Nos. 20-429, 20-454

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.*

NORRIS COCHRAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*, *Petitioners*,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

OPPOSITION OF PETITIONERS IN 20-429 AND RESPONDENT IN 20-454 TO MOTIONS OF OHIO ET AL. AND THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS ET AL. FOR LEAVE TO INTERVENE

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INTRODUCTION

The States of Ohio et al. and the American Association of Pro-Life Obstetricians and Gynecologists et al. (collectively, Movants) seek to intervene to defend the validity of a Title X regulation issued by the Department of Health and Human Services. But the parties in these consolidated cases—the federal government and the plaintiffs that challenged the regulation below—already have stipulated to dismissal under Rule 46.1, which in turn mandates "an order of dismissal." And even if that were not enough to end these cases, HHS is

reexamining the regulation and is virtually certain to rescind or replace it soon, rendering this dispute moot. Lest there be any doubt on that, HHS dispelled it today—announcing that, by April 15, 2021, it "plans to propose revised regulations substantially similar to those issued in 2000." The intervention motions should be denied.

This is a case about HHS's regulatory authority concerning the Title X program—in particular, whether the federal regulation at issue is arbitrary and capricious and contrary to law. While Movants have views on those questions, they do not have interests that would justify allowing them to wrest this case away from the parties. Should Movants be aggrieved by the replacement regulation issued by HHS, they will be free to challenge it in a federal district court. But they should not be permitted to force the parties to litigate, or this Court to decide, the validity of a regulation that will soon cease to exist.

BACKGROUND

These consolidated cases arise from a 2019 HHS Rule that imposed significant changes on the Title X family planning program. *See* 84 Fed. Reg. 7,714 (Mar. 4, 2019). The Rule requires that Title X providers withhold certain information about abortion from pregnant patients, even if the patient wants that information, and requires providers to inform patients about non-abortion options, even if a patient does not want or need them. It also imposes physical-separation provisions requiring providers to establish separate facilities and to employ duplicative personnel and medical records if they engage in virtually any abortion-related activity outside the Title X program.

Numerous parties, including petitioners the American Medical Association et al. (No. 20-429), and respondent the Mayor and City Council of Baltimore (No. 20-454), filed lawsuits challenging the Rule as arbitrary and capricious and contrary to law. Ultimately, the Fourth and Ninth Circuits divided over the Rule's validity, and this Court granted certiorari. *See* __ S. Ct. __, 2021 WL 666372 (Feb. 22, 2021).

Shortly after taking office, President Biden issued a memorandum addressing the Rule. Specifically, President Biden directed as follows:

> The Secretary of Health and Human Services shall review the Title X Rule and any other regulations governing the Title X program that impose undue restrictions on the use of Federal funds or women's access to complete medical information and shall consider, as soon as practicable, whether to suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those regulations, consistent with applicable law, including the Administrative Procedure Act.

Memorandum on Protecting Women's Health at Home and Abroad § 2 (Jan. 28, 2021). In so doing, President Biden underscored the Rule's grave harms, including that it "puts women's health at risk by making it harder for women to receive complete medical information." *Id.* § 1. It is thus virtually certain that the Rule will, at minimum, be significantly revised. President Biden repeatedly has made clear that he opposes and will reverse it. *See, e.g.*, AMA et al. Pet. Reply 2-3.

Nonetheless, two sets of non-parties, the States of Ohio et al. and the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) et al., re-

cently moved to intervene in this case, by motions filed on March 8 and 12, respectively.[1] In the meantime, on March 12, the parties in these consolidated cases stipulated to dismissal under Rule 46.1.

Today, in response to President Biden's memorandum, HHS issued a statement on its intent concerning the Rule. The agency announced: "After reviewing the 2019 rule, HHS plans to propose revised regulations substantially similar to those issued in 2000 …, under which the program operated successfully for years[.]" HHS, Office of Population Affairs, *Statement on Proposed Revision of Title X Regulations* (Mar. 18, 2021). HHS further explained that it expects to have this notice of proposed rulemaking "published in the *Federal Register* no later than April 15, 2021," and to have its "Final Rule in place by early fall." *Id.*

REASONS FOR DENYING THE MOTIONS

Intervention for the first time on appeal is rare, and this Court routinely denies motions to intervene without comment. *See* Shapiro et al., *Supreme Court Practice* § 6.16(c) (11th ed. 2013); *see also, e.g.*, *Amalgamated Transit Union Int'l* v. *Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam) ("A court of appeals may allow intervention at the appellate stage … 'only in an exceptional case for imperative reasons.'"); *Richardson* v. *Flores*, 979 F.3d 1102, 1104 (5th Cir. 2020) (intervention for the first time on appeal limited to "truly exceptional cases").

