
In the Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION, *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

NATIONAL FAMILY PLANNING & REPRODUCTIVE
HEALTH ASSOCIATION, *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

ESSENTIAL ACCESS HEALTH, INC., *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF HEALTH AND 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 PETITIONERS

BRIAN D. VANDENBERG
LEONARD A. NELSON
DIANA T. HUANG
KYLE A. PALAZZOLO
ERIN G. SUTTON
AMERICAN MEDICAL
ASSOCIATION
Office of General Counsel
330 N. Wabash Ave.
Chicago, IL 60611
*Counsel for American
Medical Association and
Oregon Medical Association*

PAUL R.Q. WOLFSON
Counsel of Record
KIMBERLY A. PARKER
ALBINAS J. PRIZGINTAS
ELIZABETH P. PHILLIPS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com
*Counsel for Planned
Parenthood Federation of
America, Inc., Planned
Parenthood of Southwestern
Oregon, Planned Parenthood
Columbia Willamette, and
Thomas N. Ewing, M.D*

MARK A. BONANNO
OREGON MEDICAL ASSOCIATION
11740 SW 68th Parkway
Suite 100
Portland, OR 97223
*Counsel for American
Medical Association and
Oregon Medical Association*

DAVID D. COLE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th St. NW
Washington, DC 20005
*Counsel for National
Family Planning &
Reproductive Health
Association, Feminist
Women's Health Center,
and Deborah Oyer, M.D.*

RUTH E. HARLOW
BRIGITTE AMIRI
WHITNEY WHITE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
*Counsel for National
Family Planning &
Reproductive Health
Association, Feminist
Women's Health Center,
and Deborah Oyer, M.D.*

LEAH E. RUTMAN
JOHN MIDGLEY
AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
P.O. Box 9782
Seattle, Washington 98112
*Counsel for National
Family Planning &
Reproductive Health
Association, Feminist
Women's Health Center,
and Deborah Oyer, M.D.*

ALAN E. SCHOENFELD
JULIA C. PILCER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
*Counsel for Planned
Parenthood Federation of
America, Inc., Planned
Parenthood of Southwestern
Oregon, Planned
Parenthood Columbia
Willamette, and Thomas N.
Ewing, M.D.*

HELENE T. KRASNOFF
CARRIE Y. FLAXMAN
PLANNED PARENTHOOD
FEDERATION OF AMERICA,
INC.
1110 Vermont Ave. NW
Suite 300
Washington, DC 20005
*Counsel for Planned
Parenthood Federation of
America, Inc., Planned
Parenthood of Southwestern
Oregon, Planned
Parenthood Columbia
Willamette, and Thomas N.
Ewing, M.D.*

MICHELLE S. YBARRA
SOPHIE HOOD
SARAH SALOMON
CONNIE P. SUNG
DIVYA MUSINIPALLY
KEKER, VAN NEST &
PETERS LLP
633 Battery Street
San Francisco, CA 94111
*Counsel for Essential
Access Health, Inc. and
Melissa Marshall, M.D.*

JOE SHAEFFER
MACDONALD HOAGUE &
BAYLESS
705 Second Ave., Suite 1500
Seattle, Washington 98104
*Counsel for National
Family Planning &
Reproductive Health
Association, Feminist
Women's Health Center,
and Deborah Oyer, M.D.*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Diffenderfer v. Central Baptist Church</i> , 404 U.S. 412 (1972)	4
<i>Kremens v. Bartley</i> , 431 U.S. 119, 129 (1977)	4
<i>New York State Rifle & Pistol Ass’n v. City of New York</i> , 140 S. Ct. 1525 (2020)	3
<i>Princeton University v. Schmid</i> , 455 U.S. 100 (1982)	3
<i>Triangle Improvement Council v. Ritchie</i> , 402 U.S. 497 (1971)	4
<i>United States v. Alaska Steamship Co.</i> , 253 U.S. 113 (1920)	5
<i>Vita Nuova, Inc. v. Azar</i> , 458 F. Supp. 3d 546 (N.D. Tex. 2020).....	5
<i>Wilderness Society v. Kane County</i> , 632 F.3d 1162 (10th Cir. 2011)	5
<i>Wyoming v. United States Department of Interior</i> , 587 F.3d 1245 (10th Cir. 2009)	4, 5

