No. 23-11184

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA, EX REL, ALEX DOE, RELATOR,
Plaintiff-Appellee,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INCORPORATED,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division
No. 2:21-cv-00022

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION, TO STAY MERITS BRIEFING, AND ALTERNATIVE MOTION TO EXPEDITE APPEAL

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No. 23-1184

UNITED STATES OF AMERICA, EX REL, ALEX DOE, RELATOR,
Plaintiff-Appellee,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.,
Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellee	**Former or present counsel**
• Relator Alex Doe (identity under seal)	Hacker Stephens LLP • Heather Gebelin Hacker • Andrew B. Stephens
Defendant-Appellant	**Former or present counsel**
• Planned Parenthood Federation of America	O'Melveny & Myers LLP • Danny S. Ashby • Justin R. Chapa • Megan R. Whisler • Anton Metlitsky • Leah Godesky • Amanda Santella • Craig P. Bloom • Ross Galin Ryan Brown Attorney at Law • Ryan Patrick Brown

Other Parties	
• State of Texas, Plaintiff	Office of the Attorney General • Ken Paxton • Brent Webster • Grant Dorfman • Shawn E. Cowles • Ralph Molina • Raymond Winter • Christopher D. Hilton • Halie E. Daniels • Reynolds B. Brissenden, IV • Amy S. Hilton • William Wassdorf
• United States of America, Real Party in Interest	United States Attorney's Office • Kenneth G. Coffin • J. Scott Hogan • Jamie Yavelberg
• State of Louisiana, Real Party in Interest	Office of the Louisiana Attorney General • Joseph Scott St. John
• Planned Parenthood of Greater Texas, Defendant • Planned Parenthood Gulf Coast, Defendant • Planned Parenthood South Texas, Defendant • Planned Parenthood Cameron County, Defendant • Planned Parenthood San Antonio, Defendant	Arnold & Porter Kaye Scholer LLP • Christopher M. Odell • Craig D. Margolis • Tirzah S. Lollar • Paula Ramer • Alyssa Gerstner • Christian Sheehan • Emily Reeder-Ricchetti • Megan Pieper • Meghan Martin • Ralf Owen Dunn • Marcus Asner • Jayce Lane Born

• The Anti-Fraud Coalition, *Amicus Curiae*	• Diana Mahoney Law Office of Blackburn & Brown, LLP • Ryan Patrick Brown Taxpayers Against Fraud • Jacklyn DeMar

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INTRODUCTION

This interlocutory appeal is the latest of Planned Parenthood Federation of America (PPFA)'s many attempts to delay trial in this case, which had been set for April 16. The current gambit is as meritless as its predecessors. To start, this Court lacks jurisdiction because the defense PPFA invokes as the basis for this pretrial appeal—attorney immunity—was asserted by PPFA solely in response to a claim the district court has *already dismissed*.[1] The applicability of this defense against that claim is accordingly moot and PPFA cannot use an interlocutory appeal to belatedly inject this defense as to other claims.

Beyond that, the Court lacks jurisdiction for several additional reasons: (1) PPFA faces liability for many reasons beyond the involvement of their attorney-employees, so assertion of the defense does not provide the sort of complete defense to suit that could justify an interlocutory appeal; (2) PPFA's assertion of attorney immunity to defend a suit that is not against lawyers, a law firm, or an entity that exists to provide legal services is unprecedented and frivolous; and (3) PPFA never pleaded this defense nor argued it as an affirmative defense, much less invoked it as an immunity to suit. The Court thus has ample reason to dismiss this appeal now without further delaying trial.

[1] Plaintiffs Alex Doe and Texas asked the district court to certify this appeal as frivolous and retain jurisdiction, but the Court denied the motion the day before Plaintiffs' reply brief was due. Plaintiffs had intended to notify the district court of this fact in that brief.

To preserve judicial and party resources, the Court should stay merits briefing in this appeal until this motion to determine the Court's jurisdiction is resolved. In the alternative, if the Court proceeds with the merits, it should expedite the appeal so the case can get back on track for trial, avoiding continued prejudice to Plaintiffs due to PPFA and the other defendants' dilatory tactics.

