ORAL ARGUMENT HELD: SEPTEMBER 15, 2026

No. 26-5157

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIEGO N., *et al.*,

Plaintiffs–Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 26-cv-0577
Hon. Carl J. Nichols, U.S. District Judge

DEFENDANTS–APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

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INTRODUCTION

Defendants–Appellees respectfully move to dismiss as moot Plaintiffs–Appellants' appeal from the district court's April 30, 2026 order denying Plaintiffs' motion for a preliminary injunction. No Plaintiffs remain in the custody of the Unaccompanied Alien Children Bureau within the Office of Refugee Resettlement ("ORR") in the U.S. Department of Health and Human Services ("HHS"). As a result, Plaintiffs are no longer subject to the alleged policy that they challenge and would not benefit from the preliminary injunction that they request. No exception to mootness applies. Therefore, the Court should dismiss this appeal as moot.

On October 13, 2026, undersigned counsel requested Plaintiffs' position on this motion. Plaintiffs oppose Defendants' motion.

BACKGROUND

Four Plaintiffs initiated this lawsuit on February 23, 2026. *See* Br. for Defendants-Appellees ("Defs. Br.") at 16, 19 (Doc. #2182877). At that time, all four Plaintiffs were in the custody of ORR's Unaccompanied Alien Children Bureau. *Id.* at 17. Plaintiffs argued that ORR's alleged sponsor reapplication policy violates the Due Process Clause of the Fifth

Amendment and the Administrative Procedure Act. *Id.* at 17-18. Plaintiffs moved for a preliminary injunction and provisional class certification. *Id.* at 18. Plaintiffs asked the district court to preliminarily enjoin the alleged sponsor reapplication policy and to require ORR to conduct two new administrative processes. *Id.* Plaintiffs separately moved for class certification. JA13 n.1. On April 30, 2026, the district court denied Plaintiffs' motion for a preliminary injunction and did not rule on Plaintiffs' motion for class certification. JA11, JA36, JA13 n.1, JA16 n.3. Plaintiffs appealed the April 30 opinion and order.

Before Plaintiffs filed their Opening Brief in this appeal, ORR released three of the four named Plaintiffs after determining that their proposed sponsors were suitable. JA257; Defs. Br. 20-22. One Plaintiff, Benito S., remained in ORR custody at the time of briefing. Defs. Br. 23. In their briefing on appeal, Plaintiffs never argued that the district court should have granted provisional class certification and did not develop that issue. *See generally* Opening Br. for Plaintiffs-Appellants ("Pls. Op. Br.") (Doc. #2178174); Reply Br. for Plaintiffs-Appellants ("Reply Br.") (Doc. #2186184). This Court held oral argument on September 15, 2026.

On October 2, 2026, Benito S. was discharged from the custody of ORR's Unaccompanied Alien Children Bureau. Ex. A, Declaration of Toby Biwas ("Biswas Decl.") ¶ 4. Benito S. is now legally an adult. *Id.* ¶ 5. He cannot meet the statutory definition of an unaccompanied alien child. No Plaintiff remains in the custody of ORR's Unaccompanied Alien Children Bureau.

Because no Plaintiffs have a live interest in the requested preliminary injunction, Defendants move to dismiss this appeal as moot.

ARGUMENT

The Court should dismiss this appeal as moot because the preliminary injunction that Plaintiffs request would no longer provide them any concrete benefit. Plaintiffs seek an injunction as to an alleged ORR policy that applied to them while they were in the custody of ORR's Unaccompanied Alien Children Bureau. Plaintiffs have now been discharged from that custody because of ORR's sponsor-vetting practices and the passage of time.

I. This appeal is moot because Plaintiffs are not in ORR custody and are not subject to the alleged ORR policy.

Under the mootness doctrine, "a federal court must refrain from deciding the dispute if events have so transpired that the decision will

neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Pub. Citizen, Inc. v. FERC*, 92 F.4th 1124, 1127 (D.C. Cir. 2024) (citation modified). "The party seeking jurisdictional dismissal bears the initial heavy burden of establishing mootness, but the opposing party bears the burden of proving an exception applies." *J.D. v. Azar*, 925 F.3d 1291, 1307 (D.C. Cir. 2019) (per curiam) (citation modified).

Here, Defendants have met their burden to establish mootness as to Plaintiffs' appeal because Plaintiffs have been released from the custody of ORR's Unaccompanied Alien Children Bureau. Two Plaintiffs, Mario C. and Benito S., are legally adults and cannot be referred again to ORR's Unaccompanied Alien Children Bureau. Reply Br. 3 n.1 ("Mario has since turned eighteen[.]"); Biswas Decl. ¶ 5 ("Benito S. has reached the age of 18."). The other two Plaintiffs, Diego N. and Renesme R., were released to the custody of their parents. *See* Defs. Br. 20-21. There is not a more-than-speculative chance that Diego N. and Renesme R. will be subject to the alleged ORR policy in the future.

