Nos. 20-429, 20-539

# In the Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION, et al.,
*Petitioners*,
v.
NORRIS COCHRAN, Acting Secretary of Health and Human Services, et al.,
*Respondents*.

State of OREGON, et al.,
*Petitioners*,
v.
NORRIS COCHRAN, Acting Secretary of Health and Human Services, et al.,
*Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE STATES OF OREGON, NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA IN OPPOSITION TO MOTIONS FOR LEAVE TO INTERVENE


ELLEN F. ROSENBLUM
*Attorney General of Oregon*
BENJAMIN GUTMAN
*Solicitor General*
1162 Court Street N.E.
Salem, OR 97301

XAVIER BECERRA
*Attorney General of California*
1300 I Street
Sacramento, CA 95814

LETITIA JAMES
*Attorney General of New York*
BARBARA D. UNDERWOOD*
*Solicitor General*
ANISHA S. DASGUPTA
*Deputy Solicitor General*
JUDITH N. VALE
*Senior Assistant Solicitor General*
LAURA ETLINGER
*Assistant Solicitor General*
28 Liberty Street
New York, NY 10005
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

(*Complete counsel listing appears on signature pages.*)

## TABLE OF CONTENTS

**Page**

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**



**Federal Regulations**



**Rules**

**Miscellaneous Authorities** **Page(s)**

## INTRODUCTION

The petitioners in No. 20-539—twenty-one States and the District of Columbia—oppose the motions to intervene filed by (1) Ohio and eighteen other States and (2) the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), the Christian Medical and Dental Associations (CMDA), and the Catholic Medical Association (CMA). The Court should deny the motions because the parties have stipulated to dismiss these proceedings under Supreme Court Rule 46.1, which provides for automatic dismissal of the proceedings when the parties agree that they no longer have a dispute for the Court to resolve. In any event, the proposed intervenors cannot meet the high standard for intervention at this late stage of the litigation. Indeed, the proposed intervenors will not suffer any adverse impact if the proceedings are dismissed and the decisions below stand without this Court's review. A dismissal will result in the Rule continuing in effect in every State except Maryland, and the proposed intervenors claim no harm from the Rule's inapplicability there.

## STATEMENT

In these consolidated cases, plaintiffs challenge a 2019 rule promulgated by the Department of Health and Human Services (HHS) that undermines the stability of the Title X program, 42 U.S.C. § 300 et seq., which funds family planning services and reproductive health care for patients who have low incomes, live in rural communities, or face other barriers to accessing medical care. The Rule prohibits Title X providers from communicating certain abortion-related information to their patients, and requires physical separation of Title X–funded care from healthcare facilities that provide

abortion services or certain abortion-related information. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714 (Mar. 4, 2019). Plaintiffs in these cases—twenty-two States and the District of Columbia, the Mayor and City Council of Baltimore, the American Medical Association, reproductive healthcare organizations that include many historical Title X providers, and several private Title X grantees and subgrantees—brought a number of separate lawsuits against HHS and related entities challenging the Rule as contrary to law and arbitrary and capricious.

The U.S. District Courts for the District of Oregon, the Northern District of California, and the Eastern District of Washington each preliminarily enjoined the Rule's implementation. (AMA Pet. App. 133a, 156a, 269a.) The U.S. Court of Appeals for the Ninth Circuit granted defendants' request for a stay of these preliminary injunction orders, thereby allowing the Rule to take effect. (AMA Pet. App. 289a (panel stay order).) An en banc panel of the Ninth Circuit maintained the stay pending its consideration of the matter, *California v. Azar*, 928 F.3d 1153 (9th Cir. 2019) (order) (en banc), and then vacated the preliminary injunctions (AMA Pet. App. 5a). The Ninth Circuit en banc panel rejected plaintiffs' arguments that the Rule is contrary to an appropriations rider requiring that pregnancy counseling in the Title X program be nondirective, contrary to the Noninterference Mandate of the Affordable Care Act, and is arbitrary and capricious. (AMA Pet. App. 68a.)

