



Azar v. Garza, 925 F.3d 1291 (D.C. Cir. 2019)

Topics Covered: Freedom of Speech

Outcome: Favorable

Issue

The issue in this case was whether the Office of Refugee Resettlement (ORR), an agency of the United States government, can prevent unaccompanied alien children (UCs) from obtaining abortions.

AMA interest

Physicians should support access to medical care for all people.

Case summary

ORR is empowered to make all medical decisions for UCs in place of the child's parents. ORR places UCs with federal grantee organizations (generally not government agencies) that provide shelter and services in compliance with ORR policies and procedures.

On March 4, 2018, ORR submitted a memorandum, directed to "Whom It May Concern." The memorandum provided that, except in emergency situations, when a situation arises that may involve a UC in an abortion, grantee organizations (1) must immediately notify the ORR Director of the situation and (2) are prohibited from taking any action that facilitates an abortion without approval from the ORR Director. In follow-up communications, ORR grantees were informed that they would not be permitted to support abortion services "pre or post release" (from the grantee facility), and they could provide "only pregnancy services and life-affirming options counseling." ORR approval for any abortion facilitation would have to be in writing and would be required even though federal funds would not be used to pay for the procedure. "Facilitation" for an abortion would include scheduling an appointment, arranging transportation, or obtaining a judicial bypass (of state laws that may restrict the ability of a minor to obtain an abortion). A UC seeking an abortion would require an ultrasound, counseling from a pre-approved provider, and a notarized declaration of consent from the UC's parents (regardless of whether her parents may have been abusive). ORR adopted this anti-abortion position without statutory or regulatory authority. Indeed, it was not even based on a presidential proclamation or executive order.

Rochelle Garza, a pregnant UC, brought a class action in the United States District Court for the District of Columbia, on her own behalf and on behalf of other UCs, including those who were then pregnant or might become pregnant and including aliens not yet in the custody of ORR but who might subsequently come into ORR custody. She sued HHS, ACF, and ORR and moved for a preliminary injunction.

The trial court found that, simply by being physically present in the United States and being under the control of a federal agency, the UCs had constitutional rights. By its March 4, 2018 memorandum and its follow-up actions, ORR was effectively exercising “an absolute veto” over the reproductive decisions of UCs in its custody. It was invariably exercising this power to bar UCs from obtaining abortions, even in cases of rape. This was regardless of the wishes or intentions of the UCs and even though public funds would not be used to pay for the abortions. Moreover, ORR’s asserted power could even extend to the withholding of medical treatment from a UC who suffered post-procedure complications.

Based on these and similar findings, the trial court held that the ORR policies unduly burdened the UCs’ right to an abortion and were in probable violation of the Fifth Amendment. It preliminarily enjoined the defendants from interfering with UCs’ access to abortion services.

The defendants appealed the preliminary injunction to the District of Columbia Circuit Court of Appeals. On June 14, 2019, the appeals court affirmed the grant of preliminary injunction regarding the *de facto* ban on abortion. However, it reversed and remanded the part of the district court’s injunction that barred disclosure to parents and others of the unaccompanied minors’ pregnancies and abortion decisions.

Litigation Center involvement

The Litigation Center, along with the Medical Society of the District of Columbia, the American College of Obstetricians and Gynecologists, and the American Academy of Pediatrics filed an *amicus* brief to support the plaintiffs in the District of Columbia Circuit Court of Appeals.

United States Court of Appeals for the District of Columbia brief