No. 20-539

IN THE
Supreme Court of the United States

OREGON, et al.,
Petitioners,
v.
ALEX M. AZAR II, et al.,
Respondents.

CALIFORNIA,
Petitioner,
v.
ALEX M. AZAR II, Secretary,
U.S. Department of Health & Human Services, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY 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

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ARGUMENT

The parties agree that this case—which seeks review of a decision from an en banc panel of the Ninth Circuit—presents an appropriate vehicle for addressing a circuit split over the validity of the Final Rule challenged here and in No. 20-429. (Br. for Resps. 13; Pet. 16-32; AMA Pet. 20-22; *see* AMA Pet. App. 1a-94a.) The Final Rule, promulgated by the United States Department of Health and Human Services (HHS), purports to implement § 1008 of Title X of the Public Health Services Act.

President-elect Biden, however, has made it clear that he intends to promptly change the policy reflected in the Final Rule. *See The Biden Agenda for Women*, https://joebiden.com/womens-agenda; *see also* Maggie Astor, *How the 2020 Democrats Responded to an Abortion Survey*, N.Y. Times (Nov. 25, 2019) (Biden spokesperson stating that Biden will "use executive action to on his first day in office withdraw . . . Donald Trump's Title X restrictions"). That may well render this Court's review unnecessary. The most prudent approach would be to hold the petitions here and in *Azar v. Matter of Baltimore*, No. 20-454 (the petition seeking review of a Fourth Circuit decision presenting similar questions) to allow the incoming administration an opportunity to advise the Court of its views and intentions.

Once the incoming administration changes the policies reflected in the Rule, there will likely no longer be a live case or controversy for this Court to resolve. *See New York State Rifle & Pistol Ass'n v. City of New York,* 140 S. Ct. 1525, 1526 (2020) (per curiam) (challenge to rule mooted by its amendment to remove challenged provision); *Diffenderfer v. Central Baptist*

Church of Miami, Fla., Inc., 404 U.S. 412, 414-15 (1972) (per curiam) (challenge to statute mooted by repeal). Where "[e]ach cause of action challenge[s] the validity of" a regulation, as is the case here, the Court "can do nothing to affect" the challengers' rights after the regulation is replaced—"thus making th[e] case classically moot for lack of a live controversy." *Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016); *see, e.g.*, *New York State Rifle & Pistol Ass'n,* 140 S. Ct. at 1526; *Wyoming v. United States Dep't of Interior*, 587 F.3d 1245, 1253 (10th Cir. 2009) (Gorsuch, J.) ("beyond cavil" that Park Service's issuance of new rule mooted challenge to old rule).

This Court should not grant certiorari immediately, as the federal respondents ask, before the new administration can provide its views. *See Department of Justice v. House Comm. on the Judiciary*, No. 19-1328, 2020 WL 6811248 (U.S. Nov. 20, 2020) (granting motion to remove the case from the argument calendar in light of potential effect of election results on underlying dispute). Respondents are incorrect in suggesting that a swift grant of certiorari is needed to "provide clarity now on the statutory-authority question that has divided the circuits"—even if the challenged Rule will soon be rescinded. *See* Letter from Acting Solicitor General Jeffrey B. Wall to Scott S. Harris ("Letter") 2, *Azar v. Mayor of Baltimore,* No. 20-454 (U.S. Dec. 7, 2020). The issues presented by the petitions for certiorari here and in Nos. 20-429 and 20-454 concern the legality of the challenged Rule and the rulemaking procedures that led to its promulgation. Resolution of those issues will likely not have any practical effect on the parties if the Rule is rescinded. *See Princeton*

Univ. v. Schmid, 455 U.S. 100, 103 (1982) (per curiam).

For example, petitioners challenge the Final Rule as arbitrary and capricious because HHS failed to sufficiently consider evidence that the counseling provisions violated standards of medical care and ethics, and that the counseling provisions and physical separation requirements would result in enormous costs and public-health harms. (Pet. 23-24; AMA Pet. App. 52a (Ninth Circuit decision describing petitioners' arguments). These challenges are specific to only this Final Rule and the rulemaking process that produced it.