In a separate lawsuit, the U.S. District Court for the District of Maryland preliminarily enjoined the Rule's enforcement within Maryland, and later issued a final judgment permanently enjoining the Rule's

implementation and vacating the Rule within Maryland. (Baltimore Pet. App. 133a-134a, 178a-179a.) Defendants appealed from both of those decisions, and the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, affirmed. The en banc Fourth Circuit held that the Rule was contrary to both the Nondirective Mandate and the Noninterference Mandate and arbitrary and capricious. (Baltimore Pet. App. 25a-26a, 38a-39a, 50a.)

At present, the Rule remains in effect everywhere except Maryland. On January 28, 2021, President Joseph R. Biden directed HHS to review the Rule and to consider "as soon as practicable, whether to suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding [the Rule]." Memorandum on Protecting Women's Health at Home and Abroad, 2021 Daily Comp. of Pres. Doc. 100, at 2 (Jan. 28, 2021). On March 18, 2021, HHS announced that following its review it has determined to propose revised regulations and expects to file the Notice of Proposed Rulemaking by April 15, 2021. Office of Population Affairs, HHS, OPA Newsroom, *Office of Population Affairs Statement on Proposed Revision of Title X Regulations*, https://opa.hhs.gov/about/news/opa-newsroom.

In February 2021, this Court granted petitions for a writ of certiorari filed by various plaintiffs in the Ninth Circuit cases and defendants in the Fourth Circuit case, and consolidated the proceedings. On March 12, all of the parties to these consolidated cases filed joint stipulations pursuant to Rule 46 of this Court's Rules, stipulating that each of the cases be dismissed by this Court.

Two groups have moved to intervene: (1) Ohio and eighteen other States, and (2) AAPLOG, CMDA, and

CMA, all of which are private medical organizations. None of them sought to participate as parties during the proceedings below or at the certiorari stage in this Court.

## ARGUMENT

### I. The Court's Rules Require Dismissal of These Proceedings and Denial of the Motions to Intervene as Moot.

The Court should deny the motions to intervene because the parties' joint stipulations require dismissal, leaving no proceeding in which the parties may intervene. Rule 46.1 of the Rules of this Court permits parties to stipulate to dismissal as a matter of right. The rule allows dismissal "[a]t any stage of the proceedings," including after certiorari has been granted, and "whenever all parties file with the Clerk an agreement in writing that a case be dismissed." Sup. Ct. R. 46.1. Once the stipulation is filed, the "Clerk, without further reference to the Court, will enter an order of dismissal." *Id.* Rule 46.1 serves the important purpose of ensuring that appeals are dismissed when the parties have resolved the dispute that previously presented itself on appeal and thus no longer have any live controversy for this Court to address. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* 969 (10th ed. 2013) (parties that agree to dismiss proceedings without seeking vacatur of decisions below should file stipulation to dismiss under Rule 46.1).

The Court should follow Rule 46.1 here. All of the parties have jointly stipulated to dismissal of the proceedings before this Court. Proposed intervenors are not parties, and thus under Rule 46.1 their agreement was not required.

Rule 46.1 requires the Clerk to dismiss the proceedings regardless of the pending motions to intervene. The cases on which proposed intervenors rely (AAPLOG Suppl. Br. in Supp. of Intervention (AAPLOG Suppl. Br.) 3-4) are not to the contrary. Those cases did not address the propriety of entering a stipulated dismissal despite pending intervention motions, but rather addressed the jurisdiction of a court to consider a motion to intervene where the underlying proceedings had already been dismissed. None of them involved Rule 46.1 or any other court rule providing for the automatic dismissal of appellate proceedings after the parties filed stipulations of dismissal.