DOCKETED CASES

<i>Arkansas v. Gresham</i> , No. 20-38 (U.S.).....	5
<i>Azar v. Gresham</i> , No. 20-37 (U.S.).....	5
<i>Azar v. Mayor & City Council of Baltimore</i> , No. 20-454 (U.S.).....	2, 3, 4, 5, 6, 7
<i>Oregon v. Azar</i> , No. 20-539 (U.S.).....	2, 5, 6, 7

TABLE OF AUTHORITIES—Continued

	Page(s)
STATUTES AND REGULATIONS	
42 U.S.C. § 300a-7	5
Memorandum, <i>The Title X “Gag Rule,”</i> 58 Fed. Reg. 7,455 (Jan. 22, 1993)	3
58 Fed. Reg. 7,462 (Feb. 5, 1993)	3
OTHER AUTHORITIES	
Astor, Maggie, <i>How the 2020 Democrats Re- sponded to an Abortion Survey</i> , N.Y. Times (Nov. 25, 2019), https://www.nytimes.com/2019/11/25/us/politics/democratic-candidates-abortion-survey.html	2
Biden Harris Campaign, <i>Health Care: Com- munities of Color</i> , https://joebiden.com/health-care-communities-of-color/ (visited Dec. 22, 2020)	2
Biden Harris Campaign, <i>The Biden Agenda for Women</i> , https://joebiden.com/womens-agenda/ (visited Dec. 22, 2020)	2
Joe Biden Tweet (Aug. 19, 2019), https://archive.is/WA5aj	2

IN THE
Supreme Court of the United States

No. 20-429

AMERICAN MEDICAL ASSOCIATION, *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

NATIONAL FAMILY PLANNING & REPRODUCTIVE
HEALTH ASSOCIATION, *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

ESSENTIAL ACCESS HEALTH, INC., *et al.*, *Petitioners*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF HEALTH AND 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 PETITIONERS

INTRODUCTION

This case concerns challenges to a 2019 Final Rule that imposes drastic changes on the Title X family planning program—changes that interfere with the patient-provider relationship, conflict with providers’ ethical obligations, and impose burdensome, counterpro-

ductive physical separation requirements on longstanding Title X providers. The Rule has decimated the Title X program, a vital public health program that has served millions of individuals each year.

Recognizing the Rule’s serious flaws and Title X’s essential role in ensuring that all individuals have access to family planning care—regardless of where they live or their economic means—President-Elect Biden has declared his intention to rescind the Rule upon assuming office next month. The incoming administration’s position on the Rule is unequivocal. Thus, the ultimate relief sought by petitioners—to set aside and vacate the Rule—will be achieved in the executive branch, which will moot the current conflict. Accordingly, petitioners respectfully request that the Court hold this petition and the related *Oregon* petition (No. 20-539) and *Baltimore* petition (No. 20-454) until the incoming administration has had the opportunity to advise the Court of its views.

ARGUMENT

1. After the filing of the petition in this case, the country held its presidential election, and Joseph Biden was elected President. The imminent change of administration has significant consequences for this case because President-Elect Biden has repeatedly stated that he will take action to rescind the Rule—as early as his first day in office. *See, e.g.*, Biden Harris Campaign, *The Biden Agenda for Women* (“As President, Biden will ... reverse the Trump Administration’s [Title X] rule[.]”); Biden Harris Campaign, *Health Care: Communities of Color* (same); Joe Biden Tweet (Aug. 19, 2019) (“The Trump Administration’s Title X rule is ... wrong, and as president I will reverse it.”); Astor, *How the 2020 Democrats Responded to an Abortion Survey*,

N.Y. Times (Nov. 25, 2019) (spokesman for Biden campaign: “Biden will ... use executive action ... on his first day in office [to] withdraw ... Donald Trump’s Title X restrictions”).

The President-Elect’s position is clear, and the Rule’s demise is far from “speculati[ve]” (U.S. Resp. to Mot. for Extension 1-2 (“U.S. Extension Resp.”), *Azar v. Mayor & City Council of Baltimore*, No. 20-454 (Dec. 7, 2020)). Indeed, this commitment to take immediate action echoes the Clinton Administration’s quick reversal of the 1988 Title X rule. Two days after President Clinton’s inauguration in 1993, he ordered HHS to rescind a 1988 rule similar to the one at issue here. *See* Mem., *The Title X “Gag Rule,”* 58 Fed. Reg. 7,455 (Jan. 22, 1993). HHS then did so, with immediate effect, 14 days later. 58 Fed. Reg. 7,462 (Feb. 5, 1993); *see also* Pet. 8-9 (describing history of 1988 rule and subsequent regulatory actions).

