No. 24-1221

In the Supreme Court of the United States

SUSAN NEESE, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, JR., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' ruling that petitioners lack Article III standing should be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Neese v. *Becerra*, No. 21-cv-163 (Nov. 22, 2022)

United States Court of Appeals (5th Cir.):

Neese v. *Becerra*, No. 23-10078 (Dec. 16, 2024)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 123 F.4th 751. The opinion and order of the district court (Pet. App. 17a-49a) is reported at 640 F. Supp. 3d 668. The prior opinions and orders of the district court are reported at 342 F.R.D. 399 and available at 2022 WL 1265925. The final judgment of the district court (Pet. App. 50a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2024. Rehearing was denied on January 31, 2025 (Pet. App. 7a-16a). On March 3, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 31, 2025. The petition was filed on May 27, 2025. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1557 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 260, prohibits discrimination in "any health program or activity * * * receiving Federal financial assistance" based on a "ground prohibited under" several other statutes. 42 U.S.C. 18116(a). One of those statutes is Title IX of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex." 20 U.S.C. 1681(a).

In 2021, the Department of Health & Human Services (HHS) issued a notification announcing that in light of this Court's decision in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), the agency would "interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity." 86 Fed. Reg. 27,984, 27,985 (May 25, 2021). HHS explained that the notification would "guide" the agency "in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts." *Ibid.* The notification provided no detail on what conduct the agency deemed prohibited discrimination on the basis of sexual orientation or gender identity.

The parties to this case agree that "HHS has never * * * brought an enforcement action" under Section 1557 for "a medical provider's refusal to provide services outside its specialty area." Gov't C.A. Br. 22; see C.A. Oral Arg. at 23:24-23:35, https://www.ca5.uscourts.gov/OralArgRecordings/23/23-10078_1-8-2024.mp3 (petitioners noting lack of any "past enforcement action").

2. Petitioners Susan Neese and James Hurly are doctors subject to Section 1557. Pet. App. 19a. Neese practices general internal medicine, and Hurly is a

pathologist who diagnoses patients. *Id.* at 2a. Petitioners are generally willing to treat "transgender patients." *Id.* at 19a-20a. But "both claim to be 'unwilling to provide gender affirming care, in at least some situations, to patients who assert a gender identity that departs from their biological sex.'" *Id.* at 2a. Neese is unwilling "to assist minors with transitioning," which "is not within her medical specialty." *Id.* at 2a-3a. And both petitioners wish to provide care "consistent with" "transgender patients['] * * * biological sex," such as "informing a biological male who identifies as a woman of her prostate cancer diagnosis." *Id.* at 3a.

Although neither petitioner "believes that their medical practices constitute gender-identity discrimination," they "fear[ed] that HHS w[ould] view their practices as violating the Notification." Pet App. 3a. They filed this pre-enforcement suit on behalf of a proposed class of all healthcare providers subject to Section 1557, claiming the notification was unlawful because HHS erroneously interpreted the governing statute. *Id.* at 21a.

3. The district court denied the government's motion to dismiss for lack of subject-matter jurisdiction, certified the proposed class, and entered summary judgment for petitioners. 2022 WL 1265925; 342 F.R.D. 399; Pet. App. 17a-49a. As relevant here, the court ruled that petitioners had standing because they faced a "credible threat" that HHS would enforce the notification against them. Pet. App. 23a (citation omitted). And it held the notification unlawful because "*Bostock* does not apply to Section 1557 or Title IX." *Id.* at 24a. It set aside the notification and entered declaratory relief. *Id.* at 50a-51a.

4. A unanimous panel of the Fifth Circuit reversed in a per curiam opinion. Pet. App. 1a-5a.

The court of appeals held that petitioners lacked Article III standing. The court explained that "a plaintiff must have suffered an injury that is 'concrete and particularized' and 'actual or imminent.'" Pet. App. 3a (citation omitted). And the "right to pre-enforcement review is qualified and permitted only 'under circumstances that render the threatened enforcement sufficiently imminent.'" *Id.* at 4a (citation omitted).