BACKGROUND

I. Factual background

From 2013 to 2015, Relator Alex Doe[2] participated in an undercover investigation to determine whether Planned Parenthood and its affiliates were providing fetal remains collected from abortions to researchers and tissue procurement companies. ROA.79-80. The investigation revealed Planned Parenthood officials appeared willing to (1) obtain fetal tissue in exchange for money and/or (2) modify abortion procedures to obtain more intact specimens—in violation of federal and state laws. ROA.95-100. Relator provided video footage of those meetings with Planned Parenthood officials to government officials. ROA.100-01. Based in part on that information, the States of Louisiana and Texas terminated Planned Parenthood affiliates from their respective state Medicaid programs. ROA.101-02. On September 15, 2015, Louisiana notified Defendant Planned Parenthood Gulf Coast (PPGC) that it would be terminated from the State's Medicaid program. ROA.101, 120-22. Louisiana determined that PPGC was not a qualified Medicaid provider. *Id.* PPGC did not

[2] The Relator's identity is under seal. *See* ROA.12383 (sealed); *cf.* ROA.80, 316, 1243-50.

pursue a challenge of the termination by a state administrative proceeding and the termination became final by operation of state law on October 15, 2015. ROA.101. On October 19, 2015, Texas sent initial notices of termination from the Texas Medicaid program to PPGC, Planned Parenthood of Greater Texas (PPGT), and Planned Parenthood of South Texas (PPST). ROA.101-02, 133-37. PPGC, PPGT, and PPST (the PPFA Affiliates) did not challenge the State's initial determinations that they were unqualified providers in a state administrative proceeding. ROA.102. On December 20, 2016, Texas sent final notices of termination to the PPFA Affiliates. ROA.103, 139-44. The PPFA Affiliates did not contest the terminations in a state administrative proceeding and they became final by operation of state law on January 19, 2017. ROA.103.

The PPFA Affiliates, represented by PPFA, obtained preliminary injunctions preventing the States from effecting the terminations. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 236 F. Supp. 3d 974, 1000 (W.D. Tex. 2017); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 653 (M.D. La. 2015). This Court vacated the preliminary injunction in the Texas case. *Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs., Inc v. Smith*, 913 F.3d 551 (5th Cir. 2019). On November 23, 2020, the en banc Court affirmed vacatur of the preliminary injunction in the Texas case and overruled the Louisiana case. *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc). The PPFA Affiliates' termination from Texas Medicaid was implemented, but despite the Court's decision in *Kauffman*, the district court in *Kliebert* maintained the

preliminary injunction until PPGC dismissed its lawsuit in 2022, and PPGC continued to submit claims for Medicaid reimbursement until then. Even though they were terminated from Medicaid in 2015 and 2017, the PPFA Affiliates continued to submit Medicaid claims and have not returned the money they received to Louisiana or Texas. ROA.107-08, 109.

II. Procedural history

On February 5, 2021, Relator filed this *qui tam* action against PPFA and the PPFA Affiliates. ROA.73-145. Relator's Complaint asserts claims under the False Claims Act, the Texas Medicaid Fraud Prevention Act (TMFPA), and the Louisiana Medical Assistance Programs Integrity Law (LMAPIL) on behalf of the United States, Texas, and Louisiana. ROA.109-15. Relator alleges that PPFA and the PPFA Affiliates violated state and federal law by falsely certifying their compliance with Texas and Louisiana Medicaid rules and regulations when filing claims for reimbursement (known as an "implied false certification"), *see* ROA.109-10, 112-13, 114, and by failing to repay the government millions of dollars of Medicaid funds that they knew or should have known they were obligated to repay (known as "reverse false claims"), *see* ROA.111-12, 113, 114. Relator also brought claims for conspiracy to commit healthcare fraud against all defendants under Texas and Louisiana law. ROA.115; *see also* ROA.1204 (dismissing federal conspiracy claim). The United States declined to intervene. ROA.235-37. On January 6, 2022, Texas filed its Complaint in Intervention, intervening in Relator's reverse false claim against Defendants under the TMFPA. ROA.245-89. Louisiana has neither elected nor declined to

intervene. ROA.1173. On January 12, 2022, the district court unsealed the case. ROA.315-17.