Thus, an opinion regarding the legality of the Rule after it is no longer in force "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." *Wyoming*, 587 F.3d at 1250 (Gorsuch, J.) (quotation marks omitted). And this Court does not decide "hypothetical issues or . . . give advisory opinions" about issues that will soon cease to have any practical effects on the parties. *Princeton Univ.*, 455 U.S. at 102

Accordingly, the Court should hold the petitions because resolving whether HHS sufficiently considered the record evidence before promulgating the current Rule will not aid HHS or the public in determining whether a different rule promulgated in the future is valid. The federal respondents contend that the case is unlikely to become moot before the end of the Court's current Term because HHS will need to "go through notice-and-comment rulemaking" to withdraw the Final Rule. (Letter, *supra*, at 2.) But that is not necessarily true, *see, e.g.*, 5 U.S.C. § 553(b)(3)(B), and

the new administration should be afforded an opportunity to clarify how exactly it intends to proceed. For example, on two prior occasions, presidents have utilized their executive authority to direct HHS to take immediate action to modify or suspend enforcement of then-applicable rules governing pregnancy counseling and physical separation requirements in the Title X program—in one instance, doing so two days after the inauguration. *See* Title X "Gag Rule," 58 Fed. Reg. 7,455 (Feb. 5, 1993) (President William J. Clinton memorandum issued January 22, 1993, directing Secretary of HHS to suspend existing Title X rule "as soon as possible"); *see also National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230 (D.C. Cir. 1992) (describing President George H.W. Bush's 1991 directive to HHS to modify implementation of 1988 rule to avoid interference with the physician-patient relationship).

Delaying consideration of the petitions for certiorari will avoid the possibility of proceedings on the validity of a Rule that may soon be a dead letter. "[P]rudence and comity counsel the court to stay its hand" in favor of waiting until the new administration can give its views or explain what regulatory action it intends to take. *See Wilderness Soc'y v. Kane Cty., Utah*, 632 F.3d 1162, 1175 (10th Cir. 2011) (en banc) (Gorsuch, J., concurring) (quotation and alteration marks omitted). Such judicial restraint would respect the incoming administration's prerogative to reevaluate the Rule, as it is entitled to do under both Title X of the Public Health Services Act and the Administrative Procedure Act—and to reach its own policy judgment about the implementation of § 1008 of Title X and the administration of the Title X program.

Petitioners' speculation about potential legal challenges to the Rule's future withdrawal do not warrant an immediate grant of certiorari in this case, which does not involve any such challenge. (Letter, *supra*, at 2.) The existence, timing, or nature of any future lawsuit is wholly speculative; and "the courts can and will address those questions if and when they arise," *Wilderness Soc'y*, 632 F.3d at 1175 (Gorsuch, J., concurring).

No exception to mootness would apply if the incoming administration rescinded the Rule. Regulatory action to rescind or substantially alter a challenged rule does not fall under the "voluntary cessation" exception to mootness unless there is a reasonable likelihood that the agency will reissue the same challenged rule after dismissal. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982). No such likelihood of reissuance exists where, as here, a new administration has already committed to following a different policy. *See Wilderness Soc'y*, 632 F.3d at 1174-76 (Gorsuch, J., concurring) (challenges to provisions of repealed county ordinance were moot where county expressed no interest in reenacting them).

The exception to mootness for legal questions that are capable of repetition yet evade review also does not apply here. There is no reasonable expectation that the incoming administration will again subject the private and state petitioners to this Rule. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (exception applies only where there is "a reasonable expectation that the same complaining party [will] be subject to the same action again" (brackets in original)). And even if a future administration were to change course again, a challenge to

that new rule would not likely evade this Court's review. *See, e.g.*, *Diffenderfer*, 404 U.S. at 414.

Contrary to the federal respondents' claim (Letter, *supra*, at 2), it is not merely speculative that the incoming administration will implement a different policy. The incoming administration has already declared its intention to do so. And history shows that the Executive Branch has repeatedly exercised its discretion to implement lawful changes to the rules governing the Title X program, reversing course on a number of occasions regarding the scope of permissible counseling; and on at least one occasion, the Executive Branch has directed the implementation of such changes on the second day of an incoming presidential administration. Title X "Gag Rule," 58 Fed. Reg. at 7,455; *see also* Pet. 5-11 (describing history of Title X regulations).

Accordingly, the Court should hold this petition and the parallel one filed by the other Ninth Circuit parties, as well as the petition arising out of the Fourth Circuit proceedings, until the incoming administration has the opportunity to fully consider the federal government's litigation position and inform the Court of its views.

CONCLUSION

The petition for a writ of certiorari should be held until the new administration has the opportunity to inform the Court of its views, and should be granted if the administration does not rescind the Final Rule.

Respectfully submitted,

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