No. 21-1043

United States Court of Appeals for the Fourth Circuit

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,
Plaintiffs-Appellees,

– v. –

ROBERT M. KERR,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of South Carolina
Case No. 3:18-cv-02078 (Hon. Mary Geiger Lewis)

APPELLEES' MOTION FOR LEAVE TO FILE A SURREPLY

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Plaintiffs-Appellees Planned Parenthood South Atlantic (PPSAT) and Julie Edwards move for leave to file the attached surreply brief (Exhibit A) and supporting declaration (Exhibit B) to respond to a mootness argument raised for the first time in South Carolina's reply brief on the merits. PPSAT asked Defendant-Appellant's position on this motion and has not received a response. However, South Carolina previously asked Ms. Edwards to "correct the record to establish that her case is not moot." Reply Br. 4 n.1.

A surreply brief is permitted with leave of Court. Fed. R. App. P. 28(c). Courts routinely provide the opportunity to submit a short brief to respond to new legal arguments raised for the first time in the last-scheduled brief. *See Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005); *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003); *see also Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016). That principle also is reflected in Federal Rule of Appellate Procedure 28(j), which permits, in response to a letter advising the circuit clerk of supplemental authority, the filing of a "similarly limited" letter.

In this appeal, a surreply brief is necessary to give Ms. Edwards a fair opportunity to address a new legal argument presented for the first time in South Carolina's reply brief. Ms. Edwards is challenging South Carolina's termination of PPSAT's participation in the state Medicaid program without cause. The reply brief begins with the new legal argument that the case

is moot because Ms. Edwards, a South Carolina resident insured by Medicaid, "has not sought to obtain healthcare from Planned Parenthood since" 2018. Reply Br. 3; *see id.* at 1-7. South Carolina asserts that "according to [its] records, the only Medicaid payments made to Planned Parenthood for services provided to [Ms.] Edwards were on July 9, 2018." *Id.* at 3.

South Carolina has been litigating this case since 2018, yet this is the first time it ever raised any mootness argument. South Carolina did not present this argument in its opening brief, and it has given no explanation for its failure to do so. Further, South Carolina's argument relies on a new factual assertion – one that is not part of the record filed with the Court and was never previously mentioned in this case at any stage.

Because Ms. Edwards has not had an opportunity to respond to South Carolina's mootness argument, a surreply brief is necessary. The Plaintiffs-Appellees have prepared a short surreply brief (Exhibit A) and Ms. Edwards has prepared a supplemental declaration (Exhibit B), and they are being submitted concurrently with this motion.

Respectfully submitted,

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Dated: July 30, 2021

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellees certifies that this motion:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 437 words, including footnotes; and

(ii) complies with the typeface and style requirements of Rule 27(d)(1) because this document has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 30, 2021 /s/ *Nicole A. Saharsky*

EXHIBIT A

No. 21-1043

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TABLE OF CONTENTS

Page

INTRODUCTION 1
ARGUMENT 2
CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page**

Arizonans for Off. Eng. v. Arizona,
520 U.S. 43 (1997) 4

Bain v. Cal. Tchrs. Ass'n,
891 F.3d 1206 (9th Cir. 2018) 4

Bayer v. Neiman Marcus Grp., Inc.,
861 F.3d 853 (9th Cir. 2017) 4

Cedar Coal Co. v. United Mine Workers of Am.,
560 F.2d 1153 (4th Cir. 1977) 6

CVLR Performance Horses, Inc. v. Wynne,
792 F.3d 469 (4th Cir. 2015) 4

Dep't of Com. v. New York,
139 S. Ct. 2551 (2019) 2

Fox v. Bd. of Trustees of State Univ. of N.Y.,
42 F.3d 135 (2d Cir. 1994)..5

Friedman's, Inc. v. Dunlap,
290 F.3d 191 (4th Cir. 2002) 5

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,
204 F.3d 149 (4th Cir. 2000) 2

Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.,
527 U.S. 308 (1999) 7

Harris v. Bd. of Supervisors, Los Angeles Cty.,
366 F.3d 754 (9th Cir. 2004) 3

Mayor of Baltimore v. Azar,
973 F.3d 258 (4th Cir. 2020) 7

Monahan v. Nebraska,
687 F.2d 1164 (8th Cir. 1982) 5

TABLE OF AUTHORITIES
(continued)

Cases (continued) **Page**

Radiant Glob. Logistics, Inc. v. Furstenau,
951 F.3d 393 (6th Cir. 2020) 7

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 6

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 6

Other Authorities

Nora V. Becker et al., JAMA Health Forum, *Utilization of Women's Preventive Health Services During the COVID-19 Pandemic* (July 2, 2021) 6

INTRODUCTION

After more than three years of litigation – including a prior appeal to this Court, and a trip to the Supreme Court – South Carolina argues for the first time that this case is moot. South Carolina asserts that Plaintiff Julie Edwards, a South Carolina resident insured by Medicaid, has not received health care from Planned Parenthood South Atlantic (PPSAT) since 2018, and it argues that Ms. Edwards no longer has an interest in this lawsuit challenging South Carolina's termination of PPSAT from participation in the state's Medicaid program. South Carolina never previously made that argument, and it does not explain why it raised the argument for the first time in its reply brief in this Court. Further, the argument relies on facts that the state simply asserts in a brief, with no supporting declaration.