Since the case was unsealed, there has been extensive litigation: the district court considered and denied motions to dismiss, a motion for interlocutory appeal, and Defendants' motion to reconsider the motion to dismiss. *See* ROA.22, 27. Planned Parenthood moved to transfer venue under 28 U.S.C. § 1404 and petitioned for mandamus in this Court after the district court denied their motion. ROA.29, 33. This Court denied the petition, noting Planned Parenthood's strategic delay in filing the motion until after the motion to dismiss was denied. *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 631 (5th Cir. 2022). The parties finished discovery and filed summary judgment motions in early 2023. *See* ROA.51-52. Before reply briefs were filed, and just two months before the scheduled trial date in April 2023, Planned Parenthood moved to stay the case; the district court granted that stay the day summary judgment briefing concluded. ROA.56-57. The district court lifted the stay in June 2023 and held a summary judgment hearing in August. ROA.58, 64. Planned Parenthood then filed an untimely motion for judgment on the pleadings in September 2023. ROA.65, 11714-23, 11736-46, 11824-32.

The next month, the district court denied that motion and denied summary judgment in large part. ROA.46640-86 (sealed). In its order, the district court held that the PPFA Affiliates are obligated to return the overpayments they received and granted PPFA summary judgment on the reverse false claims. ROA.46676, 46686 (sealed). The district court denied summary judgment on all remaining claims, in-

cluding Relator's federal and state-law implied false certification and state-law conspiracy claims against both the Affiliate defendants and PPFA. ROA.46666-73, 46682-83, 46685 (sealed). The district court also issued an amended scheduling order, setting trial to begin on April 16, 2024. ROA.67. PPFA filed this appeal on November 20, 2023. ROA.12000-023. PPFA's appeal is based on its purported assertion of attorney immunity. *Id.* (citing *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341 (5th Cir. 2016)). A week later, PPFA, along with the PPFA Affiliates, moved to stay proceedings in the district court. ROA.12004-15. The district court granted the motion to stay pending this appeal on January 11 and vacated the scheduling order, including the trial date. ECF 601.[3]

ARGUMENT

Interlocutory appellate jurisdiction is the exception rather than the rule. Congress has given the courts of appeals jurisdiction over interlocutory appeals only in certain, limited circumstances. *Dardar v. Lafourche Realty Co.*, 849 F.2d 955, 957 (5th Cir. 1988). Interlocutory appeals are not favored and the statutes allowing them must be strictly construed. *E.E.O.C. v. Kerrville Bus Co.*, 925 F.2d 129, 131 (5th Cir. 1991). Courts must "approach this . . . somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Ass'n, Inc. v. E. Hornes Market, Inc.*, 385 U.S. 23, 24 (1966) (citation omitted).

[3] This refers to the district court docket. The Court granted PPFA's motion to supplement the record with this order but it was not part of the ROA as of this filing.

PPFA's appeal is from an order that largely denies summary judgment. "Generally, an order denying a motion for summary judgment is not an appealable final decision under [28 U.S.C.] § 1291." *Burge v. Par. of St. Tammany*, 187 F.3d 452, 478 (5th Cir. 1999). The collateral order doctrine permits appeals from interlocutory orders that are deemed final under 28 U.S.C. § 1291 because they "(1) conclusively determine the disputed question; (2) resolve an issue that is completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment." *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 99 F.3d 761, 766 (5th Cir. 1996). To be sure, "orders denying certain immunities are strong candidates for prompt appeal under § 1291." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 871 (1994). That is because some immunities protect a defendant from *suit*, not just liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But even those defendants have only a limited right to appeal an order denying their motion for summary judgment—they may appeal only the determination of legal issues. *See, e.g., Oliver v. Arnold*, 3 F.4th 152, 155 (5th Cir. 2021); *accord Carter ex rel. Carter v. Butler*, No. 21-30216, 2022 WL 72730, at *4 (5th Cir. Jan. 7, 2022); *Burge*, 187 F.3d at 478.