There are three straightforward reasons to deny the motions here. First, the parties to these cases al-

[1] Movants also filed two motions for leave to file supplemental briefs in support of intervention on March 15.

ready stipulated to dismissal under Rule 46.1. Movants concede, as they must, that that rule speaks in "mandatory terms" (AAPLOG et al. Supp. Br. 3), and what it mandates is plain: "an order of dismissal" (S. Ct. R. 46.1). Second, there is no reason to allow Movants' intervention to defend a Rule that HHS is reconsidering and will rescind, rendering this litigation moot. Underscoring the point, HHS said just that today—that it plans to issue "revised regulations substantially similar to those issued in 2000." Movants' arguments are calls for an advisory opinion by this Court. Third, even taking Movants' asserted interests on their own terms, none suffices to justify intervention.

Contrary to what Movants suggest, their purported interests will not go unsafeguarded. They will be free to challenge the replacement regulation in the lower courts under the Administrative Procedure Act, to the extent they have standing to do so. But this is surely not the proper forum for Movants to argue, for the first time, that HHS may not rescind or alter the Rule; as this Court has often stated, it is a court of "review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Intervention should therefore be denied.

I. THIS COURT'S RULES REQUIRE AN ORDER OF DISMISSAL

The parties have stipulated to dismiss these cases under this Court's Rule 46.1. That should be the end of the matter.

Rule 46.1 provides: "[W]henever all parties file with the Clerk an agreement in writing that a case be dismissed, … the Clerk, without further reference to the Court, will enter an order of dismissal." The rule's text is plain and "speaks in mandatory terms"—as Mo-

vants concede. AAPLOG et al. Supp. Br. 3. And it admits no exceptions. What the Proposed-Intervenor States improperly deride as "collusive agreements" (Ohio et al. Supp. Br. 2) is thus expressly contemplated by this Court's rules, which require an order of dismissal here.

II. THERE IS NO BASIS FOR MOVANTS TO DEFEND A RULE THAT HHS IS RECONSIDERING

Even assuming the parties' joint stipulation were not enough to end these cases, President Biden has directed HHS to reconsider the Rule, and HHS has now announced that it will propose revised regulations "substantially similar to those issued in 2000." When HHS does rescind the Rule, as it has made clear it will do, these cases will be moot. *See, e.g.*, *New York State Rifle & Pistol Ass'n* v. *City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (per curiam); *see also, e.g.*, *Wyoming* v. *U.S. Dep't of Interior*, 587 F.3d 1245, 1253 (10th Cir. 2009) (Gorsuch, J.) ("[B]ecause the new Park Service rule … supersedes its 2007 rule, it is now beyond cavil[] … that the petitioners' underlying challenge to that rule is … moot."). (Indeed, even a similar rule adopted on a new agency record would present a different case.) And if Movants are aggrieved by HHS's unfolding regulatory action and have Article III standing, then they will be free to challenge a new regulation in district court under the APA—including on the ground that the agency should not have revisited the Rule here.

But the possibility that Movants might be dissatisfied with a new regulation, the precise contours of which cannot be known until the agency issues it, does not justify their intervening in *this* lawsuit. These cases concern whether HHS permissibly exercised its discretion in adopting the Rule within the constraints of

the APA and two other federal laws. There is no need, as the Proposed-Intervenor States claim (Mot. 8), for a Rule that is being reconsidered to "receive the defense [it] deserve[s]."

The Proposed-Intervenor States' arguments to the contrary are calls for an advisory opinion. They criticize changes in Executive Branch legal positions as "slow[ing] the development of law" and "leav[ing] unresolved issues that matter a great deal to the States and the American people" (Mot. 13), but this Court is not in the business of issuing advisory opinions on soon-to-be inoperative regulatory actions merely to develop the law. *See, e.g.*, *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (legislative changes to statute deprived case of "its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law"); *see also, e.g.*, *Wyoming*, 587 F.3d at 1253 (Gorsuch, J.) ("Any ruling on [a superseded rulemaking] could only 'constitute a textbook example of advising what the law would be upon a hypothetical state of facts rather than upon an actual case or controversy as required by Article III of the Constitution.").

