

In opposing the motion for class certification, Defendants also asserted that “Defendants’ ‘policies’ do not apply to the putative class as a whole, making class-wide relief improper.” *Id.* at 23. But the ORR Decision Document regarding Plaintiff Poe, as now on the public record, makes clear that ORR does indeed have a policy that would prevent any unaccompanied minor in its custody from obtaining an abortion, except, perhaps, one for whom continuation of pregnancy would be life-threatening. *See* Redacted ORR Decision Document at 7-8 (ECF 87-1).

The government has confirmed that during fiscal year 2017 (October 1, 2016, through September 30, 2017), ORR had 420 *pregnant* unaccompanied minors referred to its custody. ECF 53 at 5.

Given these facts, and given that this Court has already found that ORR’s policy likely violates the constitutional rights of pregnant unaccompanied minors in its custody, *see* Temporary Restraining Order (October 18, 2017) at 1 (ECF No. 20); Temporary Restraining Order (December 18, 2017) at 4 (ECF No. 73), protection of the constitutional rights of ORR detainees who are putative class members demands that ORR be required to provide certain notice to putative class members and/or putative class counsel. The need for such notice is particularly acute given the isolation and vulnerability of the putative class members, and their likely ignorance of their rights under U.S. law. These are minors in a foreign country without their parents, detained by and completely under Defendants’ control. Many do not speak English and have no accessible support system. In both the case of both Jane Roe and Jane Poe, ORR refused to act on their requests for abortions for several weeks; had Plaintiffs’ counsel not learned of their situations by happenstance, neither young woman would have been able to get the care to which she was entitled.

An appropriate way to ensure that putative class members have information regarding their legal rights, and access to counsel to protect those rights, is to certify the proposed class, at least on a provisional basis. While Plaintiffs' motion for class certification is fully briefed, if the Court is not yet ready to make a final ruling on that motion, provisional certification is permissible, subject to later amendment.² See *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (provisionally certifying a class of immigration detainees regarding an allegedly unlawful detention policy); *Kirwa v. United States Dep't of Defense*, ___ F. Supp. 3d ___, 2017 WL 4862763 (No. 17-cv-1793 (ESH) (D.D.C. Oct. 25, 2017) (granting provisional class certification in context of granting preliminary injunction); *Bame v. Dillard*, 2008 WL 2168393 at *9 (No. 05-cv-1833) (D.D.C. May 22, 2008) (conditionally certifying class "without prejudice to Defendant's renewed objections after the close of discovery"); *Chang v. United States*, 217 F.R.D. 262, 274 (D.D.C. 2003) (granting provisional class certification before defendants had filed their opposition to certification); *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 178 (D.D.C. 1999) (granting provisional class certification subject to amendment after a statute of limitations question was resolved); *Foltz v. U.S. News & World Report, Inc.*, 106 F.R.D. 338 (D.D.C. 1984) (granting provisional class certification); *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 334 n.6 (D.D.C. 2007) (courts may "reassess class certification rulings as the case develops, and certify a class or alter a certification decision if necessary in light of developments in the case").

Once a class is certified, or provisionally certified, the Court can and should require appropriate notice to class members and class counsel. Once a class is certified, Plaintiffs' counsel have an attorney-client relationship with each class member, and therefore both the

² Plaintiffs moved for provisional certification as an alternative request in their motion for class certification. See ECF 18 at 1 n.2.

attorneys and the clients have a right to communicate with each other. “Class counsel represents all class members as soon as a class is certified.” *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978) (“A certification under [then-Rule 23(c)] makes the Class the attorney’s client for all practical purposes.”); *Tedesco v. Miskin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (“A lawyer who represents the named plaintiff in a class which has been certified immediately assumes responsibility to class members for diligent, competent prosecution of the certified claims.”). Class counsel thus have a right to communicate with their clients, and that requires knowing who their clients are. Class members likewise have a right to communicate with their counsel.

Accordingly, after certifying or provisionally certifying a class in this case, the Court should (1) order the Defendants to notify all pregnant unaccompanied minors in their custody of the existence and nature of this lawsuit and of their right to consult class counsel if they so wish, such notice to be provided in a language and in a manner (written or oral) that the unaccompanied minor can understand; and (2) order the Defendants to notify class counsel of the name and location of all pregnant unaccompanied minors in their custody, and contact information for the shelters where such persons are detained, within two business days of becoming aware that a pregnant unaccompanied minor is in their custody, and an indication for each minor whether she has requested an abortion. If a pregnant unaccompanied minor subsequently requests an abortion, notice of that request should be provided within two business days of the request. Only with such requirements in place can the Court have some degree of confidence that Defendants will not continue to violate the constitutional rights of the children in their custody and care.