Thus, whether the summary judgment order here "would be effectively unreviewable on appeal from final judgment" for purposes of the collateral order doctrine depends on whether attorney immunity, as asserted here, "'provides a true immunity from suit and not a simple defense to liability.'" *Troice*, 816 F.3d at 345 (citation omitted). "The critical question ... is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988). There is no interlocutory appeal when a defendant loses on a "mere defense to liability."

Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 43 (1995). And "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment." *Id.* Thus, the Court must "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

I. The Court Lacks Jurisdiction Because PPFA Did Not Assert an Attorney Immunity Defense to The Remaining Claims in the Case at Summary Judgment.

Even assuming an attorney immunity defense applies here—and it does not, as explained below—the Court *still* lacks jurisdiction because PPFA never asserted this defense in response to the claims that remain in this suit. PPFA asserted an attorney immunity defense solely in response to Plaintiffs' reverse false claims. *See* ROA.11217, 11230, 11234-42 (attorney liability is part of Section II.A, "PPFA Cannot Be Held Directly Liable for Reverse False Claims,"); ROA.9168, 9174, 9180-88 (attorney liability is part of Section I, "PPFA Cannot Be Held Directly Liable for Reverse False Claims"); ROA.12281-83 (similarly describing argument). But the district court granted summary judgment for PPFA on those claims on other grounds. ROA.46676, 46686 (sealed). There is no basis to litigate the hypothetical application of attorney immunity to those claims. By contrast, PPFA did *not* invoke attorney immunity as a defense to the claims that are now headed for trial. It did not assert attorney immunity as a defense to Relator's implied false certification. ROA. 11246-55 (Part II.B, "PPFA Cannot Be Held Directly Liable for Implied False Certification," including nothing about attorney immunity); ROA.9193-96 (Part II, "PPFA Cannot Be Held Directly Liable for Implied False Certification" including

nothing about attorney immunity). And it did not assert attorney immunity as a defense to Relator's conspiracy claims. ROA.9196 (Part III, "PPFA Is Entitled to Summary Judgment on Relator's Conspiracy Claims" including nothing about attorney immunity).

PPFA should not be able to assert an interlocutory appeal based on defenses it did not raise below. *Cf. Arredondo v. Elwood Staffing Services, Inc.*, 81 F.4th 419, 428 (5th Cir. 2023) ("[I]n order to preserve an argument for appeal, the argument (or issue) not only must have been presented in the district court, a litigant also must press and not merely intimate the argument during proceedings before the district court." (quoting *Templeton v. Jarmillo*, 28 F.4th 618, 622 (5th Cir. 2022)). This is especially so here because attorney immunity is an affirmative defense that PPFA has the burden to establish. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020). If the district court ruled more broadly than PPFA asked in denying summary judgment, that does not cure its failure to raise the defense to those claims in the first instance. PPFA remains free to try to raise it at trial and appeal any rejection of this defense as part of an ordinary post-judgment appeal. But it cannot upend the standard process and demand a pretrial advisory opinion from this Court about whether attorney immunity would apply in a context in which PPFA did not invoke it below.

II. The Court Lacks Jurisdiction Over This Interlocutory Appeal Because Even If PPFA Had Sustained Its Burden to Show the Attorney Immunity Defense Applies, It Would Not Result in Immunity to Suit.

Even if PPFA were correct to invoke attorney immunity here, it would still have to go to trial. And given that PPFA's defense cannot exempt it from facing trial altogether, it is unclear why this Court must entertain an extraordinary pretrial appeal now. An immunity appeal is far less pressing when the immunity asserted is only, at best, a defense against only certain aspects of some claims at trial. *See Will v. Hallock*, 546 U.S. 345, 352 (2006) ("The importance of the right asserted has always been a significant part of our collateral order doctrine." (quoting *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring)).

