UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Alexander R. Deanda, on behalf of himself and others similarly situated, Plaintiff, v. **Xavier Becerra**, in his official capacity as Secretary of Health and Human Services; **Jessica Swafford Marcella**, in her official capacity as Deputy Assistant Secretary for Population Affairs; **United States of America**, Defendants.	Case No. 2:20-cv-00092-Z

REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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The defendants oppose class certification on numerous grounds, but none of their arguments warrant denial of the motion.

I. Mr. Deanda Has Article III Standing

The defendants correctly observe that a representative plaintiff must have Article III standing for a class to be certified,[1] and they continue to maintain that Mr. Deanda has failed to establish standing. These issues have been fully addressed in the summary-judgment briefing, and Mr. Deanda respectfully incorporates by reference the discussion that appears in his earlier briefs. *See* Pls'. Cross Mot. Summ. J., ECF No. 30 at 3–12; Reply Br. in Supp. of Summ. J., ECF No. 40 at 2–5.

II. The Proposed Classes Are Ascertainable

Nothing in the text of Rule 23 requires a class to be "ascertainable" or "identifiable."[2] But numerous courts—including the Fifth Circuit—have imposed an "ascertainability" requirement on top of the criteria for class certification spelled out in Rule 23. *See DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) ("[T]o maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."). This "ascertainability" doctrine allows courts to deny certification to vague or poorly defined classes. *See John v. National Security Fire & Casualty Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" (citation omitted)). *DeBremaecker*, for example, rejected a proposed class of "residents of this State active in the 'peace movement,'" because of the "patent uncertainty of the meaning of 'peace movement' in

1. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 769 (5th Cir. 2020) ("[I]f the class representative lacks standing, then there is no Article III suit to begin with—class certification or otherwise.").
2. *See* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. Kan. L. Rev. 913, 913 (2017) ("[C]lass ascertainability . . . [is] neither mandated by the text of Rule 23 nor supported by a reasonable interpretation of the Rule's language and purpose.").

view of the broad spectrum of positions and activities which could conceivably be lumped under that term." *Id.*

There is nothing vague or imprecise about the proposed class definitions. A person is either a parent of minor children in the State of Texas (or in the United States), or he isn't. More importantly, the requirement of "ascertainability" is applied with far less rigor when certification is sought under Rule 23(b)(2). At least three circuits hold that "ascertainability" is categorically inapplicable to (b)(2) classes.[3] And the Fifth Circuit (along with many other courts) has recognized that the ascertainability requirement is greatly relaxed in the (b)(2) context:

> [T]he precise definition of the [(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance.

In re Monumental Life Ins. Co., 365 F.3d 408, 413 n.6 (5th Cir. 2004) (quoting *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974)).[4] *In re Rodriguez*, 695 F.3d

3. *See Shelton v. Bledsoe*, 775 F.3d 554, 563 (3rd Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief"); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."); *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004) ("[W]hile the lack of identifiability [of class members] is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2).").
4. *See also Finch v. New York State Office of Children and Family Services*, 252 F.R.D. 192, 198 (S.D.N.Y. 2008) ("A Rule 23(b)(2) class need not be defined as precisely as a Rule 23(b)(3) class"); *Multi-Ethnic Immigrant Workers Organizing Network v. City of Los Angeles*, 246 F.R.D. 621, 630 (C.D. Cal. 2007) ("[L]ess precision is required of class definitions under Rule 23(b)(2) than under Rule 23(b)(2), where mandatory notice is required by due process . . . . Manageability is not as important a concern for injunctive classes as for damages classes." (citations omitted)); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. Kan. L. Rev. 325, 390 (2017) ("Conditioning certification on the ascertainability of class members should not apply to Rule 23(b)(2) classes because it is immaterial whether individual class members can be identi-

360 (5th Cir. 2012), and *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999), approved (b)(3) classes despite the extensive individualized inquiries that were required; that creates an even steeper hill for the defendants, who must explain why this Court should reject ascertainability in the more forgiving (b)(2) context.

The defendants complain that the proposed classes are "overly broad,"[5] but that standing alone is not a reason to deny class certification. The plaintiffs must link their complaints about the supposedly overbroad class definition to some requirement in Rule 23. The defendants suggest that the proposed class definitions are problematic because they will include absent class members "who do not share Plaintiff's objection to the administration of Title X, or whose minor children would be unlikely to seek or obtain family planning services or methods from an entity receiving Title X funds." Defs.' Br., ECF No. 37 at 6. But that has nothing to do with ascertainability, although it may have some bearing on the typicality or adequacy-of-representation objections that appear later in the defendants' brief.

