IN THE SUPREME COURT OF THE UNITED STATES

No. 19A246

ALEX M. AZAR, II, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL., APPLICANTS

v.

J.D., ON BEHALF OF HERSELF AND OTHERS
SIMILARLY SITUATED, ET AL.

APPLICATION FOR A FURTHER EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Rules 13.5 and 30.3 of this Court, the Solicitor General, on behalf of applicants, respectfully requests a further 24-day extension of time, to and including November 8, 2019, within which to file a petition 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. The court of appeals entered its judgment on June 14, 2019. By order dated September 3, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to October 15, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals, which is reported at 925 F.3d 1291, is attached. App., infra, 1a-99a.

1. This case arises from a complaint filed by Rochelle Garza, who was the guardian ad litem for Jane Doe. At the time

the complaint was filed, Doe was a pregnant, unaccompanied alien minor in the custody of the Department of Health and Human Services (HHS). She sought to compel the government to facilitate her efforts (and those of other unaccompanied minor aliens in HHS custody) to obtain an elective abortion. See 138 S. Ct. 1790-1791.

Under federal law, HHS is responsible for the care and placement of unaccompanied children who enter the United States illegally and are "in Federal custody by reason of their immigration status." 6 U.S.C. 279(b)(1)(A). HHS's Office of Refugee Resettlement (ORR) is charged by Congress with "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child," and for "implementing policies with respect to the care and placement of unaccompanied alien children." 6 U.S.C. 279(b)(1)(B) and (E). ORR generally provides that care through state-licensed residential-care providers that operate at ORR's direction and in compliance with ORR policies and procedures. See generally ORR, HHS, ORR Guide: Children Entering the United States Unaccompanied (Jan. 30, 2015), https://go.usa.gov/xVZP6 (ORR Guide); see also App., infra, 7a. As part of fulfilling its custodial obligations, ORR policies provide for children in HHS custody to obtain necessary medical treatment for medical emergencies, including transporting them offsite when necessary. See ORR Guide § 3.4.5.

Respondents allege that, in March 2017, ORR adopted a new policy that required shelters to obtain approval from the ORR Director before taking any action that would facilitate an unaccompanied minor's request to obtain an abortion and that the ORR Director denied every such request presented to him during his tenure. App., infra, 11a-12a. They contend that the policy violates an unaccompanied minor alien's due process right for the government not to impose an undue burden on her right to terminate a pregnancy before viability. Id. at 54a-55a. Through a series of emergency motions beginning in the fall of 2017, the named plaintiffs in this suit -- Ms. Doe and three other purported unaccompanied minors -- sought temporary restraining orders requiring ORR to facilitate their efforts to obtain abortions. Id. at 12a-16a; see, e.g., 138 S. Ct. at 1791-1792. Each named plaintiff eventually obtained such an order or was released from ORR custody while her request was pending. App., infra, 12a-16a. None remains in ORR custody today. Ibid.

Two months after the last named plaintiff's emergency motion was resolved, the district court certified a class of "'all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government,'" identified two of the named plaintiffs (Ms. Doe and Jane Roe) as class representatives, and granted class-wide preliminary injunctive relief enjoining the government "from 'interfering with

or obstructing any class member's access to . . . an abortion.'" App., infra, 16a, 18a (citations omitted); see id. at 16a-18a.

2. A divided panel of the court of appeals affirmed. App., infra, 1a-81a. The panel majority acknowledged that both class representatives' claims had become moot months before the district court entered its order certifying a class and granting preliminary injunctive relief. Id. at 19a-20a; see 138 S. Ct. at 1793 ("Doe's individual claim for injunctive relief * * * became moot after [her] abortion."). But the panel majority held that the class-certification order "relate[d] back" to the filing of the class-certification motion "when the individual claims were live," and that, "[b]ecause the class possesses a concrete legal interest, the mootness of individual claims does not affect the ability of representatives to litigate [this] controversy." App., infra, 20a, 28a. The panel majority reasoned that the length of time that any particular pregnant minor will remain in ORR custody "'is uncertain and unpredictable,'" but that, in its view, "some class members will have live claims" throughout the litigation. Id. at 27a-28a (citation omitted). It therefore concluded that the "inherently transitory" exception to mootness applied and that the relation back of the class-certification order was appropriate. Id. at 28a; see Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 71 (2013).

On the merits, the panel majority concluded that the district court had not abused its discretion in certifying a class and had properly enjoined the government from interfering with any class member's request for access to pre-viability abortion services. App., infra, 28a-79a. As to certification, the panel majority reasoned that the class representatives could adequately represent the interests of the class despite the mootness of their individual claims; that the requirements of commonality and typicality were met despite the variations in the facts and circumstances of each individual alien's abortion requests; and that the numerosity requirement was met even though only 18 minors in ORR custody in 2017 had requested abortions. Id. at 28a-50a.

As to injunctive relief, the panel majority reasoned that the government was not being asked to facilitate abortions, because ORR would commit resources to caring for the minor's health "regardless of any decision about an abortion" and the additional steps that were required to enable minors to access abortion services were "essentially ministerial functions associated with any procedure for any medical condition." App., infra, 58a. It also rejected the government's argument that the alleged conduct did not pose any undue burden because an alien could leave ORR custody through voluntary departure from the United States. Id. at 62a-66a. The panel majority reasoned that the timing and availability of voluntary departure is uncertain, and that many

countries to which those aliens would return may impose their own restrictions on abortion access. Ibid. For similar reasons, the majority found irrelevant a minor alien's ability to leave ORR custody and enter the United States under the custody of a sponsoring relative or other adult. Id. at 66a-74a. And it dismissed any benefits that a minor alien might gain from the guidance of an adult sponsor in deciding whether to seek, and in seeking, abortion-related services on the ground that ORR did not have those benefits "in mind * * * when it instituted and applied" the policy. Id. at 69a.

Judge Silberman dissented. App., infra, 82a-99a. In his view, the majority's reasoning was incorrect on mootness and the merits. Id. at 82a. He reasoned that the majority erred in applying the "inherently transitory" exception to mootness, noting that the roughly 90-day average stay in ORR custody of an unaccompanied minor alien "is hardly too brief for judicial action" and that, in any event, there was insufficient evidence to find that there would be "a constant class of individuals with live claims" during the course of class proceedings. Id. at 84a-85a; see id. at 82a-86a. Judge Silberman also concluded that the district court abused its discretion in certifying a class of all pregnant minors in ORR custody even though "many of [those] minors could be expected to have moral/religious objections to abortion." Id. at 87a. He reasoned that the presence of those individuals in

the class created problems concerning the adequacy-of-representation, typicality, and commonality class-action requirements, as well as presented Article III standing concerns for those class members. See id. at 86a-96a. And he concluded that the majority erred in failing to require the district court to at least impose a narrower injunction that would allow the government limited time to find a sponsor for an unaccompanied minor before it would be required to facilitate the minor's request for an abortion. Id. at 96a-99a. Judge Silberman criticized the majority for ignoring the distinction between the rights of minors and adults -- a distinction that underlies this Court's jurisprudence upholding parental-consent requirements for minors seeking abortions in other circumstances. Id. at 98a. And he recognized the benefits of adult guidance that sponsorship could afford a minor alien in these circumstances. Id. at 98a-99a.

3. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed for further consultation with HHS, as well as other components of the Department of Justice, and, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2019