There is little question that PPFA will face trial even if it somehow manages to establish attorney immunity. For one thing, attorney immunity is only a defense, if at all, to the Texas claims. *See Bethel*, 595 S.W.3d at 654. Relator brought claims under the federal False Claims Act and LMAPIL in addition to the TMFPA. ROA.109-15. PPFA has cited no authority establishing attorney immunity as a defense under federal law or the False Claims Act. "A state law immunity, though perhaps helpful in deriving an historical practice relevant to determining whether absolute immunity should be extended against a federal claim, is far from dispositive." *Ray v. Recovery Healthcare Corp.*, No. 3:19-CV-3055-G, 2021 WL 1102081, at *6 (N.D. Tex. Mar. 22, 2021), *reconsideration denied*, No. 3:19-CV-3055-G, 2021 WL 3603339 (N.D. Tex. Aug. 13, 2021) (citing *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 375-76 (1990) (state law immunities have no force in § 1983 suits "over and above" those

provided by § 1983 because "[t]he elements of, and the defenses to, a federal cause of action are defined by federal law")). Nor does there appear to be a specific attorney immunity defense in Louisiana, where attorneys can be liable if they exceed the limits of their agency and may be liable to third parties in cases of fraud or collusion. *St. Paul Ins. Co. of Bellaire, Tex. v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279 (5th Cir. 1991).

Nor would attorney immunity provide PPFA a complete defense to the Texas claims, even if PPFA somehow established it. Relator does not argue that PPFA's potential liability under the remaining Texas claims is due solely to the actions of PPFA attorney-employees. To the contrary, PPFA is liable for its Affiliates' misdeeds because of its direct involvement in and oversight of the Affiliates' business practices and Medicaid participation.[4] There is no basis to immunize PPFA for its non-legal activities even if PPFA somehow gets a free pass to the extent its attorneys helped orchestrate false claims. Regardless of attorney immunity, PPFA will still have to contend with the voluminous evidence of its non-legal involvement in the Affiliates' filing of false claims. *See* ROA.10336-47, 10466-70, 11433-35, 11438-40. PPFA will also have to contend with the extensive evidence that it directed its attorney-employees' provision of advice to the Affiliates, and that the advice given was in PPFA's interest, not the Affiliates'. *See* ROA.11435-36, 11437-38.

[4] *See* ROA.10321-26, 10336-49, 10466-70, 11433-40.

For these reasons, there is little point to this appeal. At most, PPFA could obtain reversal of the district court's (correct) conclusion that the attorney-immunity defense does not apply when attorneys are not being sued, *see* Part III.A *infra*. But that would not free PPFA from trial. It would only, at most, exempt PPFA from liability to the extent that (1) Relator's evidence on any claim is limited to actions taken by in-house lawyers and (2) PPFA somehow proves that all of its conduct "constitute[d] the provision of 'legal' services involving the unique office, professional skill, training, and authority of an attorney and that . . . the attorney engage[d] in to fulfill the attorney's duties in representing the client within an adversarial context . . ." *Haynes & Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, 78 (Tex. 2021).

This situation stands in stark contrast to the typical immunity-based appeal, such as qualified immunity, where the appellate court considers whether the defendant must stand trial at all. In that context, immediate appeal is proper because it "conclusively determines the disputed question" and is "effectively unreviewable on appeal" because it denies the official their right to immunity from trial. *Walker*, 99 F.3d at 766; *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). That is simply not true here, even if PPFA's novel arguments were correct.

III. This Court Lacks Jurisdiction Over This Interlocutory Appeal Because PPFA's Assertion of the Attorney Immunity Defense Is Frivolous.

A. PPFA's assertion of attorney immunity is unsupported by law.

Texas courts recognize "[a]ttorney immunity [a]s an affirmative defense." *Bethel*, 595 S.W.3d at 654. But Plaintiff is unaware of *any case* applying attorney immunity outside the context of claims directly against lawyers or law firms. It is clear why: that is the only context in which it makes sense to apply it.

