the timing of Ms. Doe's abortion procedure, and one of respondent's counsel agreed to do so.

Based on those representations, the government informed this Court's Clerk's Office and respondent's counsel that it would file a stay application the following morning, October 25. At that point, by their own account, Ms. Doe's representatives did three things: they secured the services of Ms. Doe's original physician (who had provided counseling the previous week), moved her appointment from 7:30 to 4:15 a.m. on the morning of October 25, and changed the appointment from counseling to an abortion. Although Ms. Doe's representatives informed the government of the change

in timing, they did not inform the government of the other two developments—which kept the government in the dark about when Ms. Doe was scheduled to have an abortion. The government did not learn that critical fact until shelter personnel arrived with Ms. Doe at the clinic for her early-morning appointment on October 25. The government's efforts to reach respondent's counsel were met with silence, until approximately 10 a.m. Eastern Time, when one of respondent's counsel notified the government that Ms. Doe had undergone an abortion.

1. When an unaccompanied alien minor enters the United States, the U.S. Department of Health and Human Services (HHS) is normally responsible for the minor's care and custody pending completion of immigration proceedings. See 8 U.S.C. 1232(b)(1). HHS exercises this responsibility through its Office of Refugee Resettlement (ORR), which contracts with various private entities that operate shelters and detention centers for these minors. See ORR, HHS, *Children Entering the United States Unaccompanied: Section 1* (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1.

Generally, a minor has the immediate opportunity to identify an adult sponsor in the United States to whom the minor can be released, with preference given to the minor's relatives within the United States (if any), though non-relatives can qualify to be sponsors. HHS promptly pursues that opportunity and works with the minor and her family to help identify and consider potential sponsors. See 8 U.S.C. 1232(c)(3); ORR, HHS, *Children Entering the United States Unaccompanied: Section 2* (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-

section-2; 10/23/17 Jonathan White Decl. (10/23/17 White Decl.) 2-4 (filed under seal; redacted version filed Oct. 31, 2017).

Once a prospective sponsor applies, HHS determines whether the applicant is "capable of providing for the child's physical and mental well-being," which must "include verification of the [applicant'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." 8 U.S.C. 1232(c)(3)(A). HHS also may, and in some cases must, conduct a home study. 8 U.S.C. 1232(c)(3)(B). If no suitable sponsor is found, and the minor does not voluntarily depart the country, see 8 U.S.C. 1229c; 8 C.F.R. 1240.26, the minor normally remains in an HHS-contracted shelter or other facility until the age of 18.

2. Jane Doe is 17 years old. In early September 2017, she was apprehended at the border as an unaccompanied minor entering the United States without authorization, and was placed in HHS custody. She is currently cared for by a federal grantee at a shelter in Texas. App., *infra*, 68a.

Following her arrival, Ms. Doe was given a medical examination, after which she was informed that she was pregnant. App., *infra*, 69a. Shelter staff also asked Ms. Doe about persons who might sponsor her in the United States. 10/23/17 White Decl. 2. Two were identified and called, but they chose not to apply. *Ibid.* Upon learning this, Ms. Doe informed shelter staff that she desired to return to her country of origin, but she did not file formal papers to do so. *Ibid.* Shelter staff continued to work with Ms. Doe, those potential sponsors, and other

family members by phone to help Ms. Doe identify other potential sponsors. *Id.* at 3.

Ms. Doe subsequently requested an abortion, which under Texas law cannot be provided to a minor absent parental consent or a judicial bypass. App., *infra*, 69a; Compl. 4. On September 25, 2017, a Texas state court granted Ms. Doe a bypass, and also appointed a guardian ad litem and an attorney ad litem. App., *infra*, 69a; 10/13/17 Brigitte Amiri Decl. (Amiri Decl.) 1.

Texas law further requires that an individual who seeks to have an abortion receive counseling at least 24 hours in advance of the procedure, and that the counseling be conducted by the same doctor who will perform the procedure. App., *infra*, 70a. The Director of ORR evaluated Ms. Doe's request for an abortion and declined to permit Ms. Doe to leave her shelter for purposes of attending the state-mandated counseling session or obtaining an abortion. 10/17/17 Jonathan White Decl. (10/17/17 White Decl.) 2-3; Amiri Decl. 2.

As the ORR's Deputy Director for Children's Programs explained, authorizing Ms. Doe to attend such appointments would entail facilitating an abortion. HHS or shelter staff would need to (and did) attend trips to any appointment to maintain ORR's custody of Ms. Doe. And even if HHS or the shelter did not transport Ms. Doe to the abortion clinic, approval would still require that HHS devote time and staff towards drafting and executing approval documents and providing direction to the shelter on its role in connection with the procedure, and would require that HHS expend resources to monitor Ms. Doe's health after the abortion. 10/17/17 White Decl. 3.

