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

REPLY IN SUPPORT OF APPELLEE'S CROSS-MOTION TO DISMISS

The district court vacated and permanently enjoined the Rule on Friday, February 14, 2020. The very next weekday, on Monday, February 17, 2020, the Appellee Mayor and City Council of Baltimore ("Appellee") brought the permanent injunction to this Court's attention. ECF No.78. That was something Appellee was required to do. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.5 (1997) ("It is the duty of counsel to bring to the federal tribunal's attention,

'without delay,' facts that may raise a question of mootness."); *see also Fox v. Bd. of Trs. of State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994) ("[T]he condition of mootness is not a defense that could be waived.").

The moment the district court entered final judgment in this case, concrete adverseness in this appeal was lost. Its outcome became academic. Nothing the Court concludes about the merits of the preliminary injunction will change the relative positions of the parties. The Rule will still be enjoined and still be vacated whether the Court rules for Appellants or Appellee in this appeal. The appeal is therefore moot. *See* 13C Fed. Prac. & Proc. Juris. § 3533.10 (3d ed.).

This is not a "difficult constitutional question." ECF No.88, at 1. Courts routinely hold that an interlocutory appeal is moot because neither party can obtain any meaningful relief from winning it. *See Kilty v. Weyerhaeuser Co.*, 758 F. App'x 530, 533-34 (7th Cir. 2019) (immunity-based interlocutory appeal mooted by entry of summary judgment for Defendant on the merits of the underlying claims); *Brennan v. William Paterson Coll.*, 492 F. App'x 258, 263-64 (3d Cir. 2012) (appeal of the denial of a preliminary injunction mooted by

district court's grant of a motion to dismiss); *Chaparro-Febus v. Int'l Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 331 n.5 (1st Cir. 1992) (same); *Senseny S. Corp. v. Dep't of Labor*, 816 F.2d 673 (4th Cir. 1987) (declining to decide whether district court properly granted preliminary injunction because no effectual relief could be given to either party); *SEC v. Mount Vernon Mem'l Park,* 664 F.2d 1358, 1361-1362 (9th Cir. 1982) (settlement of a claim mooted the appeal of a preliminary injunction as to that claim).

Not only does the general mootness rule apply here, but so does the more specific rule that a plaintiff's win on the merits in a case moots a preliminary injunction "even if the preliminary injunction was wrongly issued." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314-15. (1999); *accord In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1088 (Fed. Cir. 2012) ("If [a party] was simply enjoined from engaging in conduct in which it had no right to engage, [its] complaints about [an] injunction become meaningless.").

This Court's holding in *International Brotherhood of Teamsters, Local Union No. 639 v. Airgas, Incorporated*, 885 F.3d 230 (4th Cir.

2018)—which Appellee cited in its motion to dismiss—is on all fours with this case. There, the question decided by the arbitrator (the merits of the parties' contract dispute) differed from the question at issue in the preliminary injunction appeal (whether the district court had jurisdiction to enter a *Boys Markets* preliminary injunction). *Id.* at 236. But the abitrator's ruling on the merits in favor of the union mooted the appeal because *even if* the district court lacked jurisdiction to issue the preliminary injunction, the arbitrator's ruling for the union established that the employer never should have been engaging in the conduct the district court restrained. *Id.* This case is just like *Airgas*. The district court's judgment on the merits in favor of Appellee in this case establishes that *even if* the district court should not have issued the preliminary injunction, Appellants never should have enforced the Rule in the first instance. This is a far cry from a "serious and novel constitutional question[] that this Court has not addressed." ECF No.88, at 2.

There are even cases finding mootness in the exact circumstances presented here. *Contra* ECF No.88, at 2-3 (arguing "there does not appear to be any precedent addressing how" mootness "applies in the

context of a permanent injunction issued on grounds different from the preliminary injunction"). In *New Mexico v. Watkins*, 969 F.2d 1122 (D.C. Cir. 1992), the district court granted a preliminary injunction based on two claims under the Federal Land Policy and Management Act of 1976 (FLPMA). *Id.* at 1124. The District Court later granted summary judgment and a permanent injunction on the first of the FLPMA claims, but not the second. *Id.* Defendants appealed the preliminary injunction and "spen[t] many pages attacking the district court's" analysis of the second FLPMA claim in its order granting the preliminary injunction. *See id.* at 1129, 1137-38. The court of appeals held that the entry of the permanent injunction on a different basis mooted any challenge to the second FLPMA claim. *Id.* at 1137-38 ("We do not reach that issue, for it did not enter the permanent injunction calculus."). Similar cases abound. *See Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 880-81 (7th Cir. 1990) (entry of a permanent injunction on basis of some claims mooted preliminary injunction granted on the basis of all claims).

Contrary to Defendants' conjecture, a hypothetical future ruling in favor of Defendants in the merits appeal (No. 20-1215) cannot keep this

appeal alive. *Contra* ECF No.88, at 3. Defendants admit that the theory on which that argument depends—that the preliminary injunction would automatically go back into effect if Appellee loses the merits appeal—is "arguable." *Id.* In fact it is clearly wrong. The preliminary injunction dissolved the moment the district court entered the permanent injunction, meaning it will not automatically snap back into effect. *See, e.g.*, *New Mexico*, 969 F.2d at 1138 ("By its very nature, the preliminary ruling was a tentative order that persisted until, but not after, a definitive injunction was decreed.").

But even if the preliminary injunction is revived at some future point, the time for resolving an appeal from that injunction will be at that future point, not now. Jurisdiciton cannot flicker in and out over the course of a case. "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And right now, it is undeniable that the Court lacks jurisdiction because the Court cannot issue any meaningful relief. That means this appeal is over. And the district court's intentions when it entered the final order in this case do not make this appeal any less moot. *Contra* ECF No.88, at 3.

The Court cannot act on the motion to consolidate until it resolves the jurisdictional question raised in this motion. Defendants are wrong that "the Court can and should consolidate the appeals before deciding the mootness question." ECF No.88, at 4. They cite no authority for that erroneous claim because it is contrary to controlling Supreme Court precedent. The Court must decide whether it has jurisdiction before resolving the motion to consolidate. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause.").

CONCLUSION

The Court should dismiss this appeal.

March 9, 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 Reply in Support of Appellee's Cross-Motion to Dismiss was filed electronically on March 9, 2020 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
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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 1,219 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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