Plaintiffs point to Diego N.'s desire "to make sure that if I encounter immigration in the future, I don't have to repeat this experience." JA42

(Diego N. Decl. ¶ 17); *see* Pls. Op. Br. 25 n.4. Diego N.'s wish for a judicial guarantee does not establish a more-than-speculative chance that prevailing in this appeal and receiving the requested preliminary injunction would affect him in the future. Diego N. would only benefit from the preliminary injunction requested in this appeal if a long series of future events all occur:

(1) Diego N. does not obtain lawful immigration status or voluntarily depart the United States;

(2) The U.S. Department of Homeland Security ("DHS") again arrests Diego N. for immigration enforcement;

(3) Diego N. is still a minor at the time of the future arrest;

(4) DHS determines that Diego N. still meets the definition of an *unaccompanied* alien child and refers him to ORR;

(5) Diego N.'s previous sponsor is still available and willing to sponsor him; and

(6) By that time, this lawsuit has not reached a final judgment that supersedes any preliminary injunction entered today.

"Given the substantial uncertainty surrounding each of those requirements," Diego N.'s concern is far too speculative to sustain a live controversy in this appeal. *Pub. Citizen, Inc.*, 92 F.4th at 1130.

In sum, reversing the district court's April 30 order denying a preliminary injunction would "neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Id.* at 1127. Because Plaintiffs are "no longer subject to ORR's policies," Plaintiffs' claims are moot. *J.D.*, 925 F.3d at 1307; *see also Weinstein v. Bradford*, 423 U.S. 147, 147-48 (1975) (per curiam) (holding that, after respondent was released from supervision, he "can have no interest whatever in the procedures followed by petitioners in granting parole"); *Scott v. District of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998) ("As to Scott, his release from confinement surely moots his case."). Thus, this appeal should be dismissed.

II. No mootness exception applies.

Plaintiffs cannot meet their "burden of proving [a mootness] exception applies." *J.D.*, 925 F.3d at 1307. Plaintiffs have argued that "they could still be subject to ORR's reapplication policy in the future," suggesting that the voluntary-cessation or capable-of-repetition-yet-

evading-review doctrines may apply. Pls. Op. Br. 25 n.4 (citing *FBI v. Fikre*, 601 U.S. 234, 241, 243 (2024)). Plaintiffs have also implied that the inherently transitory exception to mootness may apply because "Plaintiffs have a pending motion for class certification." *Id.* (citing *J.D.*, 925 F.3d at 1308-11). Those exceptions do not apply under the facts here.

A. The voluntary-cessation doctrine does not apply because ORR did not voluntarily cease the challenged conduct and the concerns underlying the doctrine are not present.

The voluntary-cessation doctrine does not apply because ORR has not voluntarily ceased the challenged conduct and because nothing suggests that ORR is trying to manipulate this Court's jurisdiction.

When the voluntary-cessation doctrine applies, "a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." *Fikre*, 601 U.S. at 241 (citation modified). The critical inquiry is "the potential for a defendant's future conduct" to affect the plaintiff in the same way. *Id.* at 242-44. The doctrine's purpose is to prevent gamesmanship: "Were the rule more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off[.]" *Id.* at 241. Notably, the doctrine "does not

apply automatically whenever the prospect of mootness is raised by a party's voluntary conduct." *Pub. Citizen, Inc.*, 92 F.4th at 1128. "Instead, courts have declined to apply the doctrine when the facts do not suggest any arguable manipulation of our jurisdiction." *Id.* (citation modified).

Here, the doctrine does not apply because ORR has not voluntarily ceased the challenged conduct. ORR did not forego vetting Plaintiffs' proposed sponsors and did not adopt Plaintiffs' desired new procedural scheme. Rather, ORR released three of the four Plaintiffs after conducting the vetting that ORR deemed necessary in accordance with its statutory mandate, regulations, and policies. JA257; Defs. Br. 20-22. Benito S. was discharged because he became an adult due to the passage of time. Biswas Decl. ¶¶ 4-5.

These facts do not suggest any arguable manipulation of this Court's jurisdiction. Indeed, ORR could not win dismissal "and later pick up where it left off." *Fikre*, 601 U.S. at 241. ORR has no authority to go into the community and retake custody of Plaintiffs. JA101 (¶ 15). ORR can only take children into custody upon referral by another federal agency. JA101 (¶ 15). As a result, ORR could not manipulate jurisdiction by securing a dismissal and then unilaterally reasserting custody and

reimposing the alleged reapplication policy onto Plaintiffs. The ordinary mootness analysis applies, not the voluntary-cessation doctrine.