South Carolina's argument lacks merit. A plaintiff has an injury in fact sufficient to confer standing if the challenged action presents a substantial risk of future harm to her. South Carolina's termination of PPSAT presents just such a risk to Ms. Edwards. The declaration she submitted to the district court details her prior care from PPSAT and states her intention to continue obtaining gynecological and reproductive health care from PPSAT. South Carolina does not question the veracity of that declaration. The declaration alone is enough to establish the continued justiciability of this case.

To fully put the issue to rest, Ms. Edwards is filing a supplemental declaration in this Court. That declaration explains that Ms. Edwards intends to continue using PPSAT for gynecological and reproductive health care and has an upcoming appointment there. Ms. Edwards thus continues to be aggrieved by South Carolina's termination of PPSAT's Medicaid contract, and so she has standing to pursue the case, and the case is not moot.

ARGUMENT

South Carolina presents a new argument for the first time in its reply brief – that "there is no indication Edwards can establish that she followed through on her alleged intent to obtain healthcare from Planned Parenthood," and so Ms. Edwards cannot "maintain standing and defeat mootness." Reply Br. 4, 7. That argument appears to address two issues: whether Ms. Edwards suffered an injury in fact sufficient to maintain standing, and whether there is a live dispute for the Court to resolve. The answer to both is yes.

Ms. Edwards plainly had standing when this case began, and South Carolina does not argue otherwise. A future injury satisfies the injury-in-fact requirement of Article III standing if "there is a substantial risk that the harm will occur." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019); *see Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (discussing "the injurious nature of

risk itself"). Since a person's "future need for medical attention" is practically certain, impeding access to health care presents a substantial risk of harm. *Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d 754, 762 (9th Cir. 2004) (finding standing to challenge health system's capacity reduction); *see* JA221-22 (discussing Ms. Edwards's "difficulty finding a doctor who accepted Medicaid patients" and "plan[s] to switch her gynecological and reproductive health care" to PPSAT).

In the declaration originally filed in the district court, Ms. Edwards explained that she is insured through Medicaid, that she relies on PPSAT for gynecological and reproductive health care, and that she intends to continue receiving care there. JA058, JA061-62. South Carolina has never questioned the veracity of that declaration, and this Court relied on the declaration in its prior decision in this case. JA221-22, JA249-50. South Carolina's termination of PPSAT's Medicaid contract creates a substantial risk that Ms. Edwards will be unable to continue receiving health care at PPSAT, which would cause her harm. South Carolina does not dispute that.

Instead, South Carolina argues that the case has become moot because Ms. Edwards "has not sought to obtain healthcare from Planned Parenthood since" 2018. Reply Br. 3; *see id.* at 1-7. Even if that were true (and as discussed below, it is not), it would not diminish Ms. Edwards's standing to pursue this lawsuit, because she remains a Medicaid beneficiary who intends to continue receiving gynecological and reproductive health

care from PPSAT. And as Ms. Edwards previously explained, her need for reproductive care is particularly acute, because it would be very dangerous for her to carry a pregnancy to term. JA 221. The mere fact that a patient has not sought medical care for a period of years – especially during a global pandemic – does not establish that she has no future need for medical care. Ms. Edwards still intends to use PPSAT for gynecological and reproductive health care. Supplemental Decl. of Julie Edwards 1. If South Carolina is allowed to terminate PPSAT's Medicaid contract, it will harm Ms. Edwards's ability to obtain needed care at PPSAT. JA058, JA061-62.

The case is not moot because there is a live controversy between the parties. There has not been any "intervening event" that would "make[] it impossible for the court to grant effective relief." *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 474 (4th Cir. 2015). South Carolina continues to defend its decision to terminate PPSAT's Medicaid contract, and if that termination is upheld, that will harm Medicaid patients like Ms. Edwards because it will be more difficult for them to get the medical care they need. This case thus is distinguishable from the decisions cited by South Carolina (Reply Br. 4-7) where courts found mootness based on a material change in the facts rendering the requested relief impossible or unnecessary to grant. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 72 (1997) (employee resigned); *Bain v. Cal. Tchrs. Ass'n*, 891 F.3d 1206, 1212 (9th Cir. 2018) (teacher left position); *Bayer v. Neiman Marcus Grp., Inc.*,

861 F.3d 853, 865 (9th Cir. 2017) (employee was fired); *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) (state court granted relief sought); *Fox v. Bd. of Trustees of State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994) (students no longer enrolled at university); *Monahan v. Nebraska*, 687 F.2d 1164, 1168 (8th Cir. 1982) (student moved out of school district).

