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' REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AS MOOT

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INTRODUCTION

This appeal is moot because Plaintiffs lack a "legally cognizable interest in the outcome." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 528 (D.C. Cir. 2006) (citation modified). In their Opposition to Motion to Dismiss Appeal as Moot (Doc. #2200363) ("Opp."), Plaintiffs do not contest that Defendants have met their initial burden to show mootness. *See J.D. v. Azar*, 925 F.3d 1291, 1307 (D.C. Cir. 2019) (per curiam). And Plaintiffs do not meet their burden to show that any mootness exception applies. *See id.* Thus, the appeal is moot.

ARGUMENT

I. Plaintiffs' individual claims are moot.

A. The voluntary-cessation doctrine does not apply.

Plaintiffs' argument for applying the voluntary-cessation doctrine fails for several reasons. Opp. 16-18. First, Plaintiffs completely ignore Benito S. His claim became moot because he turned 18 years old. Plaintiffs provide no reason to apply the voluntary-cessation standard when this appeal became moot because of the passage of time. Plaintiffs knew of Benito S.'s birthday in October 2026 and could have moved for a more expedited briefing schedule. *See* Unopposed Mot. to Expedite Appeal (Doc. #2174175) (requesting oral argument in September 2026).

Plaintiffs did not do so. The passage of time is why this appeal became moot.

Benito S.'s circumstances also fatally undercut Plaintiffs' theory that ORR is trying to manipulate jurisdiction. Plaintiffs assert that "it may fairly be inferred that Diego, Renesme, and Mario were released to weaken Plaintiffs' claims for class-wide relief." Opp. 18 (citing *A.A.R.P. v. Trump*, 605 U.S. 91, 98 (2025)). In *A.A.R.P.*, the Supreme Court found voluntary cessation as to all the named applicants, not just some. *See* 605 U.S. at 98. Here, Plaintiffs posit no reason why ORR would attempt to moot the claims of three Plaintiffs in March 2026 but take no action as to Benito S. *See* Br. for Defendants-Appellees 20-22 (Doc. #2182877).

Second, even as to Diego N. and Renesme R., ORR never voluntary ceased requiring all sponsors to undergo some vetting. Diego N.'s and Renesme R.'s sponsors still had to apply and participate in the vetting ORR determined to be necessary. JA114-16. Contrary to what Plaintiffs seek in this lawsuit, Diego N. and Renesme R. did not have the opportunity to be released based merely on a presumption that their past sponsors remain suitable. *See* Proposed Order, *Diego N. v. HHS*, No. 1:26-cv-00577-CJN (D.D.C. Feb. 24, 2026), ECF No. 10-2.

Third, in Defendants' Motion to Dismiss Appeal as Moot (Doc. #2198355) ("Motion"), Defendants noted that applying the voluntary-cessation doctrine makes little sense here because ORR has no authority to go into the community and retake custody of Plaintiffs. Motion 8-9. As a result, ORR is unable to manipulate jurisdiction and "and later pick up where it left off." *Id.* (quoting *FBI v. Fikre*, 601 U.S. 234, 241 (2024)). Plaintiffs have no response to this point.

B. Plaintiffs do not show that there is a reasonable expectation that they will face the same circumstances again.

Plaintiffs do not meet their burden to show that this controversy is capable of repetition yet evading review. Plaintiffs do not establish a reasonable expectation that they will be in the same circumstances again. *See J.T. v. District of Columbia*, 983 F.3d 516, 523 (D.C. Cir. 2020). Plaintiffs argue that Diego N. and Renesme R. have "already been re-referred to ORR custody, so the likelihood they will be re-referred again is far more than a theoretical possibility." Opp. 19. A past occurrence is not enough to show a reasonable expectation of a future occurrence. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 109 (1983). If a past occurrence were enough to establish the "capable of repetition" prong,

then this mootness "exception" would no longer apply "only in exceptional situations." *Id.* at 109.

Plaintiffs argue that a series of events could occur, leading to Diego N. or Renesme R. being in ORR custody again. Opp. 19-21. But Plaintiffs do not establish a reasonable likelihood that any of the events will occur, let alone that they will all occur in sequence before Plaintiffs become adults or this case reaches final judgment. *See Pub. Citizen, Inc. v. FERC*, 92 F.4th 1124, 1130 (D.C. Cir. 2024); *J.T.*, 983 F.3d at 524. Plaintiffs rely on speculation. Plaintiffs also cite no situation where the Department of Homeland Security arrested and referred a child to ORR a third time. Plaintiffs have not shown that the capable-of-repetition-yet-evading-review exception applies.

II. Plaintiffs cannot invoke class-action exceptions to mootness because there is no certified class and Plaintiffs have not sought provisional class certification in this appeal.

Plaintiffs principally oppose mootness by relying on exceptions that apply in class actions. Opp. 8-16. These exceptions are inapplicable because this case has no certified class and Plaintiffs did not assert their interest in class certification in the merits briefing.