III. The Proposed Classes Satisfy The Numerosity Requirement

The plaintiffs defined their classes to include: (1) All parents of minor children in the State of Texas; and (2) All parents of minor children in the United States. *See* Mot. for Class Cert., ECF No. 32 at 1. The plaintiffs' evidence proves that each of these classes, as defined, easily exceeds the numerosity threshold. *See* Pls.' Br. in Support of Class Cert., ECF No. 33 at 1–2.

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fied."); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 638–39 (2017) ("The definiteness and ascertainability requirements either do not apply in Rule 23(b)(2) cases, or apply in a far less demanding and precise manner.").

5. *See* Defs.' Br., ECF No. 37 at 6.

The defendants complain that not all of the class members will share Mr. Deanda's desire to protect his parental rights under Texas law and the Constitution, and they insist that the classes should be limited to those who "share his contentions" and subjective beliefs. *See* Defs.' Br., ECF No. 37 at 14. But the classes are defined in a manner that is limited to parents who agree with Mr. Deanda's views. The classes include all parents of minor children, and they seek relief that preserves a parent's right to *choose* whether to consent to their child's medical treatment, including the provision of family-planning services. A class definition of this sort is entirely proper, even though it will inevitably include some parents who are indifferent to the rights that Mr. Deanda seeks to assert on their behalf. The D.C. Circuit recognized the propriety of such a class definition when it allowed a pregnant minor seeking an abortion to represent a class of *all* pregnant unaccompanied minors in the government's custody, even though many of the absent class members had no desire to abort their unborn children or obtain judicial relief that would enable them to do so:

> [T]he fact that the class representatives chose to terminate their pregnancies, whereas the lion's share of the class might make the opposite choice, entails no "conflict[ ] of interest between named parties and the class they seek to represent" for purposes of Rule 23(a)(4)'s adequacy standard. The constitutional right asserted by the class is a woman's "right to choose to terminate her pregnancy" before viability. The class members all assert a common entitlement to make that choice on their own, free from any veto power retained (unconstitutionally, the class says) by ORR. And on the plaintiffs' theory, they are all denied the right to terminate their pregnancies by a veto power that effectively supersedes it. The class representatives are suited to press that interest on the class's behalf, even if various class members might make varying ultimate decisions about how to exercise their choice.

J.D. v. Azar, 925 F.3d 1291, 1313 (D.C. Cir. 2019) (citations omitted). So too here. The named plaintiffs are seeking to vindicate the right of every parent to consent to their child's medical treatment, including the provision of family-planning services,

regardless of whether a particular parent in the class wants to exercise that right. It is undisputed that these classes (as defined) satisfy the numerosity requirement.

IV. The Proposed Classes Satisfy The Commonality Requirement

Commonality requires only a single common question of law or fact, and each of the proposed classes satisfies that requirement. *See* Br. in Support of Mot. for Class Cert., ECF No. 33 at 2. Indeed, for the class of Texas-based parents, there are *multiple* common questions of law.[6] The defendants do not deny these common legal questions, but they contend that the class members lack a "common contention" and a "common injury" because the classes (according to the defendants) may include parents who do not share Mr. Deanda's belief that the defendants' administration of Title X harms them. *See* Defs.' Br., ECF No. 37 at 9. But that argument does not defeat commonality. The common issues in this case are pure questions of law, and the answers to those questions do not in any turn on whether a particular class member supports or opposes the defendants' current administration of the Title X program. Mr. Deanda is seeking a ruling on the *legality* of the defendants' behavior, and it does not matter in answering those questions whether some of the class members approve of the allegedly unlawful conduct.

The variation among different states' laws is likewise irrelevant to the commonality question. *See* Defs.' Br., ECF No. 37 at 10. With respect to the second proposed class of all parents of minor children in the United States, Mr. Deanda is seeking a ruling on whether the class members have a constitutional right to be notified or consent to their children's medical treatment. State law has no bearing on the answer

6. Those questions are: (1) Whether Texas's parental-consent laws are preempted by the Title X statute; and (2) Whether the Title X statute, as currently interpreted and administered by the defendants, infringes the constitutional right of parents to direct the upbringing of their children. *See* Br. in Support of Mot. for Class Cert., ECF No. 33 at 2.

to that question, as claims of constitutional right trump state law. *See* U.S. Const. art. VI, § 2.