Applying those principles, the court of appeals determined that petitioners had "not met their burden to establish standing in this case." Pet. App. 4a. They offered "no evidence that an enforcement proceeding is imminent," that "HHS w[ould] view" their practices as discrimination, or that their practices had been "chilled or otherwise affected." *Ibid.* Because they "failed to show that they are actually violating the Notification, much less that they face a credible threat of enforcement," they "d[id] not have standing." *Ibid.*

Judge Jones concurred. Pet. App. 5a-6a. She emphasized that the government "affirm[ed] the plaintiffs are not facing any 'credible threat' of prosecution for treating biological men or women according to their physical characteristics." *Id.* at 5a (citation omitted). Indeed, "HHS has never taken the position that such conduct constitutes gender-identity discrimination." *Ibid.* So, "nothing in the briefing or argument by HHS implie[d] that the plaintiffs faced a credible threat of investigation or losing federal funds." *Id.* at 6a.

After the court of appeals' decision, a judge *sua sponte* called for a poll on rehearing en banc. Pet. App. 7a. The court denied rehearing by a vote of 16-1. *Id.* at 8a. Judge Duncan, joined by Judges Jones, Smith, Willett, Oldham, Engelhardt, and Wilson, wrote separately to "concur in the denial of en banc rehearing" because

"there was no plausible reason to rehear this case." *Id.* at 8a-10a. Judge Ho dissented. *Id.* at 10a-16a.

5. On January 20, 2025, President Trump issued Executive Order No. 14,168, which directed agencies to "correct" the "prior Administration['s]" extension of *Bostock* to "sex-based distinctions in agency activities" under statutes including Title IX and to "rescind all guidance documents inconsistent with the requirements of this order." 90 Fed. Reg. 8615, 8616-8617 (Jan. 30, 2025). HHS rescinded the notification at issue here on May 14, 2025. Pet. App. 52a-54a; see 90 Fed. Reg. 20,393, 20,394 (May 14, 2025).

ARGUMENT

Petitioners agree (Pet. 5-7) this case is moot due to rescission of the challenged notification, and the only relief they seek is vacatur of the court of appeals' decision under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). But "not every moot case will warrant vacatur"; rather, because vacatur for mootness "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar* v. *Garza*, 584 U.S. 726, 729 (2018) (per curiam) (citation omitted). Vacatur is inappropriate here. The case would not otherwise have warranted certiorari, especially since the lower court's ruling on one jurisdictional ground does not warrant vacatur on a different jurisdictional ground. And the equities counsel against vacatur.

A. The Decision Below Would Not Independently Have Warranted This Court's Review

1. a. Vacatur of a lower court's decision due to intervening mootness is generally available only to "those who have been prevented from obtaining the review to

which they are entitled." *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). Because the decision whether to grant certiorari on any issue (including mootness) "is not a matter of right, but of judicial discretion," Sup. Ct. R. 10, it follows that petitioners who do not meet Rule 10's criteria are not entitled to vacatur either. Cf. *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief) (applying Rule 10's criteria to a request for injunction, another form of discretionary equitable relief).

The United States has thus consistently taken the position that when a case becomes moot after the court of appeals enters its judgment but before this Court acts on a petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have merited this Court's review absent the intervening mootness. See, *e.g.*, Gov't Br. in Opp. at 11-12, *Military-Veterans Advocacy Inc.* v. *McDonough*, 143 S. Ct. 2609 (2023) (No. 22-605); Gov't Br. in Opp. at 6-8, *Electronic Privacy Info. Ctr.* v. *Department of Commerce*, 140 S. Ct. 2718 (2020) (No. 19-777); Pet. at 23 n.4, *Garza*, *supra* (No. 17-654); Gov't Br. in Opp. at 5, *Strong* v. *United States*, 552 U.S. 1188 (2008) (No. 07-6432); Gov't Br. in Opp. at 6, 15-16, *Liberty Cable Co.* v. *City of New York*, 516 U.S. 1171 (1996) (No. 93-953); Gov't Br. in Opp. at 4-8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900).

Indeed, "observation of the Court's behavior across a broad spectrum of cases since 1978" indicates that the Court "will simply deny certiorari" in "arguably moot cases unless the petition presents an issue (other than mootness) worthy of review." Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-28 & n.34 (11th ed.