Finally, given the likelihood that additional pregnant unaccompanied minors are even now being blocked from accessing abortion, being denied qualified, non-directive counseling, and being coerced into receiving religiously-based anti-abortion propaganda, or will be in that situation in a matter of days, Plaintiffs also respectfully request that Defendants' time in which to respond to this motion be shortened, and that they be directed to file any response on or before December 27, 2017.³

A proposed order is submitted with this motion.

Date: December 22, 2017

Respectfully submitted,

/s/ Arthur B. Spitzer

Arthur B. Spitzer (D.C. Bar No. 235960)
Scott Michelman (D.C. Bar No. 1006945)
American Civil Liberties Union Foundation
of the District of Columbia
4301 Connecticut Avenue NW, Suite 434
Washington, D.C. 20008
Tel. 202-457-0800; Fax 202-457-0805
aspitzer@acludc.org
smichelman@acludc.org

Brigitte Amiri (admitted *pro hac vice*)
Meagan Burrows
Jennifer Dalven
Lindsey Kaley
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel. (212) 549-2633; Fax (212) 549-2652
bamiri@aclu.org
mburrows@aclu.org
jdalven@aclu.org
lkaley@aclu.org

Daniel Mach (D.C. Bar No. 461652)
American Civil Liberties Union Foundation
915 15th Street NW

³ Defendants have already opposed Plaintiffs' motion for class certification; their opposition to this motion is accordingly presumed.

Washington, DC 20005
Telephone: (202) 675-2330
dmach@aclu.org

Mishan R. Wroe
American Civil Liberties Union Foundation of
Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel. (415) 621-2493; Fax (415) 255-8437
mwroe@aclunc.org

Melissa Goodman
American Civil Liberties Union Foundation of
Southern California
1313 West 8th Street
Los Angeles, California 90017
Tel. (213) 977-9500; Fax (213) 977-5299
mgoodman@clusocal.org

Attorneys for Plaintiff

Defendants are acting in a manner generally applicable to the class, thereby making appropriate preliminary and permanent injunctive relief with respect to the class as a whole. The fact that Plaintiffs Doe and Roe have now had abortions does not disqualify them as class representatives where, as here, the class is highly fluid and the harm suffered by any individual class member will last, at most, only a matter of weeks.

2. It additionally appears, for reasons that will be set out in a memorandum opinion to follow, that Defendants' class-wide policy violates the constitutional rights of plaintiff class members, and that notice to class members regarding their legal rights, and notice to class counsel regarding the identities of class members, is essential to protecting the constitutional rights of plaintiff class members.

For these reasons, it is hereby

ORDERED that Plaintiff's Motion for Class Certification is **GRANTED** [or, alternatively, is **PROVISIONALLY GRANTED**]; it is further

ORDERED that J.D., by her next friend and guardian ad litem, Rochelle Garza, on behalf of J.D. and others similarly situated, and Jane Roe, on behalf of herself and others similarly situated, are [provisionally] certified as the representatives of a class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is defined as all pregnant unaccompanied immigrant minors who are or will be in the legal custody of the federal government; it is further

ORDERED that the Court [provisionally] appoints as class counsel Arthur B. Spitzer and Scott Michelman from the American Civil Liberties Union (ACLU) Foundation of the District of Columbia; Brigitte Amiri, Meagan Burrows, Jennifer Dalven, Lindsey Kaley, and Daniel Mach from the ACLU Foundation; Mishan R. Wroe from the ACLU Foundation of

Northern California; and Melissa Goodman from the ACLU Foundation of Southern California;
it is further

ORDERED that until this Court rules on Plaintiffs' pending motion for a preliminary injunction on behalf of the class, Defendants must notify all pregnant unaccompanied minors in their custody of the existence and nature of this lawsuit and of their right to consult class counsel if they so wish, such notice to be provided in a language and in a manner (written or oral) that the unaccompanied minor can understand; it is further

ORDERED that Defendants shall notify class counsel of the name and location of all pregnant unaccompanied minors in their custody, and contact information for the shelters where such persons are detained, within two business days of becoming aware that a pregnant unaccompanied minor is in their custody (or for pregnant minors already in ORR custody, within two business days of this Order, such notice to include an indication for each minor of whether she has requested an abortion, and should a pregnant unaccompanied minor subsequently request an abortion, a notice of that request shall be provided to class counsel within two business days of her request [; and it is further

[ORDERED that this provisional class certification is subject to reconsideration and amendment at any time, on motion of any party or sua sponte, for good cause shown.]

Dated: December ____, 2017

Tanya S. Chutkan
United States District Judge