Although ORR thus denied Ms. Doe's request that ORR facilitate an abortion, it continued to look for other

avenues to accommodate her. Shelter staff continued to pursue information Ms. Doe provided about potential sponsors. 10/17/17 White Decl. 4. Indeed, at the time Ms. Doe ultimately underwent an abortion, the government believed that it had identified a potentially suitable sponsor, and it was assisting in compiling the materials for that person's application. See 10/23/17 White Decl. 3. At that time, the government believed that the process could be completed within a week, and it intended to so inform this Court in its stay application. See *id.* at 4.

3. On October 13, 2017, Ms. Doe filed the instant lawsuit, via her guardian ad litem, in the District Court for the District of Columbia. Compl. 11.[1] Ms. Doe sought to bring the action "as a class" on behalf of herself and "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit." *Ibid.* Her complaint alleged six claims: four on behalf of Ms. Doe and the putative class, seeking injunctive relief based on alleged violations of their Fifth Amendment rights to privacy and liberty (Count 1), their First Amendment rights to freedom of speech

[1] Ms. Doe had previously attempted to challenge the government's actions by seeking to join a lawsuit in the Northern District of California, *ACLU* v. *Burwell*, 16-cv-3539, Docket entry No. 1 (June 24, 2016), and by bringing a habeas corpus action in Texas state court against the shelter and its employees, *In re Doe*, 17-DLL-6644 (107th Jud. Dist. Oct. 5, 2017). The district court in the federal case held that it lacked venue over Ms. Doe's claims. 16-cv-3539 Docket entry No. 102, at 4 (Oct. 11, 2017). The state habeas corpus case was removed to the Southern District of Texas, *Doe* v. *International Educational Services (I.E.S.), Inc.*, 17-cv-211, and subsequently abated until further notice, 17-cv-211 Order 1 (Oct. 18, 2017).

(Count 2), their Fifth Amendment right to "informational privacy" (Count 3), and their rights under the Establishment Clause (Count 4); and two under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on behalf of Ms. Doe only, based on alleged violations of the Fifth Amendment (Count 5), and the First Amendment (Count 6). Compl. 12-15.

At the same time she filed the complaint, Ms. Doe sought a temporary restraining order (TRO) on several claims, including the claim that HHS was violating her Fifth Amendment rights by allegedly prohibiting her from obtaining state-required counseling and an abortion. D. Ct. Doc. 1-10 (Oct. 13, 2017). The government opposed the TRO, arguing that because Ms. Doe had the option of requesting voluntary departure or of finding a sponsor, HHS had not imposed an undue burden on any abortion right. D. Ct. Doc. 10, at 1-2 (Oct. 17, 2017).

Following an emergency hearing on October 18, the district court granted the TRO. The court ordered the government to transport Ms. Doe (or allow her guardian ad litem or attorney ad litem to transport her) to the nearest abortion provider for counseling and an abortion within two to three days. App., *infra*, 72a-73a. In addition, the court restrained the government from forcing Ms. Doe to reveal her abortion decision to anyone, or revealing it to anyone themselves; retaliating against Ms. 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 Ms. Doe's access to counseling or an abortion. *Id.* at 74a. Con-

sistent with the TRO, Ms. Doe received the state-mandated counseling on October 19. Resp. C.A. Opp. to Mot. for Stay 8 n.5 (Oct. 19, 2017).

4. The government immediately filed a notice of appeal and an emergency motion for a stay pending appeal, focusing on Ms. Doe's Fifth Amendment claim. Gov't Emergency Mot. for Stay 7-8 & n.3 (Oct. 18, 2017). A panel of the D.C. Circuit heard argument on the morning of Friday, October 20. C.A. Oral Arg. Mins.

Later that day, a majority of the panel issued a brief order vacating the portion of the TRO that required HHS to transport Ms. Doe (or to allow her to be transported) to either pre-abortion counseling or an abortion appointment. App., *infra*, 1a-2a.[2] The panel majority recognized that if Ms. Doe, who was then approximately 15 weeks pregnant, secured a sponsor, she would be able to lawfully obtain an abortion on her own. *Id.* at 2a; see *id.* at 69a-71a. As the panel majority explained, so long as the sponsorship process "occurs expeditiously," it "does not unduly burden the minor's right" to obtain an abortion. *Id.* at 2a. The panel majority therefore directed the district court to allow until Tuesday, October 31—a period of 11 additional days—for Ms. Doe to identify, and the government to vet and approve, a sponsor. *Ibid.* If a sponsor could not be approved in that time, then the district court could issue any "appropriate order," and the parties could appeal. *Ibid.*

---

[2] The panel majority agreed with the parties that the court had jurisdiction because the TRO "was more akin to preliminary injunctive relief and [wa]s therefore appealable under 28 U.S.C. § 1292(a)(1)." App., *infra*, 2a n.1.