The proposed intervenors are mistaken in suggesting that there is something "collusive" or untoward (States Suppl. Br. in Supp. of Intervention (States Suppl. Br.) 2; AAPLOG Suppl. Br. 6) about the parties independently resolving their disputes on appeal and thus obviating the need for this Court's review. To the contrary, the federal courts exercise jurisdiction "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy" between parties. *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892); *accord Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chicago*).

Where the parties are able to resolve their differences and eliminate any live controversy on appeal, the courts do not weigh in to issue a purely "advisory opinion[] on abstract propositions of law," *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)—even if others might prefer to receive such advice. Indeed, resolution of appellate proceedings without the need for further court involvement should be encouraged—as Rule 46.1 is designed to do, by allowing the parties to agree to

dismiss at any stage of the proceedings and without further consideration by the Court.

Once the proceedings are dismissed under Rule 46.1, the motions will be moot. Accordingly, the Court should dismiss these proceedings under Rule 46.1 and deny the motions to intervene as moot.

## II. The Motions Should Be Denied Because No Extraordinary Circumstances Warrant Intervention.

If the Court elects to address the motions to intervene, the motions should be denied because there are no extraordinary circumstances warranting intervention here. This Court grants motions to intervene only in exceedingly rare circumstances, and, as shown by the Court's cases, only where it is clear on the face of the motion to intervene that the proposed intervenor's important interests will be directly affected by the proceeding. Here, the vital interest needed to intervene must include Article III standing to obtain this Court's review of decisions below that the existing parties no longer seek to have reviewed. The proposed intervenors attempt to meet that high standard by asserting standing to defend the Rule as a general matter. But even if they would have standing to defend the Rule in an existing proceeding between adverse parties, and they do not (see *infra*, at 15-18), they do not have standing to pursue appellate review that the parties no longer seek.

The proposed intervenors lack any interest in preventing dismissal of the petitions here because they will not suffer any adverse impact from letting the decisions below stand without this Court's review. To the contrary, letting those decisions stand will leave in

place the Rule the proposed intervenors seek to defend in all of the jurisdictions that affect them. If these proceedings are dismissed, as the parties have stipulated, the Rule will remain in effect everywhere except for Maryland.

Neither group of proposed intervenors has identified any adverse impact on them from the two decisions at issue here, or any relief that would be afforded to them by preventing dismissal of the petitions. Under the Ninth Circuit decision, the Rule will remain in effect in Ohio and the other proposed intervenor States. The proposed intervenor States will thus not be adversely affected by the absence of this Court's review of the Ninth Circuit decision, and they have not asserted any adverse impact from the Fourth Circuit decision that set aside the Rule solely in Maryland. Similarly, the proposed private intervenors—AAPLOG, CMDA, and CMA—have not identified any members who work for Title X clinics in Maryland, much less members adversely affected by the injunction, and thus those organizations have not shown any adverse impact from either decision below remaining undisturbed.

### A. Intervention in This Court Is Exceedingly Rare and Has Been Permitted Only Where the Required Impact on the Intervenor Is Clear on the Face of the Application.

1. This Court has permitted parties to intervene in cases at the appellate stage only "on a few occasions," and only "in unusual circumstances" where the proposed intervenors' rights are "vitally affected" by the judgments below. Shapiro, at al., *supra*, at 427. The Court "routinely denies intervention motions without comment." *Id.* at 428. Indeed, intervention in appellate-stage cases is so rare that the Court has had no occasion

to express a standard or guiding principle to govern such extraordinary relief.[1]

Intervention for the first time at the appellate stage presents such unique problems that the courts of appeals grant intervention "only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam) (quotation marks omitted); *accord Peruta v. County of San Diego*, 771 F.3d 570, 572 (9th Cir. 2014) (order); *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000); *In re Grand Jury Investigation into Possible Violations of Tit. 18, etc.*, 587 F.2d 598, 601 (3d Cir. 1978); *see Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997); *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (order).