A. The interests of the putative class are not on appeal.

Federal courts are restricted "to resolving the legal rights of litigants in actual controversies." *Martin v. FBI*, 145 F.4th 1345, 1351 (D.C. Cir. 2025) (citation modified). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, . . . the action can no longer proceed and must be dismissed as moot." *Id.* (citation modified). In other words, a case is moot when "the *parties* lack a legally cognizable interest in the outcome." *Richards*, 453 F.3d at 528 (emphasis added) (citation modified).

Importantly, "putative class members . . . are *always* treated as nonparties." *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 297 (D.C. Cir. 2020). "Because no class of plaintiffs was certified, only the named plaintiffs are before this court." *DeBruyne v. Equitable Life Assur. Soc. of U.S.*, 920 F.2d 457, 463 n.9 (7th Cir. 1990).

B. Plaintiffs have no legally cognizable interest because they forfeited any claim as to provisional class certification.

Because no class has been certified, "[f]ederal appellate jurisdiction is limited by the [named Plaintiffs'] personal stake in the appeal." *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 336-37 (1980). The appeal of the

preliminary injunction order can be moot even if the underlying case may not be moot. *See Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016) (per curiam).

The named Plaintiffs here can assert only "two legally cognizable interests: One is the claim on the merits; the other is the claim that [they are] entitled to represent a class." *Richards*, 453 F.3d at 528 (citation modified). As explained in Defendants' Motion and above in Section I, Plaintiffs' individual claims on the merits are moot. Plaintiffs, therefore, "may not continue to press the appeal on the merits until a class has been properly certified." *Martin*, 145 F.4th at 1352 (citation modified).

The second potential interest—the claim that Plaintiffs are entitled to represent a class—is not part of this appeal because Plaintiffs did not assert it in their merits briefs. In Plaintiffs' motion for a preliminary injunction, Plaintiffs asked the district court for provisional class certification. *See* Pls.' Mot. for Preliminary Inj. at 2, *Diego N. v. HHS*, No. 1:26-cv-00577-CJN (D.D.C. Feb. 24, 2026), ECF No. 10. The district court denied that motion. JA11. The district court deferred ruling on Plaintiffs' separate motion for class certification, not Plaintiffs' request for provisional class certification as part of preliminary injunctive relief. *See*

JA13 n.1; JA16 n.3. In the Opening Brief for Plaintiffs-Appellants (Doc. #2178174) ("Opening Brief" or "Op. Br."), Plaintiffs do not assert that the district court erred in denying class certification and do not ask this Court to provisionally certify the class or to remand for consideration of provisional class certification. Plaintiffs' forfeiture as to that issue is fatal to this appeal.

"Where the named plaintiff's claims have expired and class certification has been denied," the named Plaintiffs' personal stake "is *limited* to the appeal of the denial of the class certification motion." *Martin*, 145 F.4th at 1351 (citation modified). Plaintiffs' standing to seek class certification "does not bring before this court" the merits of the class claims. *Id.* at 1352. Thus, this Court "lacks jurisdiction to address the merits" of the district court's ruling because Plaintiffs' individual claims are "moot and no class has been certified." *Id.*

In *Martin*, this Court determined that the plaintiff had waived "all arguments related to class certification" by choosing to argue only the merits on appeal. *Id.* As a result, no jurisdiction "exist[ed] for the court to review her moot individual claim or to resolve the merits of the class claim." *Id.* at 1353-54; *see Alvarez v. Smith*, 558 U.S. 87, 92-93 (2009).

Plaintiffs contend that they did not waive provisional class certification because they made clear in their Opening Brief that they seek relief for a provisional class. Opp. 12 (citing Op. Br. 2, 19-20, 24, 25 n.4, 30, 42). But simply referring to class certification in the "opening brief does not cure the defect." *Martin*, 145 F.4th at 1353. Several of Plaintiffs' references to the putative class are "merely recounting the district court proceedings," which is not enough to raise the issue. *Id.*; *see* Op. Br. 2, 19-20. In addition, Plaintiffs' "cursory argument" in footnote 4 of their Opening Brief "does not suffice" to make class certification an issue on appeal, *Martin*, 145 F.4th at 1353, especially when that footnote does not allege error in the district court's decision or ask this Court to review class certification. *See* Op. Br. 25 n.4. The remaining references state that Plaintiffs and the putative class are similarly situated, but they do not argue that the district court erred by not provisionally certifying a class. *See id.* at 24, 30, 42. Ultimately, like the plaintiff in *Martin*, Plaintiffs here did not identify provisional class certification "as an issue on appeal," did not argue in their merits briefs "that the district court made a sequencing error by ruling on the merits of the class claim prior to certifying a class," and did not request that the district court's

denial of provisional class certification be "vacated as erroneous." *Martin*, 145 F.4th at 1352-53.

Plaintiffs argue that "[i]f this Court reverses and remands for further proceedings, the district court will necessarily address provisional class certification at that point." Opp. 12. Plaintiffs give no reason why that is so when Plaintiffs did not ask this Court to remand for consideration of provisional class certification.