AAPLOG et al. erroneously claim (Mot. 11) that the question whether the Rule was "properly promulgated … makes this Court's review non-advisory even if the Administration purports to change" or suspend the Rule because that question affects *how* HHS may change the Rule. But even assuming, as they contend, that the Rule could only be altered through a notice-and-comment process (which HHS has announced its intention to do), AAPLOG et al. advance no valid reason why this litigation about a prior rulemaking should

continue as that process is ongoing in parallel.[2] At the end of the process HHS takes, there will be a revised rule rendering this dispute moot. If AAPLOG disagrees with the manner by which HHS effectuated the change, then it can challenge that process in a new APA lawsuit—not intervene in *this* case to argue that the *outgoing* Rule was properly promulgated.

In the meantime, the decisions below leave the Rule intact in all States but Maryland, and Movants articulate no interest in the regulation of the Title X program in Maryland. Indeed, the Proposed-Intervenor States concede the opposite. *See* Ohio et al. Mot. 12 ("Because Maryland is not one of the States now seeking to intervene here, the Fourth Circuit's decision caused the Proposed-Intervenor States no direct harm."). Thus, any purported interests in this appeal are adequately protected by an order that dismisses these cases and, by Movants' admission, leaves the Rule in place as the rulemaking process develops.

Ultimately, Movants cannot explain why they should be able to force litigation of an advisory issue after the parties have stipulated dismissal or how altering the Rule would fail to moot these cases. Permitting Movants to intervene would only serve to temporarily perpetuate this appeal, requiring the Court and parties to expend unnecessary resources—all toward the same result, which is the dismissal of this action for lack of a case or controversy.

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[2] The Seventh Circuit recently rejected a similar argument in denying the motions of several States to recall the mandate, to reconsider dismissal, and to intervene in an appeal concerning an agency rulemaking where the agency—there, the Department of Homeland Security—exercised its discretion not to defend the rule. *Cook Cty., Ill.* v. *Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021) (ECF Nos. 25-26).

III. MOVANTS HAVE NO INTEREST SUFFICIENT TO JUSTIFY INTERVENTION

Even taking Movants' asserted interests on their own terms, their motions fail because the interests they offer do not suffice. *See, e.g.*, *United States* v. *Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) ("The Supreme Court has stated that intervention aims to protect interests which are 'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.'" (quoting *Smith* v. *Gale*, 144 U.S. 509, 518 (1892)).

Considering first the Proposed-Intervenor States, Ohio claims to have a "direct financial interest" in perpetuating this litigation over the parties' stipulated dismissal (Mot. 8), while the other Proposed-Intervenor States profess "an interest in retaining their ability to operate a Title X program without appearing to put their imprimatur on abortion" (*id.* 8-9). Both claims are flawed.

Ohio fails to explain how its *existing* Title X grant would be adversely affected absent forced continuation of these cases. Ohio claims (Mot. 8) that it received supplemental funding under Title X when Planned Parenthood affiliates were forced from the program as a result of the Rule. But it does not claim that any of its existing grant funding will be imperiled if the Rule is invalidated or rescinded. Nor would there be any basis to do so. Indeed, Ohio's current Title X services grant continues its funding until March 2022; the size of that grant, or any current supplement to it, will not be affected by the stipulated dismissal of this litigation. *See* Office of Population Affairs, *HHS Awards Title X Family Planning Service Grants* (Mar. 29, 2019) (pro-

ject period of April 1, 2019 to March 31, 2022). Any current Title X grants continue regardless of any resolution of this litigation and regulation change.

What Ohio apparently wants is to ensure that it has no competition for *future* Title X grant funds. But courts routinely deny intervention based on a supposed interest in clearing the field of potential competition. In any case regarding the allocation of public funds, "[e]very competitor for those limited resources" could argue that it "has an interest that potentially may be adversely affected by that reallocation"—but that has not been thought to be a basis to "justif[y] intervention in litigation addressing issues in which [the proposed intervenor] has no other interest." *Benjamin* v. *Department of Pub. Welfare of Pa.*, 432 F. App'x 94, 98-99 (3d Cir. 2011) (affirming denial of intervention). Courts have consistently found such arguments insufficient to justify intervention, and this Court should do the same. *See Sokaogon Chippewa Cmty.* v. *Babbitt*, 214 F.3d 941, 946-947 (7th Cir. 2000) (per curiam) (intervention not appropriate based on interest in "fending off … unwelcome competition" in APA challenge to decisionmaking procedures); *Walgreen Co.* v. *Feliciano de Melecio*, 6 F. App'x 27, 28 (1st Cir. 2001) ("an interest in foreclosing competition falls short of the 'interest relating to the property or transaction' required by Rule 24(a)(2)"); *American Maritime Trans., Inc.* v. *United States*, 870 F.2d 1559, 1562 (Fed. Cir. 1989) (the "mere possibility of [increased] competition" was an insufficient basis for intervention).