Judge Henderson indicated that she concurred in the order, with her reasoning to come within five days. App., *infra*, 3a. Judge Millett dissented. *Id.* at 4a-17a.

5. At approximately 10 p.m. on Sunday, October 22, Ms. Doe filed an emergency petition for rehearing en banc and an emergency motion to recall the mandate in the court of appeals, as well as two new declarations in the district court that were supplied to the court of appeals (one of which raised, for the first time in this proceeding, the suggestion that Ms. Doe might have a claim to remain in the United States because she alleged abuse in her home country). Pet. for Reh'g 12. At approximately 11 p.m. on October 22, the D.C. Circuit ordered the government to respond to the petition for rehearing by 11 a.m. the next morning. 10/22/17 C.A. Order 1. The government did so (and also submitted a sealed declaration calling into question Ms. Doe's abuse allegations). Gov't Response to Pet. for Reh'g.

At approximately 3 p.m. on October 24, a majority of the en banc court of appeals granted the petition for rehearing and denied the government's motion for a stay pending appeal because "the stringent requirements for a stay" had not been met. App., *infra*, 19a. The court also affirmed the substance of the district court's injunctive relief, remanding the case to the district court "for further proceedings to amend the effective dates in * * * its injunction." *Ibid.*; see *id.* at 19a n.1. The en banc majority did not specify its precise reasoning, but stated that it reached its decision "substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett," *id.* at 19a, which had argued that "[t]he government's refusal to release J.D. from custody" constituted an undue burden and was tantamount to an "unqualified denial of and flat

prohibition" on the procedure, *id.* at 8a (Millett, J., dissenting). Judge Millett concurred in the en banc order, reiterating and expanding upon her prior reasoning. *Id.* at 21a-34a.

Judge Kavanaugh, joined by Judges Henderson and Griffith, dissented on the ground that "[t]he three-judge panel reached a careful decision that prudently accommodated the competing interests of the parties" and was "dictated by Supreme Court precedent." App., *infra*, 59a (Kavanaugh, J., dissenting). Judge Henderson would have further held that because Ms. Doe is in the United States illegally, and has not developed substantial connections here, she "cannot avail herself of the constitutional rights afforded those legally within our borders," including the right to an abortion. *Id.* at 43a (Henderson, J., dissenting).

6. At approximately 4 p.m. on October 24, Ms. Doe's guardian ad litem filed in the district court an emergency motion to amend the TRO. The motion requested that the TRO be modified to provide that the government make Ms. Doe available "promptly and without delay, on such dates, including today, * * * as shall be specified by [her] guardian ad litem or attorney ad litem, in order to obtain the counseling required by state law and to obtain the abortion procedure." D. Ct. Doc. 27, at 1 (Oct. 24, 2017). According to the motion, the guardian ad litem "has been informed, and represents to the [district c]ourt, that a qualified physician is available at the nearest clinic today, and will be available to perform the procedure tomorrow." *Id.* at 2.

At approximately 5 p.m., without giving the government an opportunity to respond, the district court granted the motion, adopting Ms. Doe's proposed language and ordering the government to make Ms. Doe

immediately available for counseling and an abortion. App., *infra*, 66a. The remainder of the modified TRO was identical to that court's original order. *Id.* at 67a. At approximately 10:30 p.m. that same night, the court entered findings of fact in support of the amended TRO. *Id.* at 68a-71a.

7. The government planned to seek an emergency stay from this Court before Ms. Doe could obtain an abortion. In light of counsel's representations that no abortion would take place until October 26, the government informed this Court and respondent's counsel that it would file an emergency application for a stay on the morning of October 25. Sometime later that evening, Ms. Doe's appointment was changed so that instead of obtaining counseling at 7:30 a.m. on October 25, she would undergo an abortion at 4:15 a.m. that morning, just hours before the government planned to file its stay application. Respondent's representatives did not notify the government or the shelter of the changed nature of the appointment.

a. As explained above, under state law, Ms. Doe was required to attend a counseling session 24 hours before any abortion procedure, and the counseling had to be with the same doctor who would perform the abortion. App., *infra*, 70a.[3] Ms. Doe attended counseling on Thursday, October 19, while the first TRO was in effect. Resp. C.A. Opp. to Mot. for Stay 8 n.5. Respondent's counsel, however, had represented that the doctor who