B. The capable-of-repetition-yet-evading-review doctrine does not apply because there is no reasonable expectation that the same parties will be subject to the same action again.

Plaintiffs' challenge on appeal here is not capable of repetition yet evading review. That exception applies "only in exceptional situations." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). Two conditions must be met: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein*, 423 U.S. at 149.

Regardless of whether the first prong is met, Plaintiffs do not meet the second prong. Plaintiffs cannot show that "there [is] a reasonable expectation" that they will "be subjected to the same action again." *Id.* Plaintiffs "must show a reasonable degree of likelihood that the issue will be the basis of a continuing controversy between the two parties." *J.T. v. District of Columbia*, 983 F.3d 516, 524 (D.C. Cir. 2020) (citation modified). As discussed above, Mario C. and Benito S. cannot be subject

to the same action again because they are adults. And Diego N. and Renesme R. cannot show a reasonable degree of likelihood that they will encounter the same circumstances again. Diego N. and Renesme R. can establish only a speculative possibility. As a result, the capable-of-repetition-yet-evading-review exception does not apply.

C. The inherently transitory exception does not apply because there are no class-action issues on appeal.

The inherently transitory exception applies only to class actions. *See J.D.*, 925 F.3d at 1307-12 (explaining the exception). In putative class-action cases, if the named plaintiff's individual claim becomes moot *before* class certification, "the class action based on that claim generally becomes moot." *Id.* at 1307. An exception can exist "where a named plaintiff's claim is inherently transitory." *Id.* at 1308 (citation modified). When "the individual claim might end before the district court has a reasonable amount of time to decide class certification" and "some class members will retain a live claim at every stage of litigation," then "ordinarily" the "motion for certification may 'relate back' to the filing of the complaint." *Id.* at 1308, 1311.

This exception does not apply here because no class issues are on appeal. The district court has not ruled on Plaintiffs' motion for class

certification. JA13 n.1, JA16 n.3. So the question of whether this case should proceed as a class action is not before this Court.

The issue of provisional class certification also is not before this Court. In district court, Plaintiffs asked for provisional class certification for the purposes of preliminary injunctive relief. But Plaintiffs have not pressed for provisional class certification in this appeal. *See generally* Pls. Op. Br. Plaintiffs have forfeited any review as to provisional class certification by not arguing the issue in their Opening Brief. *See Jones Lang LaSalle Americas, Inc. v. Nat'l Lab. Rels. Bd.*, 128 F.4th 1288, 1296 (D.C. Cir. 2025). Because no class claims are part of this appeal, the inherently transitory exception does not apply.[1]

CONCLUSION

For these reasons, the Court should dismiss this appeal as moot.

[1] This Court need not decide whether the inherently transitory exception may apply to Plaintiffs' class claims in district court going forward.

Dated: October 15, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that Defendants–Appellees' foregoing motion complies with the type-volume limitation for papers submitted under Rule 27(d)(2)(A). Defendants–Appellees' motion contains 2,096 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This motion also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Joshua C. McCroskey
JOSHUA C. MCCROSKEY
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EXHIBIT

A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIEGO N., *et al*.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.,*

Defendants.

Civil Action No. 26-5157

DECLARATION OF TOBY BISWAS

I, **Toby Biswas**, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Assistant Deputy Director for Policy for the Unaccompanied Alien Children Bureau (UACB), and manage the Division of Policy Coordination & Intergovernmental Affairs, and the Division of Policy Administration & Legal Affairs within the Office of Refugee Resettlement (ORR), an entity within the Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

2. This declaration also incorporates my previous declarations.

3. I am submitting this declaration in the above-captioned matter in order to provide information to the Court concerning the status of the named Plaintiff, Benito S.

4. Benito S. was discharged to the Unaccompanied Refugee Minors Program[1] on October 2, 2026.

[1] The Unaccompanied Refugee Minors Program consists of foster care placements by states and nonprofit organizations funded by Office of Refugee Resettlement to provide eligible youths with the full range of assistance available to all other foster children in the state of their placement.

5. As of the date of this declaration, Benito S. has reached the age of 18.

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

Dated: Washington, D.C.

October 8, 2026

TOBY R. BISWAS -S

Digitally signed by TOBY R. BISWAS -S
Date: 2026.10.08 15:04:04 -04'00'

Toby Biswas
Assistant Deputy Director for Policy
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Office of Refugee Resettlement