Because this Court and the parties cannot easily inquire into the claimed bases for intervention in appellate-stage cases, the Court has permitted intervention only when the basis for intervention is strong and plainly established by the application itself. For example, in *Rogers v. Paul*, a case on which Ohio relies (States Mot. to Intervene (States Mot.) 13), the Court allowed, on motion of the petitioners, two students to be added as parties in a school desegregation class-action case where the named plaintiff students were graduating and thus were no longer affected by the judgment. 382 U.S. 198, 199 (1965) (per curiam). The record in *Rogers* already demonstrated the basis for the new plaintiffs' standing because the uncontested facts

---

[1] The Court has confirmed that Rule 24 of the Federal Rules of Civil Procedure "appl[ies] only in the federal district courts," while recognizing that "the policies underlying intervention may be applicable in appellate courts." *Automobile Workers v. Scofield*, 382 U.S. 205, 217, n.10 (1965).

established that they were similarly situated to the existing plaintiff-petitioners. *Id*. Likewise, in *Mullaney v. Anderson*, also relied on by Ohio (States Mot. 7), the Court granted the motion of the plaintiff association to add two of its members as parties when the respondent questioned the association's standing for the first time after certiorari had already been granted. 342 U.S. 415, 416-17 (1952). There too, the concrete interest of the members, on whose behalf the association had brought suit, and the impact of any ruling upon them, was already clear from the record developed below. Indeed, the Court noted that the addition of these parties "merely puts the principal, the real party in interest, in the position of his avowed agent."[2] 342 U.S. at 417.

Other cases in which the Court has permitted such late-stage intervention also involved situations where there was no question that the proposed intervenor's interests would be directly and vitally affected by the outcome of the litigation. For example, in *Turner v. Rogers*, the Court allowed respondent's father, who then had custody of her child, to intervene in a proceeding to enforce a support order against the child's father. 564 U.S. 431, 436 (2011); *see Turner v. Rogers*, 562 U.S. 1002 (2010) (granting intervention motion). In *Beth Israel Hospital v. NLRB*, the Court

---

[2] The original jurisdiction cases on which the proposed intervenor States rely (States Mot. 7, 13) are inapposite. Intervention in a case over which this Court has original jurisdiction does not raise the unique concerns at issue when intervention is sought at the appellate stage of litigation because in an original-jurisdiction case the parties and proposed intervenor have the opportunity to develop a factual record regarding standing. *See, e.g.*, *South Carolina v. North Carolina*, 558 U.S. 256, 259 (2010) (noting that motions to intervene were referred to Special Master who held a hearing when motions were opposed).

allowed a union to intervene in a National Labor Relations Board (NLRB) action based on a charge filed by the union. 437 U.S. 483 (1978). In *NLRB v. Acme Industrial Co.*, the Court allowed a union to intervene in NLRB proceedings against an employer that sought to preclude enforcement of an NLRB order issued in the union's favor. 385 U.S. 432 (1967); *see NLRB v. Acme Industrial Co.*, 384 U.S. 925 (1966) (granting intervention motion). And in *United States v. Terminal Railroad Association of St. Louis*, the proposed intervenor companies sought to intervene in a proceeding concerning the modification of a decree of this Court that restricted the ability of a transportation company to move goods and materials to and from the intervenors' businesses. 236 U.S. 194, 199 (1915).

2. Where a proposed intervenor attempts to pursue appellate review that the parties do not seek, the vital interest in the proceedings that the proposed intervenor must show includes an Article III interest in maintaining the appeal, i.e., a concrete stake in having the decision below reviewed further and potentially reversed. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *see also Camreta v. Greene*, 563 U.S. 692, 701-02 (2011) (party that prevails in lower court must have "necessary personal stake in the appeal" to seek appellate review). A proposed intervenor that independently seeks to invoke the appellate court's jurisdiction "must independently demonstrate standing" to seek appellate review. *Virginia House*, 139 S. Ct. at 1951; *see Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."); *Arizonans for Official English v. Arizona*, 520 U.S. 43,

