NOS. 20-429, 20-454, 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.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OREGON, ET AL.,
Petitioners,

v.

NORRIS COCHRAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
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NORRIS COCHRAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
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v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IN SUPPORT OF INTERVENTION

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The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), the Christian Medical and Dental Associations (CMDA), and the Catholic Medical Association (CMA), file this Motion under Supreme Court Rules 21.1 and 21.2(c) and respectfully request leave to file the attached supplemental brief in support of intervention. In support of this Motion, AAPLOG, CMDA, and CMA state:

1. On February 22, 2021, this Court granted petitions for writs of certiorari in these three, consolidated cases to consider the validity of 2019 Department of Health and Human Services (HHS) rules that prohibit recipients of Title X funds from making elective-abortion referrals in Title X clinics, require recipients to maintain physical separation between their clinics and any abortion-related activities, and protect the conscience rights of pro-life healthcare organizations and providers who participate in the Title X program.

2. Concerned that the new Administration would fail to defend these 2019 Rules, see Mem. on Protecting Women's Health at Home and Abroad, § 2 (Jan. 28, 2021), Movants AAPLOG, CMDA, and CMA filed a motion on March 12, 2021, to intervene on behalf of themselves and their members as petitioners in *Cochran* v. *Mayor and City Council of Baltimore*, No. 20-454, and as respondents in *American Medical Association* v. *Cochran*, No. 20-429, and *Oregon* v. *Cochran*, No. 20-539.

3. Minutes after Movants filed their motion, their fears were realized: the United States took the extraordinary step of filing with the opposing parties in all three cases a Joint Stipulation to Dismiss under this Court's Rule 46.1. In so doing,

the United States—after having already persuaded this Court to grant its petition for certiorari in case No. 20-454—purported to capitulate to a judgment against the United States and a permanent injunction against the 2019 Rules. The only apparent reason for pursuing such a drastic course, as opposed to engaging in administrative actions that might moot these cases, was to prevent this Court from ruling on Movants' Motion to Intervene or a similar Motion filed by Ohio and 18 other States and ultimately to preclude this Court's review of the 2019 Rules. Those Rules reconcile federal regulatory policy with Title X's command that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning," 42 U.S.C. 300a-6, and are identical to those upheld by this Court in *Rust* v. *Sullivan*, 500 U.S. 173 (1991).

4. Notwithstanding the request for dismissal under Rule 46.1, the Court should grant Movants' and Ohio's intervention motions.

5. As explained in the accompanying proposed Supplemental Brief in Support of Intervention, this Court's procedural rules are "for the orderly transaction of business" and are "not jurisdictional." *Bowles* v. *Russell*, 551 U.S. 205, 211 (2007) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004)). Accordingly, Rule 46.1 does not deprive this Court of jurisdiction to grant a preexisting intervention motion *before* entering a stipulated dismissal.

6. This point remains true even if the parties to the lawsuit no longer want to continue the case. Where third parties with a concrete interest in the dispute seek to intervene, their intervention ensures an ongoing controversy. See, *e.g.*, *In re*

Brewer, 863 F.3d 861, 870 (D.C. Cir. 2017) ("if a motion to intervene can survive a case becoming otherwise moot, then so too can a motion to intervene survive a stipulated dismissal"); *Sommers* v. *Bank of America, N.A.*, 835 F.3d 509, 513 & n.5 (5th Cir. 2016) (recognizing that granting a motion for intervention may be appropriate even if the motion was not filed until *after* entry of a stipulated dismissal); *Odle* v. *Flores*, 899 F.3d 344 (5th Cir. 2017) (same).

7. In addition, there are equitable exceptions to dismissal motions joined by all parties to a pending case. *E.g.*, *Utah Pub. Serv. Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 466 (1969); *Atlantic Mut. Ins. Co.* v. *Nw. Airlines, Inc.*, 24 F.3d 958, 960 (7th Cir. 1994). That equitable exceptions exist provides further proof that Rule 46.1 cannot be jurisdictional. And such an exception is warranted under the remarkable circumstances presented here. The Government is confessing to judgment and a permanent injunction prohibiting enforcement of the 2019 Rules where (1) the Government has already successfully persuaded this Court to grant a petition for certiorari, and (2) the en banc Ninth Circuit reached the exact opposite conclusion as the Fourth Circuit.

8. The United States could have proceeded administratively and, if appropriate, moved the Court to dismiss these cases as moot. The only apparent purpose of proceeding via joint stipulation is to deprive interested parties of their ability to defend the 2019 Rules.

9. The stipulated dismissal also has broad separation of powers implications: Because the 2019 Rules have been invalidated by the Fourth Circuit,

the Administration may argue that it need not justify a future departure from the rules in any subsequent rule-making procedure, and any reenactment of the 2019 Rules could be thwarted based on the still-standing adverse decision below. All these consequences directly harm Movants. Accordingly, dismissal should be deferred until after the Court rules on the intervention motions.

