IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff-Appellee*, v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants-Appellants*.	Case No. 19-1614

RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO CONSOLIDATE AND CROSS-MOTION TO DISMISS

On February 14, 2020, the district court vacated the Rule and issued a permanent injunction prohibiting enforcement of the Rule in Maryland. *See* ECF No.78. The district court's vacatur of the Rule and permanent injunction mooted the appeal from the district court's preliminary injunction against enforcement of the Rule in Maryland ("Appeal I" or "this Appeal"), divesting this Court of Article III jurisdiction in this Appeal. The motion to consolidate this Appeal with

appeal No. 20-1215 ("Appeal II") therefore must be denied as moot and this Appeal must be dismissed.

I. This Appeal is Moot and Must be Dismissed

Except in rare circumstances not relevant here, the entry of a permanent injunction moots an appeal from a preliminary injunction. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314-15 (1999). Even if the reason for the permanent injunction differs from the reason for the preliminary injunction, the appeal is moot because "[t]he final injunction establishes that the defendant *should not have been engaging in the conduct that was [preliminarily] enjoined*." *Id.* at 315 (emphasis in original). "If the latter [injunction] is valid, the former is, if not procedurally correct, at least harmless." *Id.*

The only exception to this mootness rule is narrow and not relevant here. The exception applies only when the final judgment does not establish that the defendant's conduct should have been restrained at the time the court entered the preliminary injunction. *See Grupo*, 527 U.S. at 315 & n.2 (exception to mootness rule applied because appeal challenged district court's authority to "enter[] an order to

protect its judgment before the judgment was rendered"); *Int'l Bhd. of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 885 F.3d 230, 236 (4th Cir. 2018) ("A party may recover damages for a preliminary injunction wrongfully entered if and only if the injunction prevented it from doing something that it had the legal right to do.").

The narrow exception does not apply here. The district court's final judgment establishes that the Rule should never have been issued or enforced. The entry of the permanent injunction demonstrates that, whatever the merits of granting the preliminary injunction, "defendant *should not have been engaging in the conduct that was enjoined*." *Grupo*, 527 U.S. at 315. This Appeal is therefore moot and this Court lacks Article III jurisdiction to decide it. *See Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 228 (4th Cir. 1997); *see also Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (discussing mootness's Article III dimensions).

Nor are the issues in this Appeal subject to any equitable exceptions to mootness. Mootness arose as the natural consequence of the progression of the case to judgment before the resolution of this Appeal by this Court. The issue is not "capable of repetition yet evading

review." *See Senseny S. Corp. v. Dep't of Labor*, 816 F.2d 673 (4th Cir. 1987) (per curiam) (unpublished) (rejecting such an argument by the Department of Labor). The issues in this Appeal can be resolved (if necessary) on an appeal from a future final judgment from the district court addressing the claims involved in this Appeal.

All of the reasons to dismiss a case for lack of Article III jurisdiction are present here. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937); *accord MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Neither party can win any effective relief by winning this Appeal because there is now a permanent injunction in place restraining the exact same conduct. Thus, any opinion this Court could issue would be advisory. Article III courts exist to resolve disputes that are "definite and concrete, touching the legal relations of parties having adverse legal interests," that are "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna*, 300 U.S. at 240-41; *accord MedImmune*, 549 U.S. at 127.

Dismissing this Appeal would also promote judicial efficiency. If Appellee City of Baltimore wins Appeal II, no Court in this Circuit will be required to resolve the legal questions presented by Appeal I.

II. The Two Appeals Should Not Be Consolidated

A. The Court Lacks Jurisdiction to Consider Appellants' Motion to Consolidate

Because this Appeal is moot, the Court lacks Article III jurisdiction to decide the question whether to consolidate this Appeal with Appeal II. "Without jurisdiction the court cannot proceed at all in any cause.... [W]hen it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1868); *accord Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The Court must satisfy itself of jurisdiction first, before taking any action on the motion. Because it lacks jurisdiction, the motion cannot be granted or denied, only dismissed as moot.

B. Consolidation Would Hinder The Resolution of These Appeals

Appeal I and Appeal II should not be consolidated because merging them would make the resolution of both more difficult, not less. They involve different legal questions, decided under different legal

standards, on different records. Consolidating the appeals would be more likely to confuse the issues than promote judicial economy and efficiency.

Consider the differences.

- Appeal I was decided at the preliminary injunction stage under the heightened preliminary injunction standard. Appeal II was decided at summary judgment under the ordinary standard for resolution on the merits.
- Appeal I was not decided on the full record. Appeal II was decided after careful review of the record.
- Appeal I turns on purely legal claims. Appeal II turns on the evidence HHS had before it and HHS's misapprehensions about what that evidence was and what it showed.

The differences between the medical ethics claims in the two appeals highlights the subtle but important distinctions between them and the likelihood of confusion if they are considered together. *Contra* ECF No. 80, at 4. To win the medical ethics claim in Appeal I, Appellee must establish that the Rule likely "violates the principles of informed consent and the ethical standards of health care professionals." 42

U.S.C. § 18114. To win the medical ethics claim in Appeal II, however, Appellee needs to show either (1) that the Agency's decision "to 'disagree' with comments by every major medical organization regarding the Final Rule's contravention of medical ethics," ECF No. 78-2, at 17, was not a rational judgment based on the evidence before it, or (2) that the Agency's explanation was too inadequate to support its conclusion. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The medical ethics question in Appeal I is thus a very different question from the medical ethics question in Appeal II. The fact that Appellant conflates them only reveals the confusion that would be sown from consolidating them.

Not only are the two questions different, but so is the relevant evidence. The record before the agency is not relevant to the medical ethics question at issue in the Appeal I. The Rule either "violates the principles of informed consent and the ethical standards of health care professionals" or it does not. But the record before the agency is centrally relevant to the resolution of the medical ethics question in the Appeal II. The adequacy of the Agency's reasoning can only be measured by the record before the Agency.

Finally, Appellant does not explain—that is, tacitly concedes—that the two other central issues in Appeal II do not relate *at all* to the issues in Appeal I. Simply put, this case is an all-around bad candidate for consolidation. The superficial similarity between the two appeals masks their stark differences, and consolidation would likely lead to unfair prejudice and confusion of the issues. Accordingly the appeals should not be consolidated.

CONCLUSION

The Court should dismiss Appeal I and dismiss the motion to consolidate as moot.

March 4, 2020

Respectfully submitted,

s/ *Andrew Tutt*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response in opposition to motion for to consolidate and cross-motion to dismiss was filed electronically on March 4, 2020 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
Andrew T. Tutt

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for appellee certifies that this brief:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,337 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Andrew Tutt*
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