---

[3] See, *e.g.*, D.C. Cir. Oral Arg. 1:13:45-1:15:10, https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByMonday?OpenView&StartKey=201710&Count=37&scode=3 (quoted at App., *infra*, 31a n.6 (Millett, J., concurring)); Resp. C.A. Opp. to Mot. for Stay 8-9; D. Ct. Doc. 1-10, at 1.

was available to perform an abortion (and provide counseling) during the week of October 16 was different than the doctor who would be available to perform the procedure during the week of October 23, when the D.C. Circuit ultimately ruled. *Id.* at 8-9 ("This week, the doctor at the health care facility in South Texas provides abortions until 17.6 weeks. But next week the doctor only provides abortion to 15.6 weeks.").

Counsel's representations to the district court on October 24 confirmed that Ms. Doe would need to participate in a new counseling session and then wait a day before she could undergo an abortion. Counsel asked the court to order the government to make Ms. Doe available "promptly and without delay, on such dates, including today, * * * *in order to obtain the counseling required by state law and to obtain the abortion procedure*." D. Ct. Doc. 27, at 1 (emphasis added). Counsel stated: "Plaintiff has been informed, and represents to the Court, that a qualified physician is available at the nearest clinic *today*, and will be available to perform the procedure *tomorrow*." *Id.* at 2 (emphasis added). Counsel thus reaffirmed to the court that for Ms. Doe to obtain an abortion, she would need to complete a two-step, 24-hour process.

b. Following the district court's entry of the modified TRO at approximately 5 p.m. on October 24, counsel made similar representations directly to the government. First, Ms. Doe's guardian ad litem, attorney ad litem, and counsel from the American Civil Liberties Union (ACLU) all requested that the Texas shelter transport Ms. Doe to the clinic immediately. See Assistant U.S. Att'y Decl. 2 & Exs. B-D (Nov. 1, 2017) (AUSA Decl.) (lodged with the Court). At 6:13 p.m. on October 24, government counsel contacted respondent's counsel

by telephone, confirming that she was being transported to the clinic and asking to be apprised of the timing of any appointments. Government counsel followed up with an email to respondent's counsel, confirming that the shelter was transporting Ms. Doe to the clinic on October 24, and asking to be notified of the timing of "tomorrow's procedure." Email from Pets. Att'y to Resp. Att'y (Oct. 24, 2017, 18:26 EST) (on file with the Office of the Solicitor General). At 6:28 p.m., respondent's counsel confirmed receipt of the email and phone call, and assured government counsel that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know." Email from Resp. Att'y to Pets. Att'y (Oct. 24, 2017) (on file with the Office of the Solicitor General).

Roughly 45 minutes later, respondent's counsel informed government counsel that the doctor was not able to stay for the appointment that evening, which would be rescheduled for the following morning at 7:30 a.m. Email from Resp. Att'y to Pets. Att'y (Oct. 24, 2017, 19:17 EST) (on file with the Office of the Solicitor General). Around the same time, Ms. Doe's attorney ad litem separately informed the assigned Assistant United States Attorney (AUSA) that Ms. Doe's previous doctor was not available; that it was no longer feasible for Ms. Doe to receive counseling that evening (October 24); and that as a result the abortion could not take place until October 26. Ms. Doe's attorney ad litem further stated that the doctor had agreed to stay for an extra day, in order to perform the abortion on October 26. See AUSA Decl. 2.

c. These representations made clear that the appointment rescheduled for the morning of October 25 would be for counseling, with an abortion to follow no

earlier than the morning of October 26. By their own acknowledgement, respondent's counsel shared that understanding. See Letter from David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union, to Noel J. Francisco, Solicitor Gen. 2 (Oct. 30, 2017) (ACLU Letter) (lodged with the Court) ("We did not become aware, until late in the evening of October 24, that it might be possible for the physician who had counseled Ms. Doe on October 19 to return to the clinic to perform the abortion on the morning of October 25. It was not clear until the morning of October 25 that he would in fact be able to do so.").

Based on the representations of counsel that no abortion would occur until October 26, at approximately 9 p.m. on October 24, the government informed the Clerk's Office and respondent's counsel that it would file the application the following morning (October 25), which would allow the Court a full day to consider it before Ms. Doe could undergo an abortion. Respondent's counsel confirmed receipt of the email stating the government's intent to file the next morning and did not indicate any plans for an abortion to occur before then.