64-65 (1997); *Diamond v. Charles*, 476 U.S. 54, 68 (1986). A comparable rule exists when a proposed intervenor seeks relief different from the relief sought by the party with which it is aligned. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

The proposed intervenors must satisfy this high bar here. As the proposed intervenors acknowledge (States Mot. 13, States Suppl. Br. 1; AAPLOG Mot. to Intervene (AAPLOG Mot.) 11, 14; AAPLOG Suppl. Br. 1-2), the reason they seek party status is to keep the proceedings before this Court alive even though the existing parties no longer seek this Court's review of the decisions below and have therefore filed stipulations to dismiss the current proceedings. The proposed intervenors thus seek to maintain an appeal that the parties have agreed to dismiss—a situation akin to seeking to appeal a decision that the parties do not challenge. Accordingly, the proposed intervenors must demonstrate that they have a concrete Article III interest in obtaining this Court's review of the decisions below. *See* States Mot. 9 (acknowledging need to establish Article III standing). And they must demonstrate that their interest in this Court's review is so vital and extraordinary that they should be permitted to intervene in this Court at this late stage. The proposed intervenors have utterly failed to meet this high standard.

### B. The Proposed Intervenors Have Not Established Any Vital or Concrete Interest in Obtaining This Court's Review of the Decisions Below.

The proposed intervenors fail to demonstrate that they have any interest in preventing dismissal and obtaining this Court's review of the decisions below—

let alone the extraordinary interest required for intervention.

1. The proposed intervenor States have no vital, concrete interest in this Court's review because dismissal of the proceedings before this Court will *leave the Rule intact* in all of the proposed intervenor States' jurisdictions and, indeed, in every State except Maryland. None of the proposed intervenors has established—or even sought to establish—that they are harmed by the Ninth Circuit decision declining to disturb the Rule. Nor have they shown that they are harmed by the Fourth Circuit decision's vacatur of the Rule in Maryland, particularly when they have not demonstrated that they operate or are involved with any Title X–funded clinics in Maryland. Indeed, if these proceedings are dismissed, as the parties have stipulated, Ohio and the other proposed intervenors will obtain the very result they claim to want to pursue in these appeals: continuing to operate their Title X projects under the legal regime created by the Rule. As the proposed intervenor States acknowledge, "the Fourth Circuit's decision caused the Proposed Intervenor States no direct harm." States Mot. 12.

The proposed intervenor States misplace their reliance on claimed financial interests in Title X funding that purportedly became available because of the Rule. The proposed intervenor States assert that they have an Article III interest in this Court's review because one of the proposed intervenor States (Ohio) obtained "funding that would otherwise have gone to Planned Parenthood" after the Rule became effective and the Planned Parenthood grantees in Ohio left the Title X program. States Mot. 5; *see also id.* at 9. But Ohio's claimed financial interests will not be affected at all if the proceedings before this Court are dismissed

pursuant to the parties' agreed stipulations. As an initial matter, Ohio's current Title X grants last until March 2022.[3] Ohio's existing Title X grants—as well as grants already received by any of the other proposed intervenor States—will for that reason alone not be reduced or affected in any way by a dismissal of these proceedings.

Moreover, since dismissal leaves the Rule in place with respect to the proposed intervenor States, their asserted interest in potential further "additional funding" (States Mot. 10) also does not establish any concrete interest in obtaining review of the decisions below; review cannot provide them with any access to funding that they do not already have. The "additional funding" that Ohio previously received and wants to continue to receive was distributed under a grant-making process that applied the Rule to all States except Maryland.[4] Dismissal of these cases will continue that status quo and preserve the proposed intervenor States' purported ability to compete for additional funding in the future.

---

[3] *See* Office of Population Affairs, HHS, *HHS Awards Title X Family Planning Service Grants* (Mar. 29, 2019), https://opa.hhs.gov/about/news/grant-award-announcements/hhs-awards-title-x-family-planning-service-grants.