"Attorney immunity is an affirmative defense that 'stem[s] from the broad declaration over a century ago that attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making *themselves* liable for damages.'" *Haynes & Boone,* 631 S.W.3d at 73 (emphasis added) (citation omitted). As the Supreme Court of Texas has explained, "[a]ttorney immunity exists to promote such 'loyal, faithful, and aggressive representation' by alleviating *in the mind of the attorney* any fear that *he or she may be sued by or held liable* to a non-client for providing such zealous representation. *Id.* at 79 (emphasis added) (citations omitted). Federal courts in this circuit have followed this explanation of the Texas immunity defense. *See Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017) (Attorney immunity is a "comprehensive affirmative defense protecting *attorneys* from liability to non-clients"(emphasis added)); *accord Wesner as Tr. of Charles Wesner, Jr. Living Tr. v. Southall*, No. 3:22-CV-0927-B, 2023 WL 3000623, at *3 (N.D. Tex. Apr. 18, 2023) ("*Attorneys and law firms* in Texas are generally immune from third party liability for legal services provided in the representation of a

client." (emphasis added)). The Supreme Court of Texas recently declined to extend the defense outside this narrow context. *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 51 (Tex. 2021).

As the district court correctly noted in its summary judgment order, Plaintiffs did not sue PPFA's attorney-employees personally—they sued PPFA, which is not a law firm. ROA.46682 (sealed). PPFA's attorney-employees therefore fear no liability for damages—the entire purpose of the defense. *Id.* The identity of the party asserting immunity from suit matters; for instance, a government entity may not assert qualified or good-faith immunity, only individual government officials can. *Fairchild v. Coryell Cnty., Tex.*, 40 F.4th 359, 367 (5th Cir. 2022); *see also Sanchez v. Oliver*, 995 F.3d 461, 472 (5th Cir. 2021) ("an employee of a large firm 'systematically organized to perform a major administrative task for [a governmental entity for] profit,' is categorically ineligible to assert the defense of qualified immunity"). Even if PPFA's *lawyers* cannot be held liable for their legal advice, PPFA can be held liable for wrongdoing *it* undertakes. Corporate misconduct involving in-house (or external) legal advice is a fact pattern that arises in literally every case of corporate wrongdoing from the False Claims Act to securities fraud to mass torts. It would be extraordinary if corporate entities could shield their wrongdoing by simply making in-house lawyers part of the decisional process. And absent a colorable assertion of immunity—which PPFA plainly lacks—there is no basis to disrupt the normal litigation process by asserting appellate jurisdiction now. *See Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 291–94 (5th Cir. 2000) (dismissing appeal for lack of jurisdiction where private party asserted immunity under state action doctrine with no legal support).

PPFA did not argue during summary judgment briefing that the district court should "extend[]… existing law," Fed. R. Civ. P. 11(b)(2), on a question of Texas state law. But regardless, doing so would be inappropriate in the context of an interlocutory appeal. *See Acoustic Sys.*, 207 F.3d at 291–92 (noting that the Fifth Circuit has stated that "the collateral order doctrine is not to be applied liberally" and "is extraordinarily limited in its application" when considering (and rejecting) defendant's argument to expand immunity defense in that posture). And that is especially so because the Supreme Court of Texas recently declined to expand this defense. *Landry's,* 631 S.W.3d at 51.

Nor can PPFA make a colorable argument that the Court *should* extend Texas law to this context. As discussed above, the rationale of the attorney immunity doctrine is to protect *attorneys* from liability for actions they take during the representation of a client. PPFA's attorney-employees face no personal liability here. *See Acoustic Sys.*, 207 F.3d at 294 (dismissing appeal for lack of jurisdiction after rejecting private party's assertion of immunity under state action doctrine because the concerns justifying that immunity do not apply to private parties). And again, extending the law to encompass PPFA's assertion of this defense would be absurd. Corporate entities could escape liability for untold wrongdoing by involving in-house counsel in their misdeeds and then claiming the entire enterprise constituted immune attorney conduct. That is not the law in Texas, nor should it be.