Later that night, Ms. Doe's guardian ad litem informed the Texas shelter and the AUSA that Ms. Doe's appointment had been moved to 4:15 a.m. Central Time. AUSA Decl. 4 & Ex. K. The email did not explain the reason for the change nor state that the appointment was now for an abortion. *Ibid.* In addition, neither the AUSA nor the shelter was instructed to refrain from giving Ms. Doe food or drink before the appointment, as would have been medically indicated if the appointment were for an abortion. *Id.* at 4 & Exs. I-J. Although the change in the appointment time caused shelter staff to

wonder later that night whether the nature of the appointment also might have changed, see *id.* Ex. M, they were never told that the early-morning appointment would be for an abortion rather than counseling.

Respondent's counsel has now explained that, unbeknownst to the government, at some point "late in the evening of October 24," they became "aware" that "it might be possible for the physician who had counseled Ms. Doe on October 19 to return to the clinic to perform the abortion on the morning of October 25." ACLU Letter 2. Respondent's counsel has further explained that at some point early in the morning of October 25, it became "clear" that the original doctor "would in fact be able to" perform the procedure that morning. *Ibid.* Significantly, however, respondent's counsel did not notify the government of this possibility—notwithstanding their earlier acquiescence in a request to keep government counsel informed of the timing of the "procedure" and the government's subsequent notice of its intent to seek relief in this Court that same morning.

At 4:15 a.m. Central Time on the morning of October 25, shelter staff arrived with Ms. Doe at the clinic. At 4:30 a.m. Central Time, shelter staff emailed government personnel that the clinic had indicated that Ms. Doe would be undergoing an abortion. AUSA Decl. 4-5 & Ex. M. After receiving that information, government counsel twice emailed respondent's counsel to inquire as to the nature of the appointment. Two hours after the government's first email was sent, counsel informed the government that Ms. Doe "had the abortion this morning." Email from Resp. Att'y to Pets. Att'y (Oct. 25, 2017; 10:00 EST) (on file with the Office of the Solicitor General). Because these developments precluded

any possibility of effective relief, the government did not file its stay application with the Court.

8. On October 26, the Solicitor General wrote to the National Legal Director of the ACLU, which represents respondent in this case. Letter from Noel J. Francisco, Solicitor Gen., to David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union 1-4 (Oct. 26, 2017) (SG Letter) (lodged with the Court). The Solicitor General recounted the above series of events, *ibid.*, and expressed his concern that "ACLU attorneys misled the Department of Justice about when Jane Doe would undergo an abortion, thereby preventing the Department from seeking Supreme Court review," *id.* at 1. The Solicitor General stated that "[i]f such conduct occurred, it would be contrary to those attorneys' obligations and responsibilities as officers of the Court," *ibid.*, and he requested "the favor of a response * * * so that I may determine whether to raise this incident with the Court," *id.* at 4.

On the morning of Monday, October 30, the ACLU responded to the Solicitor General's letter. ACLU Letter 1-2. In its view, the government's concern is "unfounded," because ACLU attorneys "were in touch with the government about the timing of Ms. Doe's appointments for the sole purpose of ensuring that the shelter would abide by the court order to transport her at the appropriate times," and "[c]ounsel never agreed to provide the government information about the nature of Ms. Doe's appointments or to give the government advance notice of the imminence of the abortion." *Id.* at 1. The ACLU did not address government counsel's request on October 24 to be notified of the timing of Ms. Doe's abortion, or ACLU counsel's response that "[a]s

soon as we understand the clinic's schedule tomorrow we will let you know," p. 13, *supra*.

The ACLU further explained that, as noted above, it "did not become aware, until late in the evening of October 24, that it might be possible for the physician" who had previously counseled Ms. Doe to "perform the abortion on the morning of October 25," and that "[i]t was not clear until the morning of October 25 that he would in fact be able to do so." ACLU Letter 2. The ACLU did not say whether those events were a response to the government's notice that it intended to file a stay application with the Court the following morning, and thus whether respondent's counsel attempted to prevent this Court's review. The ACLU also did not dispute that Ms. Doe's representatives had repeatedly informed the courts and government counsel that Ms. Doe would need to attend a new counseling session with a new doctor and wait 24 hours before she could obtain an abortion; that Ms. Doe's attorney ad litem had specifically informed the government that the abortion would take place on October 26; and that respondent's counsel was aware that the United States would seek a stay from this Court on the morning of October 25. Without addressing any of those facts, the ACLU concluded that it was "under no legal, ethical, or self-imposed obligation" to "facilitate the government's ability" to seek a stay from this Court by informing the government that Ms. Doe would obtain an abortion in the early morning hours of October 25. *Ibid.*