[4] *See* Office of the Assistant Sec'y for Health, HHS, *Funding Opportunity: FY2020 Title X Services Grants: Providing Public-Funded Family Planning Services in Areas of High Need* (May 29, 2020), https://www.grants.gov/web/grants/view-opportunity.html?oppId=323353; Office of the Assistant Sec'y for Health, HHS, *FY2020 Title X Services Grants: Providing Publicly-Funded Family Planning Services in Areas of High Need – Maryland Service Area Only* (May 29, 2020), https://www.grants.gov/web/grants/view-opportunity.html?oppId=327358.

The proposed intervenor States are also not aided by their claimed interest in operating a Title X program "without appearing to put their imprimatur on abortion." *See id.* at 9. A dismissal of the current proceedings will mean that the current Rule's restrictions on pregnancy counseling and physical-separation requirements will continue to apply to all of the Title X projects operating in the proposed intervenor States' jurisdictions, as the proposed intervenors say they want. The Rule's invalidity in Maryland under the Fourth Circuit decision will have no effect on the proposed intervenor States' continued operation of their own Title X clinics under the Rule's provisions.

2. The proposed private intervenors also have not demonstrated that they have Article III standing to obtain this Court's review of the decisions below when the parties no longer seek the Court's review. The private proposed intervenors are organizations of healthcare professionals who assert that they have "[s]everal" members who "work at healthcare facilities that receive Title X funds." (AAPLOG Mot., Add. A, Decl. of Christina Francis ¶ 7 (Mar. 11, 2021); *id.*, Add. B, Decl. of Mike Chupp ¶ 6 (Mar. 11, 2021); *id.*, Add. C, Decl. of Mario Dickerson ¶ 6 (Mar. 11, 2021).) But those assertions come nowhere near to establishing any of the organizations' standing or vital interest in maintaining these proceedings.

Even assuming that the organizations can rely on their members' interests in the standing analysis, their assertions do not show that any of their members have a personal stake in review of the decisions below. As noted above, the practical result of dismissing these petitions is that the Rule will remain in effect everywhere except Maryland. Any of the proposed private intervenors' members who work outside of

Maryland will continue to be covered by the Rule and will not be affected by dismissal of these proceedings. Because the declarations do not assert that the organizations have members who work in Title X–funded clinics in Maryland, nor identify such Maryland members with cognizable interests at stake, the proposed intervenors have not identified *any* members who would be directly affected by dismissal of the proceedings.

Accordingly, the proposed intervenors have not established the extraordinary circumstances required to allow intervention in this Court to prolong a proceeding that all parties have stipulated to dismiss. The parties are entitled to dismiss their respective petitions and end these proceedings.

### C. The Proposed Intervenors Also Have Not Established Any Vital or Concrete Interest in Defending the Rule if This Court Were to Review the Decisions Below.

As explained above, proposed intervenors should not be permitted to intervene to prevent dismissal, because dismissal of these petitions will have no impact whatsoever on their funding or their conduct. Indeed, even if the proceedings in this Court were for some reason to continue, the proposed intervenors would not have the strong and concrete interest in defending the Rule that would be necessary to warrant their intervention.

1. The proposed intervenor States do not have a concrete interest in defending the Rule for several reasons. First, any current Title X grants that Ohio or the other proposed intervenor States already have

received will continue until March 2022 (see *supra*, at 13), and therefore their financial interests in those grants will not be affected by a ruling from this Court upholding or invalidating the Rule.

Second, in any event, the proposed intervenors' claimed interest in the Rule is based on their mistaken assertion that the Rule is responsible for making funding available to them, funding they would lose if it were invalidated. But Ohio did not obtain additional federal funds as a direct result of the Rule; it received additional funds because the other grantees then participating in the program decided not to compete for funding under the Rule. Thus, Ohio's potential receipt of enhanced funding depends principally on the actions of other prospective grantees who may or may not choose in the future to compete for those funds. Indeed, even if the Rule is sustained, other potential grantees in Ohio may participate in future Title X grant applications and compete with Ohio for the available funds. Ohio's asserted interest in federal funding thus does not establish Article III standing.