South Carolina's only basis for its claim of mootness is that "according to [its] records," Medicaid has not reimbursed PPSAT for providing medical care to Ms. Edwards since 2018. Reply Br. 3. The state simply asserted that fact in its brief, with no further explanation, and without following the normal procedures for introducing new factual material into a case (such as a sworn declaration). The state also made that assertion without ever contacting Ms. Edwards or her counsel about her intention to receive care, and without providing notice to them that it intended to disclose new information about her medical care publicly.

Ms. Edwards plans to receive care from PPSAT in the future. Although no supplemental declaration should be required here, Ms. Edwards is filing a supplemental declaration concurrently with this brief. In that declaration, Ms. Edwards explains that she still is insured by Medicaid; that she still intends to receive gynecological and reproductive health care from PPSAT; that she has not seen any other providers for those medical needs since going to PPSAT in 2018; that she postponed obtaining medical care

from PPSAT due to the COVID-19 pandemic[1]; and that she in fact scheduled an upcoming appointment with PPSAT before she was aware of South Carolina's new argument. Supplemental Decl. of Julie Edwards 1-2. The Court may consider that supplemental declaration at this stage of the appeal. *See, e.g.*, *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1166 (4th Cir. 1977) (reviewing affidavits filed with injunction pending appeal to decide mootness). The supplemental declaration conclusively shows that Ms. Edwards continues to have standing to bring this case and that the dispute is not moot.

Finally, even if the case were moot, South Carolina's request (Reply Br. 7) that the Court vacate its prior preliminary-injunction decision lacks merit. The decision on which the state relies, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), is about vacating a district-court judgment so that a party whose appeal "is frustrated by the vagaries of circumstance" is not bound by an adverse judgment, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,* 513 U.S. 18, 25 (1994). It is not about courts of appeals vacating their own opinions from prior cases. Further, the concern in *Munsingwear* about forcing a litigant to acquiesce in an adverse judgment does

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[1] *See* Nora V. Becker et al., JAMA Health Forum, *Utilization of Women's Preventive Health Services During the COVID-19 Pandemic* (July 2, 2021), https://perma.cc/3VJZ-6PE7 (finding significant declines in use of women's preventative health services during the COVID-19 pandemic).

not apply to preliminary injunctions, which "become[] moot when the trial court enters a permanent injunction." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999). Courts therefore generally deny vacatur of preliminary injunctions when a case later becomes moot after the entry of judgment. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 296 (4th Cir. 2020) (en banc); *see Radiant Glob. Logistics, Inc. v. Furstenau*, 951 F.3d 393, 397 (6th Cir. 2020) (collecting authorities). For all of these reasons, the case is justiciable and the Court should decide this appeal on the merits.

CONCLUSION

South Carolina's termination of PPSAT from Medicaid continues to present a substantial risk of injury to Ms. Edwards. She has standing, and this case is not moot. The Court should decide the case on the merits and affirm the judgment of the district court.

Respectfully submitted,

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Dated: July 30, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Appellees certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a) because it contains 1604 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface and style requirements of Rules 32(a)(5) and 32(a)(6) because this document has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 30, 2021 /s/ *Nicole A. Saharsky*

EXHIBIT B

SUPPLEMENTAL DECLARATION OF JULIE EDWARDS

Julie Edwards declares the following:

1. I am a 34-year-old resident of Lexington County, South Carolina, and a patient at Planned Parenthood South Atlantic's Columbia location.

2. I am insured through Medicaid.

3. I plan to receive regular gynecological and reproductive health care, including annual wellness exams, at Planned Parenthood South Atlantic. Since visiting Planned Parenthood South Atlantic in 2018, I have not seen other providers for those medical needs.

4. Because I have been carefully socially distancing during the COVID-19 pandemic, I have significantly scaled back visits to doctors. Besides visits to specialists who have treated my Type 1 diabetes and related complications, I did not visit a doctor's office from March 2020 until April 2021.

5. After getting vaccinated in April 2021 to protect against COVID-19, I finally felt that it was safe enough to start making additional health care appointments again.

6. In early July 2021, I contacted Planned Parenthood South Atlantic and scheduled an appointment.

7. After I scheduled the appointment with Planned Parenthood South Atlantic, my attorneys updated me on the lawsuit challenging South

Carolina's termination of Planned Parenthood South Atlantic from participation in the state Medicaid program. They told me that South Carolina was questioning whether I still plan to receive health care at Planned Parenthood South Atlantic, and had looked through my personal health records. I was distressed to learn that South Carolina investigated and disclosed my health information without permission because that felt like an invasion of my privacy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 30, 2021.

/s/ Julie Edwards
Julie Edwards