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 Secretary of the United States Department of Health and Human Services, et al.,
Defendants-Appellants.

Nos. 19-1614 & 20-1215

OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS/REPLY IN SUPPORT OF MOTION TO CONSOLIDATE

Baltimore's motion to dismiss asks this Court to decide a serious and open constitutional question of mootness, which the Court should avoid by instead consolidating the two appeals. The Court should therefore deny Baltimore's motion to dismiss and grant the government's motion to consolidate.

1. This Court should not reach out to decide the question whether the appeal from the preliminary injunction is moot, since it is unnecessary to resolve that difficult constitutional question. The principle of constitutional avoidance "requires the federal courts to strive to avoid rendering constitutional rulings unless absolutely necessary." *See Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 156–57 (4th Cir. 2010). That is no less true when

it comes to difficult questions of jurisdiction under Article III. *See, e.g.*, *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008) ("[T]he doctrine of constitutional avoidance requires us to eschew determinations of Article III standing, a constitutional question, in cases in which a statutory jurisdictional inquiry could dictate the result."). The issue of whether an appeal from the preliminary injunction is moot after the entry of a permanent injunction on different grounds presents serious and novel constitutional questions that this Court has not addressed. Indeed, Baltimore cites no case in which any court of appeals has resolved the issue.

An appeal from the grant of a preliminary injunction will become moot when a permanent injunction is entered in "most cases," because the preliminary injunction "merges" into the permanent injunction and thus the validity of the permanent injunction is generally all that matters going forward. *International Bhd. of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 885 F.3d 230, 235–37 (4th Cir. 2018) (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314–15 (1999)). As this Court has explained, however, "mootness is avoided" when "a final adjudication turns on legal issues different than those posed by a preliminary injunction, so that the final decision does not establish the validity of the earlier injunction." *Id.* at 237. Although there does not appear to be any precedent addressing how that principle applies in the context of a permanent injunction issued on grounds different from the

preliminary injunction, there is, at a minimum, a strong argument that mootness does not apply in these unusual circumstances.

In particular, if this Court were to vacate the district court's entry of a permanent injunction by rejecting Baltimore's arbitrary-and-capricious challenges, but without addressing the statutory claims on the ground that they were not the basis for the permanent injunction, then the validity of the statutory claims would remain a live issue in the case. Indeed, the district court's preliminary injunction arguably would be back in effect once the permanent injunction was vacated, and at a minimum the district court could reinstate preliminary or permanent injunctive relief based on the statutory claims. Accordingly, in these unusual circumstances, there are strong reasons why the preliminary injunction might not be viewed as merging into the permanent injunction with sufficient finality to moot an appeal of the preliminary injunction. *See Airgas,* 885 F.3d at 235–37; *see also Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (an appeal is not moot as long as there is "some form of meaningful relief" that may be granted). Notably, the district court itself did not appear to intend that its ruling on the arbitrary-and-capricious claims would preclude this Court's pending consideration of the statutory claims that are the subject of the appeal from the preliminary injunction. *See Mayor & City Council of Baltimore v. Azar*, No. 19-1103, 2020 WL 758145, at *7 & n.5 (D. Md. Feb. 14, 2020) (*Baltimore II*)

(declining to address the statutory claims "as they remain on appeal in connection with the Fourth Circuit's review of this Court's preliminary injunction" and noting that the court of appeals may consider and decide the "merits of the case" not just "propriety of the injunctive relief").

2. The Court can and should consolidate the appeals before deciding the mootness question to avoid having to address the serious constitutional issues presented. If the Court consolidates the appeals, then it can consider the statutory claims as a potential alternative basis for affirming the permanent injunction, at which point it need no longer determine the difficult mootness question above because the preliminary injunction appeal would indisputably be overtaken by events. Moreover, consolidating two appeals with the same background and similar legal issues would save the parties and this Court a substantial amount of resources. The first appeal, arising from a preliminary injunction barring enforcement of the same Rule, has already been fully briefed and argued before this Court. Baltimore has not disclaimed reliance on the arguments at issue in the preliminary injunction as alternative reasons to affirm the permanent injunction, so those issues are likely to remain present in the second appeal. Even aside from that fact, the appeals involve factual and legal overlap: the first appeal involves claims that certain aspects of the Rule are contrary to several statutes, whereas the second involves claims that those same aspects of the Rule are arbitrary and capricious. And in both, the government

contends that the Rule is reasonable and lawful because it is a reasoned interpretation of what Title X requires. Consolidating the appeals would thus promote efficiency and avoid unnecessary re-litigation of the same arguments. It would make little sense for the two appeals to proceed separately when the issues in the first appeal are likely to be re-litigated in the second appeal; when the two appeals involve the same regulation, the same background, and similar issues; and when consolidating the appeals allows the Court to avoid deciding a constitutional question of mootness.

CONCLUSION

The government respectfully requests that this Court deny the motion to dismiss and grant the motion to consolidate No. 19-1614 and No. 20-1215.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 984 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

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