Ohio's funding allocation is thus not "fairly traceable" to the Rule's validity, and a final decision upholding the Rule may or may not result in Ohio continuing to have fewer competitors, *See Allen*, 468 U.S. at 751; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The lack of competition for funds that Ohio wants to preserve "results from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *accord Lujan*, 504 U.S. at 560 (quoting *Simon*). Under such circumstances, Ohio cannot satisfy

the traceability or redressability requirements of Article III.[5]

Ohio misplaces its reliance on the Court's recent grant of an intervention motion in *BNSF Railway Co. v. EEOC*, 140 S. Ct. 109 (2019). In *BNSF Railway*, the injured employee who sought to intervene had an express statutory right to intervene in the lawsuit that the EEOC had brought on the employee's behalf against the employer. Russell Holt's Mot. for Leave to Intervene as Resp. at 5 (Aug. 22, 2019) (No. 18-1139) (citing 42 U.S.C. § 2000e-5(f)(1) and 42 U.S.C. § 12117(a)), *BNSF Railway*, 109 S. Ct. 109, 2019 WL 5084116. No such statutory basis for intervention exists here. *Cf.* Fed. R. Civ. P. 24(a)(1) (intervention as of right where proposed intervenor "is given an unconditional right to intervene by a federal statute"). In addition, the intervenor in *BNSF Railway* plainly had a concrete interest directly traceable to the outcome of the litigation because he would have lost the $100,000 judgment that the EEOC had obtained for him if, absent his intervention, the judgment had been vacated based on the EEOC's confession of error. *See* Holt's Mot. at 1, 5-6. Ohio and the other proposed intervenor States here fail to assert any such tangible injury directly traceable to a ruling

---

[5] Contrary to their contention (States Mot. 9), the proposed intervenor States also do not have a concrete interest in ensuring that the Rule's counseling and physical separation requirements continue to apply to them. Ohio and many of the proposed intervenor States participated for many years in the Title X program under the prior rule that would be in place if the Rule were invalidated. And to the extent they claim that a future rule change may affect them, their interest is merely speculative and unrelated to the current proceedings. Policy preferences about potential future regulations do not establish a vital interest necessary for intervention here.

vacating the Rule, or redressable by a decision upholding it.

2. Nor have the private proposed intervenors identified any vital and concrete interest in defending the Rule, and thus their motion too should be denied, even if they had identified specific members who work in Title X–funded clinics in Maryland and personally provide services affected by the Rule (which they did not do). The proposed intervenors assert that they have an interest in maintaining the Rule's "conscience protections" for individual healthcare providers who object to referring a patient for an abortion. (AAPLOG's Mot. 2). But protections for individual providers remain in place even without the Rule. HHS has represented that it will not enforce the Title X regulations' requirement of nondirective pregnancy counseling against an individual who has a religious objection to providing that counseling. *See Oregon v. Azar*, No. 19-35386, Suppl. Excerpts of Record (9th Cir.), ECF 62, at 207-208 (Letter from Assistant Sec'y for Health to Reg'l Health Adm'rs (Jan. 15, 2009)).

Thus, any decision from this Court invalidating the Rule would not change the protections that individual healthcare providers have in Maryland. Indeed, the proposed private intervenors have not shown that the Fourth Circuit's decision caused a concrete change in working conditions for any of their members—much less that the change is of a magnitude that they should be allowed to intervene on appeal. For those reasons, these proceedings do not present the sort of extraordinary circumstances that might justify intervention at this late date in the litigation.