REASONS FOR GRANTING THE PETITION

This appeal presented the question whether the government must facilitate access to an abortion that is not medically necessary to preserve the life or health of an

unaccompanied alien minor who was apprehended unlawfully entering the United States, who declines to request voluntary departure to her home country, who has not yet identified a qualified sponsor to whom she can be released, and who thus is in the government's custody. The answer to that question is no. Under this Court's case law, the government may adopt policies favoring life over abortion; it is not obligated to facilitate abortion; and the government acts permissibly when it does not place an undue burden in a woman's path. Here, the government imposed no undue burden: Ms. Doe contended that the government's actions as her custodian were obstructing her access to an abortion in violation of the Fifth Amendment, but she could have left government custody by seeking voluntary departure, or by working with the government to identify a suitable sponsor who could take custody of her in the United States. Given those options, the government was under no obligation to facilitate Ms. Doe's abortion.

The divided en banc court of appeals reached the contrary conclusion on the afternoon of October 24. Over the dissent of three judges, without holding oral argument, and after requiring the government to oppose the petition for rehearing en banc literally overnight, the en banc court vacated the panel majority's decision that had put in place a modest period of time—11 additional days—for the parties to secure a sponsor to whom Ms. Doe could be released. That narrow ruling, which had the potential to permit Ms. Doe to access an abortion without requiring the government to facilitate it, was far more appropriate in the circumstances of this case than the en banc court's sweeping constitutional rule and the district court's order for immediate relief that would be final rather than "temporary."

The government therefore was prepared to seek emergency relief from this Court, both because it disagreed with the merits of the en banc court's ruling and because HHS believed it had identified a potential sponsor. But Ms. Doe's counsel ensured that did not happen. Although they had represented to the government that, in light of Texas law and logistical constraints, no abortion would occur until the morning of October 26—and although the government had relied on those representations in deciding to file its application for a stay on the morning of October 25 and informed respondent's counsel of its intent to so file—Ms. Doe then underwent an abortion a few hours before the government would seek relief from this Court. Respondent's counsel provided no notice to the government of that critical development, despite their previous acquiescence in government counsel's request that the government be kept informed of the scheduling of the abortion "procedure."

In light of these circumstances, and the fact that the appeal was mooted before this Court's review based on the "unilateral action of the party who prevailed below," *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994), this Court should apply its longstanding practice of vacating the judgment of the court of appeals and remanding the case to that court with instructions to direct the district court to dismiss all claims that are now moot, *i.e.*, all claims for prospective relief regarding pregnant unaccompanied minors.

1. The portions of the TRO addressed by the court of appeals—those requiring the government to make Ms. Doe available for pre-abortion counseling and an abortion, and restraining the government from interfering with her access to those services—are now moot.

According to respondent's counsel, Ms. Doe has undergone an abortion. Moreover, no exception to the mootness doctrine applies. The government did not voluntarily cease its conduct, and Ms. Doe's claims regarding access to abortion are not capable of repetition yet evading review because there is no "reasonable expectation that the same complaining party" (*i.e.*, Ms. Doe) will again become pregnant and seek an abortion while in government custody. *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

2. When, as here, an appeal becomes moot "while on its way [to this Court] or pending [a] decision on the merits," this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see *id.* at 39 n.2; see also, *e.g.*, *Trump* v. *Hawaii*, No. 16-1540, 2017 WL 4782860 (Oct. 24, 2017); *Karcher* v. *May*, 484 U.S. 72, 82 (1987); *Burke* v. *Barnes*, 479 U.S. 361, 365 (1987); *Duke Power Co.* v. *Greenwood Cnty.*, 299 U.S. 259, 267 (1936) (per curiam). This Court has followed that approach in "countless cases," *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the "normal" procedure in the event of mootness, *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011). The rule serves important purposes: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25. At the same time, "[v]acatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from

opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted). The case for vacatur is especially strong here for three reasons.

a. First, the United States was denied review by the actions of opposing counsel. Vacatur is fundamentally an "equitable remedy" that recognizes "[a] party who seeks review of the merits of an adverse ruling * * * ought not in fairness be forced to acquiesce in the judgment" when "mootness results from unilateral action of the party who prevailed below." *Bonner Mall*, 513 U.S. at 25; see, *e.g.*, *Arizonans for Official English*, 520 U.S. at 75 ("agree[ing]" with State's position that "[i]t would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment") (citation omitted; second, third, and fourth brackets in original). That is precisely what would happen absent vacatur in this case. Ms. Doe obtained a favorable judgment from the court of appeals, and then mooted that judgment by undergoing an abortion hours before her counsel knew the government would seek review in this Court, and without counsel's notifying the government of the changed nature of the early morning appointment. In these circumstances, the government should not be forced to "acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25.

