No. 20-1113

IN THE
Supreme Court of the United States

AMERICAN HOSPITAL ASSOCIATION, *ET AL.*,
Petitioners,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for writ of certiorari remains accurate.

PETITION FOR REHEARING

Under Supreme Court Rule 44.2, Petitioners seek rehearing of the Court's order denying certiorari. Petitioners respectfully request that the Court vacate its order and hold the petition pending its decision in *American Hospital Association* v. *Becerra*, No. 20-1114.

Petitions for rehearing of an order denying certiorari may be granted where there are "intervening circumstances of a substantial or controlling effect." Sup. Ct. R. 44.2. That standard is met where, as here, the Court later grants certiorari in a separate case that raises the same or related issues. *See Kent Recycling Servs., LLC* v. *U.S. Army Corps of Eng'rs*, 136 S. Ct. 2427 (2016) (mem.); *Melson* v. *Allen*, 561 U.S. 1001 (2010) (mem.); *Simmons* v. *Sea-Land Servs., Inc.*, 462 U.S. 1114 (1983) (mem.).

The Court denied Petitioners' petition for a writ of certiorari on June 28, 2021. Four days later, it granted certiorari in *American Hospital Association* v. *Becerra*, No. 20-1114, which—like this case—concerns how *Chevron* deference bears on the authority of the Department of Health and Human Services (HHS) to interpret the Medicare Act to slash hospital reimbursement. How the Court resolves Case No. 20-1114 directly affects the final rule Petitioners challenge here and the D.C. Circuit's opinion upholding it.

Petitioners in Case No. 20-1114 asked the Court to grant certiorari to "enforce limits on *Chevron* deference" with respect to HHS's rule eliminating $1.6 billion for hospitals serving low-income communities. Petition for Writ of Certiorari at 15, *Am. Hosp. Ass'n*, No. 20-1114 (Feb. 10, 2021). They argued that HHS unlawfully "invoke[d] vague terms or ancillary

provisions to alter the fundamental"—and Congressionally-designed—"structure of [Medicare's hospital reimbursement] scheme." *Id.* at 16. This case is nearly identical, it also arises under 42 U.S.C. § 1395*l*(t), and the stakes are similarly very high for hospitals. The main difference between the two is that the reduction affects reimbursement to hospitals for outpatient clinic services, rather than for outpatient drugs.

In each case, HHS justified its decision to cut hundreds of millions or billions in Medicare reimbursement with an obscure statutory sub-provision that had been in effect for decades and had never before been interpreted to confer such sweeping authority to the agency. *Compare* Petition for Writ of Certiorari at 24, *Am. Hosp. Ass'n*, No. 20-1114 ("Congress buried [HHS's 'adjustment' authority] at the end of Subclause (II), and provided no indication (express or otherwise) that HHS could invoke it to render superfluous Subclause (I)"), *and id.* at 32 ("HHS's 'adjusted' reimbursement rates eviscerate the federal subsidy that has kept 340B Hospitals afloat for decades."), *with* Pet. 25 ("HHS completely bypassed that scheme in this case, based solely on its dubious interpretation of a sub-sub-sub provision of the Medicare statute that *does not even mention* reimbursement."), *and id.* at 10 ("Section (2)(F) has been on the books for over two decades, and HHS had never interpreted it to permit cuts to reimbursement rates."). And in both cases the District Court ruled that Congress's statutory scheme *unambiguously* denied HHS the authority it sought to slash reimbursement. Petition for Writ of Certiorari at 9-10, *Am. Hosp. Ass'n*, No. 20-1114; Pet. 10-12. In both cases—again—the D.C. Circuit reversed, invoking *Chevron* to countenance HHS's

strained statutory interpretation. Petition for Writ of Certiorari at 11-12, *Am. Hosp. Ass'n*, No. 20-1114; Pet. 12-13. Noting these parallels, Petitioners cited the D.C. Circuit's dissent in Case No. 20-1114 to demonstrate HHS's willingness to unlawfully "wield *Chevron* deference to re-write the Medicare statute." Pet. 26 (citing *Am. Hosp. Ass'n* v. *Azar*, 967 F.3d 818, 835 (D.C. Cir. 2020) (Pillard, J., dissenting in part)).

Moreover, each case centers on the same jurisdiction-stripping provision: 42 U.S.C. § 1395*l*(t)(12). In this case, the Government's lead argument against certiorari was that Subsection (t)(12) precludes judicial review of Petitioners' challenge. Br. in Opp. 14-19. The Government's lead argument in Case No. 20-1114 was identical. Brief in Opposition at 14-17, *Am. Hosp. Ass'n*, No. 20-1114 (May 13, 2021). In Case No. 20-1114, the Court has directed the parties to brief and argue whether Section 1395*l*(t)(12) precludes the petitioners' challenge to HHS's Medicare adjustments in that case. *See Am. Hosp. Ass'n* v. *Becerra*, __ S. Ct. __, 2021 WL 2742784 (July 2, 2021).

The petitions in Case Nos. 20-1113 and 20-1114 were filed on the same day—each by the American Hospital Association, among others. And, strikingly, the two D.C. Circuit decisions below were authored by the same judge, with a second judge also sitting on both panels.

The D.C. Circuit should be given an opportunity to revisit the decision below in light of this Court's forthcoming opinion in *American Hospital Association* v. *Becerra*, No. 20-1114. That decision will bear directly on the validity of HHS's final rule and will guide lower courts on how to assess its lawfulness.

Petitioners respectfully request that the Court grant their petition for rehearing, vacate its order denying certiorari, and hold their petition for certiorari pending the Court's decision in *American Hospital Association* v. *Becerra*, No. 20-1114. Then, if the Court reverses the D.C. Circuit in Case No. 20-1114, Petitioners request that it grant their petition for certiorari, vacate the decision below, and remand (GVR).

In the alternative, Petitioners request that the Court wait to rule on their petition for rehearing until after it issues a decision in Case No. 20-1114—as it has done in a number of previous cases. *See Addison* v. *New Hampshire*, 565 U.S. 1174 (2012) (mem.) (denying petition for rehearing only after deciding a related issue in *Perry* v. *New Hampshire*, 565 U.S. 228 (2012)); *Smith* v. *Florida*, 567 U.S. 954 (2012) (mem.) (denying petition for rehearing only after deciding a related issue in *Williams* v. *Illinois*, 567 U.S. 50 (2012)).

Respectfully submitted,

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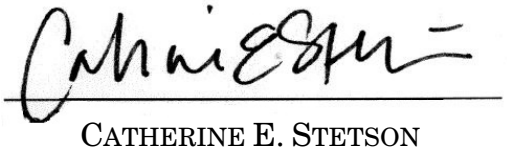
CERTIFICATE OF COUNSEL

Under Rule 44.2, Counsel certifies that the Petition for Rehearing is restricted to the grounds specified in the rule with substantial grounds not previously presented. Counsel certifies that this Petition is presented in good faith and not for delay.



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July 23, 2021