NO. 21-1043

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD SOUTH ATLANTIC; JULIE EDWARDS, on her behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

ROBERT M. KERR, in his official capacity as Director, South Carolina Department of Health and Human Services,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of South Carolina (Columbia)
The Honorable Mary G. Lewis
Case No. 3:18-cv-02078-MGL

APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR LEAVE TO FILE A SURREPLY

KELLY M. JOLLEY
ARIAIL B. KIRK
JOLLEY LAW GROUP, LLC
P.O. Box 50529
Columbia, SC 29250
(803) 809-6500
kjolley@jolleylawgroup.com
akirk@jolleylawgroup.com

JOHN J. BURSCH
BURSCH LAW, PLLC
9339 Cherry Valley Ave SE #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Attorneys for Defendant-Appellant

RESPONSE TO MOTION

Appellees feign surprise that the Director would raise mootness at this stage of the case. Yet it was Appellees' own brief that brought the issue front and center when—three full years into the litigation—they admitted that Edwards has not *actually* sought to use Planned Parenthood South Atlantic's services since filing suit but merely "*intends* to obtain *future* health care" there. Appellees' Br. 6 (emphasis added). It was this revelation that caused the Director to review his payment records and discover that the only Medicaid payment made to Planned Parenthood on Edwards's behalf was on July 8, 2018—two weeks before Edwards filed her federal complaint. In other words, it was immediately apparent that Edwards had not sought to obtain healthcare from Planned Parenthood since that date three years earlier, not even for her "annual well woman exam." J.A. 61.

Given these admissions, this Court has the duty to inquire about potential mootness. After all, Edwards satisfies Article III's injury-in-fact requirement "only if [she] is *immediately* in danger of sustaining some *direct* injury as the result of the challenged official conduct." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002) (cleaned up). And "speculative contingencies afford no basis for . . . passing on the substantive issues." *Hall v. Beals*, 396 U.S. 45, 49 (1969) (per curiam). All this suggests the parties' controversy may no longer be "live." *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002).

The Director does not object to this Court accepting Appellees' Surreply Brief or Edwards's Supplemental Declaration for filing. But those documents raise more questions than answers:

1. In her Supplemental Declaration—which lacks an original signature—Edwards says that she "plan[s] to receive regular gynecological and reproductive health care, including annual wellness exams, at Planned Parenthood South Atlantic." Edwards Supp. Decl. ¶ 3. She claims she hasn't done so for more than three years because of "COVID-19." *Id.* ¶¶ 4–5. But that doesn't explain why Edwards failed to schedule an "annual" wellness exam in July 2019—one year after her first visit to Planned Parenthood. Nor does it explain why she failed to schedule an annual exam in August, September, October, November, or December 2019—months before COVID-19 reached the United States.

2. Edwards's Supplemental Declaration also says she finally felt safe enough to start making additional healthcare appointments after being vaccinated in April 2021. Edwards Supp. Decl. ¶ 5. Yet she then waited three more months—until an unspecified date in "early July 2021"—before contacting Planned Parenthood. *Id.* ¶ 6. Given that the Director filed his reply brief on July 2, 2021, one might wonder if it was the brief that spurred the scheduling. Surely Edwards's attorneys must have sent her the Director's brief when it was filed. And it is a curious omission that the Declaration does not say what specific date Edwards did the scheduling.

3. Appellees fault the Director for not explaining why he raised the mootness issue for the first time in reply. Surreply Br. 1. But as noted above, it was Appellees' own brief that first alerted the Director and the Court to the fact that Edwards has not actually been seeing Planned Parenthood for appointments. Appellees also fault the Director for not providing a supporting declaration. *Id.* But the Director can't prove a negative, i.e., that Edwards has *not* made any appointments with Planned Parenthood since filing her lawsuit. All the Director could do was check his records and see that no Medicaid payments had been made to Planned Parenthood for any appointments. But Edwards's Supplemental Declaration now helpfully confirms that the *only* appointment she ever had with Planned Parenthood was the single visit she made shortly before filing this lawsuit.