b. Second, vacatur is appropriate because, absent mootness, this Court likely would have granted certiorari. The en banc majority's disposition of Ms. Doe's Fifth Amendment claim warranted this Court's review. Over the dissent of three judges, the en banc majority ordered the government to make Ms. Doe—an unaccompanied minor who was apprehended entering the

United States unlawfully, who has refused to request voluntary departure to her home country, who has not yet located a qualified sponsor to whom she can be released, and who thus is in government custody—immediately available for counseling and an abortion. It ordered that irreversible procedure in the form of "temporary" or "preliminary" relief; without holding oral argument; and after requiring the government to oppose the motion for rehearing en banc literally overnight. The en banc majority did so even though there is no precedent from this Court (or any court) holding that the federal government imposes an "undue burden" by refusing to facilitate access to an abortion for a pregnant unaccompanied minor who retains the freedom to leave government custody by returning to her home country or by helping to identify a suitable sponsor. Moreover, this Court has repeatedly made clear that the government generally need not facilitate abortions. See *Planned Parenthood* v. *Casey*, 505 U.S. 833, 846 (1992); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 509 (1989); *Harris* v. *McRae*, 448 U.S. 297, 315-316 (1980); *Maher* v. *Roe*, 432 U.S. 464, 471-474 (1977).

The en banc majority jettisoned the panel majority's far more moderate decision, which gave the parties a brief additional period of time to secure an acceptable sponsor for Ms. Doe. As the panel majority recognized, such a short pause in the proceedings would not have constituted an undue burden, and it had the potential to remove any alleged government obstacle to Ms. Doe's obtaining an abortion, while also ensuring that the government was not required to facilitate the procedure. In fact, at the time the en banc court ruled, we had been informed by HHS that a potential sponsor had been

identified, HHS was assisting that person with the application, and HHS believed that the approval process could be completed within a week (assuming the individual applied and was qualified). The government intended to so inform this Court in its stay application. Given the extraordinary circumstances here, the government respectfully submits it is reasonably likely that the Court would have granted the government's stay application and its petition for a writ of certiorari.[4]

c. Third, this Court explained in *Munsingwear* that "a judgment, unreviewable because of mootness," should not be permitted to "spawn[] any legal consequences." 340 U.S. at 41; see *Camreta*, 563 U.S. at 713. Here, the court of appeals' decision on Ms. Doe's now-moot claim for injunctive relief could have significant legal consequences: Ms. Doe also seeks damages for her Fifth Amendment claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Compl. 14-15; *Town of Chester* v. *LaRoe Estates, Inc.*, 137 S. Ct. 1645, 1651 & n.3 (2017)

---

[4] The United States has argued that when a case has become moot after the court of appeals' ruling, but before a petition for certiorari is granted, this Court ordinarily should decline to vacate the decision below if the case would not have warranted review on the merits. See Stephen M. Shapiro et al., *Supreme Court Practice* § 5.13, at 357-358, 968 n.33 (10th ed. 2013); see, *e.g.*, Gov't Amicus Br. at 10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31). For the reasons discussed above, this Court likely would have granted the government's stay application and its petition for certiorari; vacating the decision below therefore would be fully consistent with the practice the government has urged in other cases. In any event, even if review were not otherwise warranted under different circumstances, vacatur still would be appropriate in the circumstances of this case because the government's reasonable reliance on the representations of opposing counsel frustrated the government's opportunity to seek this Court's review.

(noting that "standing is not dispensed in gross" because a case or controversy must exist with respect to each claim) (quoting *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 734 (2008)). Although the individual defendants have additional defenses to that claim, their future litigation should not be constrained by the D.C. Circuit's "preliminary" adjudication of the merits of the Fifth Amendment claim. *Camreta*, 563 U.S. at 713.

Moreover, Ms. Doe, through her guardian ad litem, brought this case as a putative class action on behalf of herself and "all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit." Compl. 11. If the decision below is not vacated—and the putative class members' claims are not dismissed, see pp. 25-26, *infra*—it could be applied to those claims for relief. That would squarely implicate one of vacatur's key purposes: "clear[ing] the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40. The en banc court's decision should not be left on the books for use by these and other plaintiffs.

3. Under *Munsingwear*, this Court's general practice is to vacate the decision below and remand with instructions that the case be dismissed. 340 U.S. at 39. Here, however, Ms. Doe's abortion did not necessarily moot all of her claims: Counts 5 and 6 seek damages under *Bivens*, *supra*, and some of her claims for prospective relief involve the government's potential post-abortion conduct, such as disclosure of the fact that an abortion has occurred. See Compl. 14-15. Thus, the appropriate disposition is for the Court to vacate the judg-

ment below and remand to the court of appeals with instructions to direct the district court to dismiss Ms. Doe's claims for injunctive relief insofar as they relate to the government's treatment of pregnant unaccompanied minors. Ms. Doe is no longer pregnant and has no ongoing interest in those claims.