10. When the federal government issues valid administrative rules, the public interest supports enforcing those rules until they are changed through proper regulatory procedures. Abandonment of valid statutes and regulations signals the demise of the rule of law itself.

Accordingly, the Court should (1) grant Movants' request to file the attached supplemental brief in support of intervention, and (2) grant Movants' and Ohio's intervention motions.

Respectfully submitted,

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INTRODUCTION

On February 22, 2021, this Court granted petitions for writs of certiorari in these three, consolidated cases to consider the validity of 2019 Department of Health and Human Services (HHS) rules that prohibit recipients of Title X funds from making elective-abortion referrals in Title X clinics, require recipients to maintain physical separation between their clinics and any abortion-related activities, and protect the conscience rights of pro-life healthcare organizations and providers who participate in the Title X program. Concerned that the new Administration would fail to defend these 2019 Rules, see Mem. on Protecting Women's Health at Home and Abroad, § 2 (Jan. 28, 2021), Movants the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), the Christian Medical and Dental Associations (CMDA), and the Catholic Medical Association (CMA), filed a motion on March 12, 2021, to intervene on behalf of themselves and their members as petitioners in *Cochran* v. *Mayor and City Council of Baltimore*, No. 20-454, and as respondents in *American Medical Association* v. *Cochran*, No. 20-429, and *Oregon* v. *Cochran*, No. 20-539.

Minutes after Movants filed their motion, their fears were realized: the United States took the extraordinary step of filing with the opposing parties in all three cases a Joint Stipulation to Dismiss under this Court's Rule 46.1. In so doing, the United States—after having already persuaded this Court to grant its petition for certiorari in case No. 20-454—purported to capitulate to a judgment against the United States and a permanent injunction against the 2019 Rules. The only apparent reason for

pursuing such a drastic course, as opposed to engaging in administrative actions that might moot these cases, was to prevent this Court from ruling on Movants' Motion to Intervene or a similar Motion filed by Ohio and 18 other States and ultimately to preclude this Court's review of the 2019 Rules. Those Rules reconcile federal regulatory policy with Title X's command that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning," 42 U.S.C. 300a-6, and are nearly identical to those upheld by this Court in *Rust* v. *Sullivan*, 500 U.S. 173 (1991).

Notwithstanding the request for dismissal under Rule 46.1, the Court should grant Movants' intervention motion.

ARGUMENT

For two independent reasons, the actions of Plaintiffs and the Government do not deprive this Court of jurisdiction to grant the intervention motions and to decide these cases on the merits.

1. This Court's procedural rules are "for the orderly transaction of business" and are "not jurisdictional." *Bowles* v. *Russell*, 551 U.S. 205, 211 (2007) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004)). That is why this Court's time limit for filing a petition for certiorari is considered to be jurisdictional in civil cases but not in criminal cases; the former is based on a statute, 28 U.S.C. 2101(c), while the latter is not. See *Bowles*, 551 U.S. at 211.

Rule 46.1 is, of course, a court-made rule, not a statute. Nor is Rule 46.1 derived from a statute. And on its face, the rule does not purport to be jurisdictional. See

Sebelius v. *Auburn Reg'l Med. Ctr.*, 586 U.S. 145, 153–54 (2013) (requiring a clear-statement rule before deeming even a *statutory* rule to be jurisdictional). That Rule 46.1 speaks in mandatory terms does not make the provision jurisdictional; this Court has "long 'rejected the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional.'" *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012) (quoting *Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011)). Accordingly, Rule 46.1 does not deprive this Court of jurisdiction to grant a preexisting intervention motion *before* entering a stipulated dismissal.

Plaintiffs and the United States may argue that when the parties to the lawsuit no longer want to continue the case, the dispute is moot, and the Court lacks Article III jurisdiction. That would be incorrect. Where third parties with a concrete interest in the dispute seek to intervene, their intervention ensures an ongoing controversy.

For example, in *In re Brewer*, 863 F.3d 861 (D.C. Cir. 2017), an interested party filed a motion to intervene on appeal after the plaintiffs—on an interlocutory appeal—filed a stipulation of dismissal in the district court under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The D.C. Circuit granted the motion, holding that the case was not moot: "[W]e conclude that mootness, albeit accelerated by the immediacy of a stipulated dismissal, is what gives a dismissal pursuant to Rule 41(a)(1)(A)(ii) its jurisdictional effect." *Id.* at 867. "And if a motion to intervene can survive a case becoming otherwise moot, then so too can a motion to intervene survive a stipulated dismissal." *Id.* at 870. Accord, *e.g.*, *Sommers* v. *Bank of America, N.A.*, 835 F.3d 509,

513 & n.5 (5th Cir. 2016) (recognizing that granting a motion for intervention may be appropriate even if the motion was not filed until *after* entry of a stipulated dismissal); *Odle* v. *Flores*, 899 F.3d 344 (5th Cir. 2017) (same).