V. The Proposed Classes Satisfy The Typicality Requirement

The defendants try to defeat typicality by asserting that individual parents may have differing views about the defendants' administration of the Title X program, and that not every class member may want to insist on the preservation of a parental-consent regime. *See* Defs. Br. (ECF No. 37) at 12. That does not defeat typicality (or commonality) because Mr. Deanda is seeking a declaration of the class members' *right to choose* whether to consent to their child's medical treatment, including the provision of family-planning services. This presents a legal question common to every class member, Mr. Deanda is not required to show or allege that every single class member will exercise that right in the same manner that he would. *See Prantil v. Arkema Inc.*, 986 F.3d 570, 581–82 (5th Cir. 2021) ("Rule 23(b)(2) does not require 'a specific policy uniformly affecting—and injuring—each [plaintiff] . . . so long as declaratory or injunctive relief "settling the legality of the [defendant's] behavior with respect to the class as a whole is appropriate."' " (quoting *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847–48 (5th Cir. 2012)); *J.D. v Azar*, 925 F.3d 1291, 1313 (D.C. Cir. 2019) (certifying Rule 23(b)(2) class of pro-abortion and anti-abortion women because "[t]he class members all assert a common entitlement to make that choice on their own, free from any veto power retained" by the government). The defendants' insistence that a certified class may include only parents who wish to exercise their rights in the same manner as Mr. Deanda is incompatible with *J.D.*, which they do not cite or acknowledge anywhere in their brief.

VI. Mr. Deanda Is An Adequate Class Representative

The defendants try to drive a wedge between Mr. Deanda and the absent class members who are indifferent to whether their children obtain family-planning services

from Title X participants without their knowledge or consent. But Mr. Deanda is not pursuing any relief that would make those absent class members worse off. Parents who are supportive of their children's efforts to obtain family-planning services from Title X participants can simply consent; they cannot be harmed by simply being *asked* to consent. The defendants suggest that some parents may want to remain *unaware* if their children are obtain family-planning services behind their back, and that they would not even want to be asked to consent. *See* Defs.' Br., ECF No. 37 at 13 ("[T]he requested injunction would harm the interests of potential absent class members who support confidential access to family planning services as a means of promoting adolescent reproductive health and reducing unplanned pregnancies."). But those interests can be accommodated by crafting relief that allows such parents to submit a blanket-consent form in advance to the Title X program, which would eliminate any need to inform them if their child seeks confidential family-planning services from a Title X participant. *Cf.* Sup. Ct. R. 37.2(a) (allowing litigants to submit "blanket consents" to amicus briefs, which obviates the need for individualized consent). It is not a reason to deny class certification across the board. Individual rights can always be waived, and parental rights are no different. A litigant who seeks to vindicate individual rights on behalf of a class should not be denied certification merely because some class members have no interest in exercising those rights. *See J.D. v. Azar*, 925 F.3d 1291, 1313 (D.C. Cir. 2019).

Finally, although the defendants correctly observe that the text of Rule 23 does not provide for opt-out from a certified (b)(2) class,[7] there is nothing that prevents this Court from allowing individuals to opt out as a matter of constitutional law or under the Rules Enabling Act. *See, e.g.*, *DeGier v. McDonald's Corp.*, 76 F.R.D. 125, 126 (N.D. Cal. 1977); *Allen v. Isaac*, 100 F.R.D. 373, 377 (N.D. Ill. 1983).

7. *See* Defs.' Br., ECF No. 37 at 13.

VII. The Proposed Classes Satisfy The Requirements Of Rule 23(b)(2)

Certification under Rule 23(b)(2) is allowed when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b). That is exactly the situation presented here. The defendants are depriving *every* parent of minor children of their right to consent to their child's medical treatment, including family-planning services, in administering the Title X program. And they are purporting to preempt a state law that confers rights to consent on *every* member of the Texas-only class. The legal requirements remain the same with respect to every class member. The Title X statute either preempts state parental-consent laws or it doesn't. And parents either have a constitutional right to consent to their children's medical treatment (including the provision of family-planning services) or they don't. None of this turns on the subjective beliefs or desires of an individual class member.

VIII. The Proposed Classes Satisfy Article III

The Supreme Court has never resolved whether the Constitution requires every absent class member to possess Article III standing. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.4 (2021) ("We do not here address the distinct question whether every class member must demonstrate standing before a court certifies a class."). Neither has the Fifth Circuit. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020) ("Our court has not yet decided whether standing must be proven for unnamed class members, in addition to the class representative."). But the idea that *every* absent class member must have standing is very hard to square with the Supreme Court's repeated pronouncements that only one plaintiff needs to establish standing to seek declaratory or injunctive relief. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) ("Under our

precedents, at least one party must demonstrate Article III standing for each claim for relief. . . . The Third Circuit accordingly erred by inquiring into the Little Sisters' independent Article III standing."); *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue."); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."). The defendants correctly observe that the Second Circuit requires every absent class member to have Article III standing,[8] but that is not a binding pronouncement and should not (in our view) be followed.

CONCLUSION

The motion for class certification should be granted.

Respectfully submitted.

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8. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing.").

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Dated: September 13, 2021

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