### D. If the Court Does Not Dismiss These Proceedings, the Requests to Participate in Oral Argument Should Be Denied.

If the Court does not dismiss these proceedings, it should deny the proposed intervenors' requests for permission to participate in oral argument without prejudice to renew their requests at an appropriate time. This Court does not generally consider motions relating to the argument until after a date has been set for argument and all of the principal briefs have been filed. *See* Sup. Ct. R. 28.7. That practice should be followed here, because only then will the Court have before it information about all competing requests for argument time. And if intervening events result in a disposition of this matter without argument, then it will be unnecessary for the Court to resolve any applicants' requests for argument time.

## CONCLUSION

The motions for leave to intervene should be denied.

Respectfully submitted,

ELLEN F. ROSENBLUM
*Attorney General*
*State of Oregon*
BENJAMIN N. GUTMAN
*Solicitor General*
JONA J. MAUKONEN
*Senior Assistant Attorney General*

XAVIER BECERRA
*Attorney General*
*State of California*
MICHAEL MONGAN
*Solicitor General*
JOSHUA PATASHNIK
*Deputy Solicitor General*

LETITIA JAMES
*Attorney General*
*State of New York*
BARBARA D. UNDERWOOD*
*Solicitor General*
ANISHA S. DASGUPTA
*Deputy Solicitor General*
JUDITH N. VALE
*Senior Assistant Solicitor General*
LAURA ETLINGER
*Assistant Solicitor General*
barbara.underwood@ag.ny.gov

March 18, 2021

* *Counsel of Record*

*(Counsel list continues on next page.)*

PHIL WEISER
*Attorney General*
*State of Colorado*
136 State Capitol Bldg.
Denver, CO 80203

MAURA HEALEY
*Attorney General*
*Commonwealth of Massachusetts*
One Ashburton Pl.
Boston, MA 02108

WILLIAM TONG
*Attorney General*
*State of Connecticut*
P.O. Box 120
55 Elm St.
Hartford, CT 06106

DANA NESSEL
*Attorney General*
*State of Michigan*
P.O. Box 30212
Lansing, MI 48909

KATHLEEN JENNINGS
*Attorney General*
*State of Delaware*
820 N. French St., 6th Fl.
Wilmington, DE 19801

KEITH ELLISON
*Attorney General*
*State of Minnesota*
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd
Saint Paul, MN 55101

CLARE E. CONNORS
*Attorney General*
*State of Hawai'i*
425 Queen St.
Honolulu, HI 96813

AARON FORD
*Attorney General*
*State of Nevada*
100 North Carson St.
Carson City, NV 89701

KWAME RAOUL
*Attorney General*
*State of Illinois*
100 W. Randolph St.
Chicago, IL 60601

GURBIR S. GREWAL
*Attorney General*
*State of New Jersey*
25 Market St.
Trenton, NJ 08625

BRIAN E. FROSH
*Attorney General*
*State of Maryland*
200 St. Paul Pl., 20th Fl.
Baltimore, MD 21202

HECTOR BALDERAS
*Attorney General*
*State of New Mexico*
P.O. Drawer 1508
Santa Fe, NM 87504

JOSHUA H. STEIN
*Attorney General*
*State of North Carolina*
114 W. Edenton St.
Raleigh, NC 27603

JOSH SHAPIRO
*Attorney General*
*Commonwealth of Pennsylvania*
Strawberry Sq., 16th Fl.
Harrisburg, PA 17120

PETER F. NERONHA
*Attorney General*
*State of Rhode Island*
150 South Main St.
Providence, RI 02903

THOMAS J. DONOVAN, JR.
*Attorney General*
*State of Vermont*
109 State St.
Montpelier, VT 05609

MARK R. HERRING
*Attorney General*
*Commonwealth of Virginia*
202 North 9th St.
Richmond, VA 23219

JOSHUA KAUL
*Attorney General*
*State of Wisconsin*
P.O. Box 7857
Madison, WI 53707

KARL A. RACINE
*Attorney General*
*District of Columbia*
Suite 630 South
441 4th St., NW
Washington, DC 20001