B. PPFA waived the assertion of attorney immunity.

Affirmative defenses are generally waived unless they are raised in the defendant's pleading. Fed. R. Civ. P. 8(c); Tex. R. Civ. P. 94; La. Code Civ. P. art. 1005;

accord Lebouef v. Island Operating Co., 342 F. App'x 983, 984 (5th Cir. 2009). PPFA never requested dismissal of the case based on attorney immunity. ROA.531-32, 586. PPFA did not plead attorney immunity as an affirmative defense in its Answer, nor in its proposed amended Answer. ROA.1251-1361, 4851-4962. PPFA did not assert an attorney immunity argument until it responded to Plaintiffs' summary judgment motion. But "[t]hat is not a proper method to raise an affirmative defense." *Crown Castle Fiber, LLC v. City of Pasadena, Tex.*, 76 F.4th 425, 439 (5th Cir. 2023).

Nor can Defendants argue that they raised these defenses at a proper time, *see Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009), because months before they requested leave to amend in October 2022 (and before summary judgment), they knew that Plaintiffs contended that PPFA lawyers' involvement was one aspect of PPFA's liability. For instance, in interrogatories, PPFA asked about Relator's arguments as to the basis for PPFA's liability: "[I]dentify all facts that You contend demonstrate PPFA's knowledge of, involvement in, or control over the claim." ROA.12075-76; *see also* ROA.12077, 12078, 12080. In response, Relator referenced both PPFA's provision of "legal representation," and the fact that "PPFA provided legal representation to the PPFA Affiliates in federal court litigation involving the PPFA Affiliates termination from Medicaid." ROA.12076, 12078, 12079, 12080. Plaintiffs also served Rule 30(b)(6) deposition notices on PPFA and the PPFA Affiliates in early October 2022, putting PPFA on notice many times that Plaintiffs were seeking information about PPFA's involvement with the Affiliates' litigation through several topics: "legal representation" agreements between PPFA and the Affiliates, ROA.6201; "PPFA's provision of legal services, legal advice, and legal

representation to Planned Parenthood affiliate entities," ROA.6217; "PPFA's role in litigation involving or on behalf of Planned Parenthood affiliate entities," ROA.6217; "litigation in federal and state courts concerning termination of the Planned Parenthood affiliates from Texas Medicaid, and PPFA's role and involvement in litigation concerning the termination from Texas Medicaid," ROA.6235; "litigation in federal and state courts concerning termination of the Planned Parenthood affiliates from Louisiana Medicaid, and PPFA's role and involvement in litigation concerning the termination from Louisiana Medicaid," ROA.6235-36. And the topics of PPFA's attorney-employees, their involvement in the PPFA Affiliates' actions, PPFA's "Litigation and Law" division, and PPFA's involvement in the Texas and Louisiana Medicaid litigation were extensively covered in depositions in November 2022. *See, e.g.*, ROA.19909, 19913, 19914, 19916, 19918, 19920, 19929, 20010, 20012, 20044-45, 20132, 20134, 20189, 20230-31, 20234, 20237-38, 20257, 20481, 20485, 20590-91, 20598 (sealed).

PPFA's sandbagging also severely prejudices Plaintiffs. If this defense does apply, Plaintiffs are entitled to discovery to probe the extent of PPFA's attorneys' involvement in the Affiliates' actions and hold PPFA to its burden to establish that its attorney-employees were acting as attorneys to the Affiliates (as immunity would require) or in some other capacity. *See Kelly*, 868 F.3d at 375 (determining the scope of representation is necessary because "[t]he mere fact that an attorney was representing a client at the time of alleged fraudulent activity is not enough to warrant immunity."). Because PPFA had never asserted this defense, Plaintiffs could not

challenge its broad assertions of attorney-client privilege over communications involving its in-house counsel. It is axiomatic that privilege cannot be both sword and shield, such that PPFA must immediately disclose these documents if it intends to invoke the conduct they memorialize as a basis for immunity.[5] "A failure timely to answer or raise an affirmative defense before springing it on plaintiffs at summary judgment almost always constitutes an 'unfair surprise.'" *Crown Castle*, 76 F.4th at 439.