The Proposed-Intervenor States also say (Mot. 9) they want to protect their interest "not to provide actual or apparent support for" abortion. But six of them

do not even operate Title X programs.[3] Their sole apparent interest, then, is to air their abstract policy preferences concerning abortion, which surely is not a sufficient interest for intervention in these APA cases. *See Washington Elec. Co-op., Inc.* v. *Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("Intervention cannot be used as a means to inject collateral issues into an existing action."). And the Proposed-Intervenor States that do participate in the Title X program, like Ohio, operated Title X programs *for decades* under the regulations that preceded the Rule. This makes clear that they can both participate in the Title X program under either the present or past regulations *and* articulate their policy preferences to their constituents. Neither their current Title X grant funding nor their ability to make clear that they do not fund abortion is at stake in these proceedings.

The Proposed-Intervenor States cite *BNSF Railway Company* v. *Equal Employment Opportunity Commission*, 140 S. Ct. 109 (2019), where the Court granted a motion to intervene, but that case is not analogous to this one. There, the EEOC had brought a discrimination lawsuit on behalf of an employee against his employer, obtained a monetary judgment for the employee, and defended that judgment on appeal. But when the employer petitioned for certiorari, the Solicitor General filed a brief not in opposition, but in support of certiorari, urging the Court to grant the petition, vacate the judgment the EEOC had obtained, and remand to the court of appeals to reconsider its decision in light of the government's new position. This Court

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[3] Arizona, Georgia, Indiana, Missouri, Nebraska, and Texas do not have Title X grants. Office of Population Affairs, *Title X Family Planning Directory* (Feb. 2021).

then permitted the affected employee himself to intervene to continue to defend the judgment in his favor when the government would not.

Here, HHS has never purported to be participating in this matter to advance Ohio's or other States' interests. HHS promulgated, and then defended, a regulation that was based on the then-current administration's judgment about how to operate the Title X program; under the present administration, HHS is now reconsidering that judgment—as agencies appropriately do all the time. *See, e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 514-515 (2009).

As for AAPLOG et al., they claim (Mot. 11) that the Rule protects their ability to object to abortion referrals on religious grounds and that those safeguards "will disappear if the Fourth Circuit's ruling is upheld." But the Fourth Circuit's ruling applies only in Maryland. AAPLOG et al. say nothing about how or why their asserted interest in religious refusal has been affected in any way during the nearly two years since the statewide injunction against the Rule was entered.[4]

Nor do AAPLOG et al. show that the interests of some members in abstaining from abortion referral warrant intervention. Under the prior Title X regulations that were in place for years before the Rule, HHS

[4] If AAPLOG et al. were in fact aggrieved by the proceedings in the Fourth Circuit, then their motion to intervene is untimely. The Rule has been enjoined from operation only in Maryland since May 2019, and, after all, they contend (Mot. 13) that their "interests are not coextensive with the United States's" even when it defended the Rule. Thus, AAPLOG et al. ought to have moved to intervene during the proceedings in the District of Maryland or in the Fourth Circuit to protect interests not adequately represented by the federal government. By their own telling, they have instead left them unsafeguarded for nearly two years.

has represented that its "longstanding policy" was "not to apply or enforce the provisions" requiring referral for abortion "to Title X providers with religious objections to such referrals." C.A.9 S.E.R. 205-206; *see also id.* 207-208 (stating that the "Office of Population Affairs … does not enforce" the requirement to provide nondirective counseling and referrals for abortion "on objecting grantees or applicants"). A return to that regime would not affect AAPLOG et al.'s purported interest. And if the future regulatory regime is unlike both the current regime and the prior regime in some presently unknown ways, that is all the more reason to defer any challenges to it—from AAPLOG et al. or others—to another lawsuit, not for the first time before this Court.

In the end, like the Proposed-Intervenor States, AAPLOG et al. cannot show an interest that would be harmed without the forced perpetuation of this litigation. Rather AAPLOG et al. merely would prefer that the Rule remain in place, but a "generalized preference that the case come out a certain way" is not a valid basis for intervention. *Texas* v. *United States*, 805 F.3d 653, 657-658 (5th Cir. 2015).

CONCLUSION

For the foregoing reasons, the Court should deny Movants' requests to intervene.

Respectfully submitted.

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