2019); cf. *Camreta*, 563 U.S. at 713 (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review").

b. Vacatur is unwarranted here because the court of appeals' decision does not present an issue that independently merits review. The court's ruling that petitioners lack standing is correct and does not conflict with the decisions of any other court of appeals.

One indispensable requirement for establishing Article III standing is that the plaintiff must have suffered a "concrete and particularized" injury that is "'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citation omitted). Where plaintiffs bring a pre-enforcement suit based on fear of future enforcement, they must show "'a credible threat of prosecution'" that "render[s] the threatened enforcement sufficiently imminent." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). By contrast, plaintiffs "lack standing" to bring a pre-enforcement suit against a defendant that "possesses no intention to file an" enforcement action against them. *Whole Woman's Health* v. *Jackson*, 595 U.S. 30, 48 (2021).

Applying these principles, the court of appeals correctly held that petitioners lack standing to challenge HHS's notification because they "failed to show that they are actually violating the Notification, much less that they face a credible threat of enforcement." Pet. App. 4a. The court explained that petitioners had not "offer[ed] any evidence that HHS" viewed their medical practices—*i.e.*, their efforts to ensure "that the physical bodies of their patients are cared for properly"—as "gender-identity discrimination." *Id.* at 3a-4a. To the

contrary, as Judge Jones emphasized in her concurrence, "the government readily affirm[ed] the plaintiffs are not facing any 'credible threat' of prosecution for treating biological men or women according to their physical characteristics." *Id.* at 5a (citation omitted). HHS has *never* brought an enforcement action for such conduct and disavowed any intent to do so even before rescinding the notification. See pp. 2, 4, *supra*.

The court of appeals' narrow and fact-specific decision does not present any "compelling" circumstances that typically justify granting a writ of certiorari. Sup. Ct. R. 10. The decision does not "conflict with the decision of another United States court of appeals" or "relevant decisions of this Court." Sup. Ct. R. 10(a) and (c). Nor does this run-of-the-mill application of standing doctrine resolve an unsettled, "important question of federal law." Sup. Ct. R. 10(c). It "should surprise no one" that petitioners "chose not to seek en banc" rehearing below, because "there was no plausible reason to rehear this case." Pet. App. 8a (Duncan, J., concurring in the denial of rehearing en banc).

c. Petitioners do not contend that this case satisfies this Court's ordinary certiorari criteria, or even that the Fifth Circuit erred. They instead deny any need to show the case "would have been independently certworthy." Pet. 8-9. According to them, "summary vacatur is warranted" whenever a case is moot and the mootness is "attributable to the actions of the government." Pet. 8 (arguing that "[n]othing more is needed").

Petitioners' broad theory of automatic vacatur contravenes this Court's longstanding recognition that "not every moot case will warrant vacatur" and "the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Garza*, 584 U.S. at 729

(quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). Vacatur due to intervening mootness is generally available only to litigants "who have been prevented from obtaining the review to which they are entitled." *Camreta*, 563 U.S. at 712 (quoting *Munsingwear*, 340 U.S. at 39). And no petitioner is "entitled" to review on a writ of certiorari, *ibid.*, which "is not a matter of right, but of judicial discretion," Sup. Ct. R. 10.

Petitioners' theory is also inconsistent with this "Court's behavior across a broad spectrum of cases" indicating that "the Court denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review." Shapiro et al., *Supreme Court Practice* § 19.4, at 19-28 n.34; see, *e.g.*, *Military-Veterans Advocacy Inc.* v. *McDonough*, 143 S. Ct. 2609 (2023); *Strong* v. *United States*, 552 U.S. 1188 (2008). Petitioners would transform vacatur from an "extraordinary remedy," *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994), into the norm. But, "[a]s an equitable remedy, vacatur 'is not granted as a matter of course.'" *Acheson Hotels, LLC* v. *Laufer*, 601 U.S. 1, 16 (2023) (Jackson, J., concurring in the judgment) (citation omitted). Far from hewing to "this Court's longstanding practice," Pet. 8, petitioners defy the longstanding body of cases limiting the Court's exercise of its equitable authority under *Munsingwear*.