Finally, even when PPFA did make the argument that attorney immunity should apply, it couched its argument as a defense to liability and wrongly claimed that Plaintiffs—not PPFA—had the burden of proof. The "critical question" as to whether there is jurisdiction for an interlocutory appeal here "is whether 'the essence' of *the claimed right* is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (emphasis added). At summary judgment, PPFA never claimed a right to be immune from suit, it included attorney immunity among many other arguments against liability, and merely claimed that "a lawyer cannot be held liable," ROA.9180, 11234; "Louisiana similarly protects lawyers from liability," ROA.9181, 11235; and "every one of the [attorney-employee] actions Plaintiffs highlight . . . cannot be the basis for

[5] PPFA claimed privilege over thousands of documents. ROA.24233-587 (sealed). Its appeal should be dismissed for the reasons given, but, if it is not, and if the Court were to agree with PPFA that the district court's reason for denying the defense at summary judgment was incorrect, the Court would have to remand this matter to the district court to consider in the first instance whether these documents must be disclosed and evaluate whether PPFA had met its evidentiary burden to establish its entitlement to the defense.

liability," ROA.9183, 11237. Further, PPFA repeatedly tried to place the burden on Plaintiffs, even though PPFA had the burden of proof if it were properly asserting this defense. PPFA repeatedly stated that "Plaintiffs have not cited a single case," ROA.9182; "Plaintiffs cite no evidence," ROA.9184; "Plaintiffs have presented no evidence," ROA.9188; "Plaintiffs have not met their burden," ROA.9188; "Plaintiffs have presented no evidence that L&L attorneys were acting in PPFA's interest rather than the Affiliate Defendants'," ROA.9189; and "Plaintiffs bear the burden," ROA.9189; *see also* ROA.9190. There was no indication from this briefing that PPFA was invoking an affirmative defense, much less a "right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524. It is inequitable to permit PPFA to assert this claim now so it can file an extraordinary appeal to delay trial.

IV. The Court Should Stay Merits Briefing Pending Resolution of This Motion.

As explained above, the Court lacks jurisdiction over this appeal for several reasons. Rather than force the parties to devote their limited resources to briefing the merits, the Court should stay merits briefing while it resolves this motion.

V. Alternatively, If the Court Entertains This Appeal, It Should Expedite It to Avoid Prejudice to Plaintiffs from A Lengthy Delay.

This case was originally set for trial in April of last year and is now delayed again. As the Seventh Circuit recognized in a case expediting the resolution of an interlocutory appeal, interlocutory appeals:

> injure the legitimate interests of other litigants and the judicial system. During the appeal memories fade, attorneys' meters tick, judges' schedules be-

> come chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will be unnecessary. The majority of [interlocutory] appeals—like the bulk of all appeals—end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals.

Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989). Thus, at the very least, the Court should expedite this appeal even if it is inclined to consider the merits.

CONCLUSION

The Court should stay merits briefing in this appeal pending disposition of this motion to dismiss, and it should dismiss the appeal for lack of jurisdiction. In the alternative, the Court should grant the motion to expedite the appeal.

Respectfully submitted.

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Certificate of Conference

On January 18, 2024, Heather Hacker, counsel for Plaintiff-Appellee, conferred by email with Danny Ashby, counsel for Defendant-Appellant, who stated that Defendant-Appellant opposes the requested relief "subject to seeing [the] motions."

/s/ Heather Gebelin Hacker
Heather Gebelin Hacker

Certificate of Service

On January 18, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

/s/ Heather Gebelin Hacker
Heather Gebelin Hacker

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5185 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Heather Gebelin Hacker
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