Here, of course, the jurisdictional question is much easier than in *Brewer*, *Sommers*, or *Odle*, because AAPLOG, CMDA, and CMA—as well as Ohio and the other 18 States—filed their intervention motions *before* Plaintiffs and the United States filed their stipulation to dismiss. Accordingly, it is appropriate for this Court to stay and defer consideration of the Joint Stipulation to Dismiss until after the Court decides the first-filed intervention motions. "[W]hen the motion to intervene is made while the controversy is live and the subsequent disposition of the case does not provide the relief sought by the would-be intervenors (for example, [protection of conscience rights]), [this Court] can provide an effective remedy on appeal and therefore [has] jurisdiction." *CVLR Performance Horses, Inc.* v. *Wynne*, 792 F.3d 469, 475 (4th Cir. 2015).

2. There are also equitable exceptions to dismissal motions joined by all parties to a pending case. *E.g.*, *Utah Pub. Serv. Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 466 (1969) ("This is before us on appellant's motion to dismiss its appeal under Rule 60. Ordinarily parties may by consensus agree to dismissal of any appeal pending before this Court. However, there is an exception where the dismissal implicates a mandate we have entered in a cause. Our mandate is involved here. We therefore ordered oral argument at which all parties concerned were afforded an opportunity to be heard on the question whether there had been compliance with the

mandate."); *Atlantic Mut. Ins. Co.* v. *Nw. Airlines, Inc.*, 24 F.3d 958, 960 (7th Cir. 1994) ("We may assume that settlement of litigation by the original parties is not conclusive if a third party possessing an interest in 'the property or transaction which is the subject of the action' has been excluded from the negotiations. Intervention permits such an entity to prevent the original litigants *from bargaining away its interests*. If they beat the intervenor to the punch, *the court may annul the settlement* in order to give all interested persons adequate opportunity to participate in the negotiations and proceedings.") (emphasis added). That equitable exceptions exist provides further proof that Rule 46.1 cannot be jurisdictional. And such an exception is warranted under the remarkable circumstances presented here.

To begin, AAPLOG, CMDA, and CMA—as well as Ohio and the 18 other States—filed their intervention motions before Plaintiffs and the United States filed their joint stipulation, and intervention on appeal is justified given that the Government has now stipulated to the dismissal of its own, granted petition. "Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage or where intervention would not unduly prejudice the existing parties. *See* Wright & Miller § 1916. In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court. *See id.*" *Acree* v. *Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009). As *Acree* explained, "In *Smoke*, we reversed the District Court's denial of a post-judgment motion to intervene where the existing party

indicated it might not bring an appeal. In doing so, we noted that the would-be *intervenor's interests, which has been consonant with those of the existing party, were no longer adequately represented by that party's litigation of the case*. In those circumstances, we found the post-judgment motion to intervene for the purpose of prosecuting an appeal to be timely, because '*the potential inadequacy of representation came into existence only at the appellate stage*.'" *Ibid.* (emphasis added, cleaned up).

Acree cites *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), in which this Court recognized "several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal." *Id.* at 395. *United Airlines* also explains that "[p]ost-judgment intervention for the purpose of appeal has been found to be timely even in litigation that is not representative in nature, and in which the intervenor might therefore thought to have a less direct interest in participation in the appellate phase." *Id.* at 395 n.16.

As noted above, the stipulation here is remarkable. The Government is confessing to judgment and a permanent injunction prohibiting enforcement of the 2019 Rules where (1) the Government has already successfully persuaded this Court to grant a petition for certiorari, and (2) the en banc Ninth Circuit reached the exact opposite conclusion as the Fourth Circuit. What's more, the United States could have proceeded administratively and, if appropriate, moved the Court to dismiss these cases as moot. The only apparent purpose of proceeding via joint stipulation is to deprive interested parties of their ability to defend the 2019 Rules.

This stipulated dismissal also has broad separation of powers implications: Because the 2019 Rules have been invalidated by the Fourth Circuit, the Administration may argue that it need not justify a future departure from the rules in any subsequent rule-making procedure, and any reenactment of the 2019 Rules could be thwarted based on the still-standing adverse decision below. All these consequences directly harm Movants.

When the federal government issues valid administrative rules, the public interest supports enforcing those rules until they are changed through proper regulatory procedures. Abandonment of valid statutes and regulations signals the demise of the rule of law itself. Accordingly, the Court should grant the intervention motions.

CONCLUSION

AAPLOG, CMDA, and CMA respectfully ask that the Court grant their Motion to Intervene and the parallel intervention motion filed by Ohio and 18 other States.

Respectfully submitted,

s/ John J. Bursch

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