To support their theory, petitioners cite just two cases that granted vacatur without expressly "discussing whether the court of appeals' ruling would have been certworthy in the absence of mootness." Pet. 9. But petitioners vastly overread these two summary dispositions in positing that they departed *sub silentio* from the "requirement that petitioners seeking vacatur

under *Munsingwear* demonstrate that the court of appeals' ruling would have been independently certworthy." Pet. 8-9. It "bears emphasis that none of these cases addresses the propriety of" vacatur absent certworthiness, and "[l]ike a 'drive-by-jurisdictional rulin[g],' implicit acquiescence to a broad remedy 'ha[s] no precedential effect.'" *Trump* v. *CASA, Inc.*, 145 S. Ct. 2540, 2553 n.7 (2025) (citation omitted; second and third sets of brackets in original).

Regardless, both of petitioners' cited cases presented considerably stronger grounds for certiorari. *Speech First, Inc.* v. *Sands*, 144 S. Ct. 675 (2024), raised an "important" First Amendment issue that "split" circuits, *id.* at 676 (Thomas, J., dissenting), and the respondent *acquiesced* in certiorari for purposes of vacatur, Br. in Resp. at 16, *Speech First*, *supra* (No. 23-156). *Planned Parenthood Center for Choice* v. *Abbott*, 141 S. Ct. 1261 (2021), involved decisions resolving challenges to a Texas executive order banning most abortions in the COVID-19 pandemic, which even the respondents admitted "st[ood] as canonical decisions" that were "cited hundreds of times in courts across the country." Br. in Opp. at 1, *Planned Parenthood*, *supra* (No. 20-305). By contrast, the Fifth Circuit here resolved a narrow, factbound standing issue in a short per curiam that undisputedly does not independently warrant certiorari.

2. An independent reason not to vacate is that the court of appeals ruled on jurisdictional grounds, which it would have had "leeway" to rule on even had mootness arisen earlier. *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Granting certiorari and vacating one jurisdictional disposition to replace it with *another* jurisdictional disposition would

make little sense and would contravene the rule that federal courts "can address jurisdictional issues in any order [they] choose." *Acheson Hotels*, 601 U.S. at 4. Petitioners are thus mistaken in asserting it "does not matter" for *Munsingwear* purposes that the court below "dismissed the petitioners' claims for lack of Article III standing rather than rejecting those claims on the merits." Pet. 9.

Petitioners are further mistaken in suggesting that the vacatur of a court of appeals' decision addressing standing in *Speech First* justifies the same relief here. Pet. 9-10. Although the lower court in *Speech First* framed its rejection of one claim on standing grounds, its reasoning for doing so—that the challenged university policy "does not objectively chill" speech—implicated key issues of "First Amendment rights." 144 S. Ct. at 675, 678 (Thomas, J., dissenting); see Pet. at i, *Speech First*, *supra* (No. 23-156) ("The question presented is: Whether bias-response teams objectively chill students' speech."). The summary disposition of a petition for certiorari on that merits-inflected question does not suggest that vacatur should issue as a matter of course in cases decided on Article III standing grounds. See p. 10, *supra*. To the contrary, this Court routinely declines to vacate decisions that ruled against plaintiffs on standing or other jurisdictional grounds. *E.g.*, *Electronic Privacy Info. Ctr.* v. *Department of Commerce*, 140 S. Ct. 2718 (2020) (standing); *Liberty Cable Co.* v. *City of New York*, 516 U.S. 1171 (1996) (ripeness). It should do the same here.

B. The Equities Counsel Against Vacatur

Because vacatur "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Garza*, 584 U.S. at 729 (citation omitted). The equities here disfavor vacatur.

This is not a case where a prevailing party improperly frustrated further review. After a change in administration, the President, who is not a party here, issued an executive order to "correct" the "prior Administration['s]" "misapplication" of *Bostock* because he deemed it "legally untenable." 90 Fed. Reg. 8615, 8616 (Jan. 30, 2025). "It is hardly improper for" agencies to follow "the philosophy of the administration." *Biden* v. *Texas*, 597 U.S. 785, 812 (2022) (citations omitted).

Nor is there any need to preserve a "path for future relitigation." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (citation omitted). HHS never enforced the challenged notification against anyone in petitioners' position, even before rescinding it. And it is purely speculative whether HHS might someday seek to issue another notification to which petitioners would object, which could then be litigated on its own terms. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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