That Ms. Doe filed this complaint as a putative class action does not change the analysis. See Compl. 11. A putative class action, or particular claims within it, 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). This Court has recognized an exception 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), but that rule does not apply here because this case never reached that juncture. Ms. Doe filed her motion for class certification just one week before she obtained an abortion; the government has not yet responded to the motion; and the district court has not yet ruled on it. D. Ct. Doc. 18 (Oct. 18, 2017); see *Genesis Healthcare Corp.*, 569 U.S. at 75.

Nor are the putative class claims regarding pregnant minors 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). We simply do not know whether the district court could have ruled on Ms. Doe's motion for class certification before her interest in the claims for pre-abortion injunctive relief otherwise would have expired. The district court's consideration was cut short not because Ms. Doe's pregnancy came to term, or even because she obtained an abortion after an orderly appellate process. It was cut short because Ms. Doe underwent an abortion one week after filing her motion for class certification—and just hours before (as her counsel knew) the government would seek further review.

4. Finally, in light of the extraordinary circumstances of this case, the government respectfully submits that this Court may wish to issue an order to show cause why disciplinary action should not be taken against respondent's counsel—either directly by this Court or through referral to the state bars to which counsel belong—for what appear to be material misrepresentations and omissions to government counsel designed to thwart this Court's review. See Sup. Ct. R. 8.2 ("After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar.").[5]

---

[5] See also, *e.g.*, *In re Discipline of Shipley*, 135 S. Ct. 779 (2014) (order to show cause why attorney should not be sanctioned for his conduct as a member of the Bar of this Court); *In re Sibley*, 63 S. Ct. 203 (1942) (same); *In re Hall*, 57 S. Ct. 107 (1936) (disbarring attorney for conduct unbecoming a member of the Bar of this Court); *In re Davis*, 289 U.S. 704 (1933) (order to show cause for same); *In re Gilbert*, 276 U.S. 294 (1928) (imposing sanctions for same); *In re Moore*, 177 F. Supp. 2d 197, 199 (S.D.N.Y. 2001) (sug-

Respondent's counsel have taken the position that they did not have "any legal or ethical obligation" to keep the government informed of the timing of Ms. Doe's abortion. ACLU Letter 1. Perhaps that would be true if there had not been numerous filings and representations by counsel about the timing of that procedure. But they repeatedly represented—to courts and government counsel—that Ms. Doe would need to attend a new counseling session with a new doctor and wait 24 hours before she could obtain an abortion. Those representations were part of their request for immediate relief from the district court, which the court granted shortly after the court of appeals' ruling. Once the district court did so, government counsel asked to be notified of the timing of Ms. Doe's abortion, and respondent's counsel responded that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know," p. 13, *supra*. Ms. Doe's attorney ad litem separately informed the AUSA that the doctor had agreed to stay an extra day, so that the abortion would take place on October 26.

It was against that backdrop that the government decided to file its stay application on the morning of October 25, which should have allowed a full day for this Court to consider the application (and the government's accompanying request for an administrative stay) before Ms. Doe underwent an abortion. The government informed respondent's counsel of its intent to file the next morning. As the ACLU has now explained, at some point thereafter—and perhaps as a response to the government's notice—Ms. Doe's representatives secured

---

gesting that this Court's order debarring attorney, *In re Disbarment of Moore*, 529 U.S. 1127 (2000), was based on conduct unbecoming a member of the Bar).

the services of her original physician and changed the purpose of her October 25 morning appointment. See ACLU Letter 2. Given the dealings between the parties, respondent's counsel at least arguably had an obligation to notify the government of this incredibly significant development. Applicants for emergency relief—for instance, in the capital context—often face imminent action by the opposing party, and in the absence of judicial relief, the challenged action generally may proceed. But that does not mean that those planning to take authorized action may covertly change its timing, without notice to those affected by the change and in full awareness that opposing counsel has relied upon previous representations. The government recognizes that respondent's counsel have a duty to zealously advocate on behalf of their client, but they also have duties to this Court and to the Bar. It appears under the circumstances that those duties may have been violated, and that disciplinary action may therefore be warranted. At the least, this Court may wish to seek an explanation from counsel regarding this highly unusual chain of events.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand to the district court for dismissal of all claims for prospective relief regarding pregnant unaccompanied minors.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
ALEX K. HAAS
CATHERINE H. DORSEY
Attorneys

NOVEMBER 2017