4. Appellees say that Edwards's mere *intent* to receive healthcare at Planned Parenthood is enough. Surreply Br. 2–3. Not so. As the Second and Eighth Circuit have held, "[t]he bare statement of intention is insufficient to escape mootness." *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 143 (2d Cir. 1994); *Monahan v. Nebraska*, 687 F.2d 1164, 1168 (8th Cir. 1982) (student's stated intent to move back and continue her education made her future school attendance merely "speculative" for purposes of adjudication). So whether this case is moot depends on how confident the Court feels that Edwards will keep her upcoming appointment and schedule future appointments.

5. Along the same lines, Appellees say this case is not moot because there has been no change in circumstances. Surreply Br. 4–5. But there has been. At the outset, Edwards made a single Planned Parenthood appointment and expressed her intent to do so at least annually. Even accounting for COVID-19, she didn't do that. That's the definition of a changed circumstance.

6. Appellees also scold the Director for not notifying them that he intended to disclose "new" information about her medical care to this Court. Surreply Br. 5. But it wasn't the Director who first disclosed the information; it was Appellees. After all, it was their own brief that made clear that Edwards had not received any health care at Planned Parenthood since 2018. Appellees' Br. 6.

7. Finally, Appellees suggest that this Court could dismiss the case as moot while leaving intact its prior decision about the Director's decision to remove Planned Parenthood as a qualified Medicaid provider. Surreply Br. 6–7. That result would harm the Director and South Carolina taxpayers in exactly the same way the Supreme Court warned against in *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) (discussing the need to vacate a prior judgment so that a party whose appeal "is frustrated by the vagaries of circumstances" is not bound by that judgment). The panel should dismiss and vacate its prior decision as moot or render a merits decision correcting that decision's errors. Director's Reply Br. 8–23.

Mayor of Baltimore v. Azar, 973 F.3d 258 (4th Cir. 2020) (en banc), Surreply 7, is not to the contrary. There, this Court dismissed an appeal of a preliminary injunction because it was affirming a permanent injunction on the same ground. 973 F.3d at 296. As the Sixth Circuit said in *Radiant Glob. Logistics, Inc. v. Furstenau*, Surreply 7, "vacatur exists to protect a losing litigant from having to live with the precedential and preclusive effects of an adverse ruling without having had a chance to appeal it." 951 F.3d 393, 397 (6th Cir. 2020) (cleaned up). That is the exact position the Director is in here if this case is dismissed as moot.

CONCLUSION

To recap, the Director does not object to Appellees' filing of their proposed Surreply Brief or Edwards's Supplemental Declaration. But those pleadings do not solve the mootness problem that Appellees' own merits brief raised, nor do they explain why Appellees failed to disclose this issue until filing their merits brief. Perhaps counsel can further explain the discrepancies at oral argument. If not, then the Court should dismiss this appeal as moot and vacate its previous opinion so the Director can resume his policy of excluding from its Medicaid program healthcare providers that take innocent human life. If counsel does explain the discrepancies, the Court should fix its "demonstrably incorrect" decision, *Planned Parenthood of Greater Texas Family Planning & Preventative Health Services, Inc. v. Kauffman*, 981 F.3d 347, 365–66 (5th Cir. 2020) (en banc), and reverse.

Dated: August 12, 2021

By: */s/ John J. Bursch*

KELLY M. JOLLEY
ARIAIL B. KIRK
JOLLEY LAW GROUP, LLC
P.O. Box 50529
Columbia, SC 29250
(803) 809-6500
kjolley@jolleylawgroup.com
akirk@jolleylawgroup.com

JOHN J. BURSCH
BURSCH LAW, PLLC
9339 Cherry Valley Ave SE #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because this brief contains 1,240 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: August 12, 2021

/s/ John J. Bursch
John J. Bursch
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
John J. Bursch
Attorney for Defendant-Appellant