Plaintiffs also assert that holding them to their forfeiture "would lead to inequitable results by effectively preventing appellate review of erroneous denials of class-wide preliminary injunctive relief involving inherently transitory claims." Opp. 11. But there is nothing inequitable about requiring Plaintiffs to raise an issue if they want appellate review. *See Jones Lang LaSalle Ams., Inc. v. NLRB*, 128 F.4th 1288, 1296-97 (D.C. Cir. 2025).

Because Plaintiffs' individual claims are moot, Plaintiffs' failure to raise the issue of provisional class certification renders this appeal moot.

C. Even if it can, this Court should not excuse Plaintiffs' forfeiture.

A class may only be certified "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been

satisfied." *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 161 (1982). "Provisional" class certification is no less rigorous. *See* 2 *Newberg and Rubenstein on Class Actions* § 4:30 (6th ed. June 2026 Update).

Plaintiffs could have raised the appropriateness of provisional class certification and Defendants could have then responded to that argument in the merits briefs. Adequate briefing on class certification is especially important where, like here, class certification "is logically antecedent to the existence of any Article III issues regarding the putative class." *Martin*, 145 F.4th at 1351 (citation modified). Thus, this Court should not overlook Plaintiffs' failure to brief the issue. In contrast to situations where this Court has excused forfeiture, class certification is not a "straightforward legal question" and it has not been "fully addressed" by "both parties." *Molock*, 952 F.3d at 298-99 (citation modified).

D. *A.A.R.P.* and the other cases Plaintiffs rely on do not allow this Court to grant relief when Plaintiffs lack a live interest in this appeal.

Plaintiffs cite the Supreme Court's decision in *A.A.R.P.* to argue that "appellate 'courts may issue temporary relief to a putative class' even without deciding 'whether a class should be certified[.]'" Opp. 10 (quoting *A.A.R.P.*, 605 U.S. at 98). Several facts make *A.A.R.P.*

inapplicable here. First, unlike Plaintiffs here, the applicants in *A.A.R.P.* asked the Supreme Court for class treatment and briefed the appropriateness of granting relief to the proposed class. *See* Emergency Application for an Emergency Injunction at 18-21, *A.A.R.P.*, 605 U.S. 91 (No. 24A1007), 2025 WL 1171734. Second, the Supreme Court suggested that the named applicants retained a live interest because of voluntary cessation. *See A.A.R.P.*, 605 U.S. at 98. Third, the Supreme Court was acting to respond to what it viewed as an extremely urgent situation. *See id.* at 94. Last, the Court found that its order was necessary to preserve its jurisdiction pending appeal. *Id.* at 97.

The Supreme Court's action in *A.A.R.P.* provides no guidance here where Plaintiffs did not ask this Court to rule on the provisional class certification question and the named Plaintiffs do not retain a live interest in their individual claims. In addition, because Plaintiffs have not alleged the same type of extreme urgency, there is no need for an order preserving this Court's appellate jurisdiction. Plaintiffs can raise their arguments as to class certification and mootness in district court and then appeal any adverse ruling. Without the circumstances present in *A.A.R.P.*, this Court may not ignore the class-certification standards.

Plaintiffs also cite several cases applying mootness exceptions in class actions. Opp. 8-15. These cases are not relevant in this appeal where Plaintiffs forfeited the class-certification issue. Indeed, Plaintiffs' cited cases involved appeals where the plaintiffs raised the necessary issues in their merits briefing, and many of the appeals arose in different procedural postures. *See, e.g.*, Brief for Appellees at 20-35, *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (No. 18-5093), 2018 WL 3630272 (discussing class certification and the inherently transitory exception); Brief of Appellants at 35, *Jonathan R. by Dixon v. Justice*, 41 F.4th 316 (4th Cir. 2022) (No. 21-1868), 2021 WL 5239111 (arguing that the district court wrongly failed to apply the inherently transitory exception); Brief for Plaintiffs-Appellants at 45-46, *Salazar v. King*, 822 F.3d 61 (2d Cir. 2016) (No. 15-832), Dkt. No. 41 (arguing that the district court erred in denying motion for class certification as moot); Initial Brief for Appellees at 10-20, *DL v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017) (No. 16-7076), 2016 WL 7030708 (arguing that plaintiffs had a personal stake to seek certification and that the class was proper); Brief of Plaintiffs-Appellees at 46-55, *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016) (No. 14-6191), Dkt. No. 26 (discussing mootness and exceptions).

In district court, Plaintiffs may argue that these mootness exceptions allow them to continue seeking class certification. But the exceptions *do not save this appeal* from being moot because class certification is not at issue.

III. This Court does not need to vacate the district court's order.

Although this Court could choose to vacate the appealed order, *see Spirit of the Sage Council v. Norton*, 411 F.3d 225, 230 (D.C. Cir. 2005), vacatur is a matter of equitable discretion. The better course here would be not to vacate the underlying order because preliminary injunction orders "usually have no preclusive effect." *Mktg. Displays Int'l v. Shaw*, 93 F.4th 967, 971-72 (6th Cir. 2024) (citation modified).

CONCLUSION

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

Dated: November 2, 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 reply complies with the type-volume limitation for papers submitted under Rule 27(d)(2)(C). Defendants-Appellees' reply contains 2,594 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This reply 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.

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