In this case, petitioners have asserted claims for declaratory and injunctive relief—seeking to set aside and vacate the Rule—on the grounds that the Rule is arbitrary and capricious and contrary to two federal laws, namely, the Nondirective Mandate and Section 1554 of the Affordable Care Act. *See, e.g.,* Pet. 15-16. Those claims will be moot once the Rule is rescinded, as this Court held just last Term with respect to an amended regulation. *See New York State Rifle & Pistol Ass’n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (per curiam). Myriad decisions of this Court are to the same effect.¹

¹ *See, e.g., Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (“[T]he issue of the validity of the old regulation,” substantially amended while the case was on appeal, “is moot[.]”);

2. Nonetheless, in opposing a motion for an extension of time in the related *Baltimore* case, the federal government invoked the “likel[i]hood” of “further litigation” challenging any new rulemaking and insisted that “[t]his Court should provide clarity now on the statutory-authority question that has divided the circuits.” U.S. Extension Resp. 2. But the government itself concedes that any such “further litigation” is uncertain. And more fundamentally, this Court does not issue “advisory opinions on abstract propositions of law.” *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam). The statutory-authority questions in this case are whether this Rule violates the Nondirective Mandate or Section 1554 of the ACA. *See* Pet. i; *see also* U.S. Br. 13. Once the Rule is rescinded, its conflict with statutes can no longer be at issue. Any decision on the statutory questions previously raised by this case “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 contro-

Kremens v. Bartley, 431 U.S. 119, 129 (1977) (“[W]e apply the law as it is now, not as it stood below. ... Thus the enactment of the new statute clearly moots the claims of the named appellees[.]”) (internal citations and footnote omitted); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-415 (1972) (per curiam) (“The only relief sought in the complaint was a declaratory judgment that the now repealed [Florida statute] is unconstitutional[.] ... This relief is, of course, inappropriate now that the statute has been repealed.”); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498-499 (1971) (per curiam) (Harlan, J., concurring) (writ of certiorari dismissed as improvidently granted after statute “upon which petitioners base[d] their case” was “repealed”); *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.”).

versy as required by Article III of the Constitution.” *Wyoming v. U.S. Dep’t of Interior*, 587 F.3d 1245, 1253 (10th Cir. 2009) (Gorsuch, J.).

“However convenient it might be ..., this [C]ourt ‘is not empowered to decide moot questions or abstract propositions[.]’” *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920); *see also Wilderness Soc’y v. Kane Cty.*, 632 F.3d 1162, 1175-1176 (10th Cir. 2011) (Gorsuch, J., concurring). It is beside the point that “the Judiciary” might “need to address the scope of the agency’s authority in this area” in the event of a future challenge to a new rulemaking (U.S. Extension Resp. 2).²

Moreover, whether HHS acted arbitrarily in adopting the Rule is a central question presented in these challenges. *See* Pet. i; Oregon Pet. i-ii, No. 20-539; U.S. Pet. I, No. 20-454. Yet the government does not even attempt to offer a reason why the Court should decide whether a rescinded rulemaking was arbitrary and capricious. *See* U.S. Extension Resp. 2 (focusing only on “statutory-authority question”). There can be no doubt that the Rule’s imminent rescission will moot this case.³

² In any event, if the sole case the government cited is intended to be illustrative, it demonstrates only that any future challenges will present statutory questions distinct from those at issue here—including, for example, a Religious Freedom Restoration Act challenge to 42 U.S.C. § 300a-7, a statute not at issue in this case. *See Vita Nuova, Inc. v. Azar*, 458 F. Supp. 3d 546, 558-559 (N.D. Tex. 2020) (dismissing all claims except for 42 U.S.C. § 300a-7 challenge), *cited at* U.S. Extension Resp. 2.

³ The government cites the Court’s recent grants of certiorari in *Azar v. Gresham*, No. 20-37, and *Arkansas v. Gresham*, No. 20-38, as evidence that prompt review is warranted “notwithstanding

3. Accordingly, the Court should hold this petition and the *Oregon* and *Baltimore* petitions until the incoming administration has had the opportunity to advise the Court of its views. This approach promotes judicial economy, which would be disserved if the Court were to grant review and order briefing to begin on the merits, only to have the government change its position in the middle of the briefing schedule.

While the current administration claims it would be prejudiced by any “delay” (U.S. Extension Resp. 1-2), the Rule is in effect everywhere in the United States except Maryland. There, the permanent injunction has been in place for more than 10 months (since February 14, 2020); the federal government did not seek a stay from this Court; and it has not provided any evidence that it has been unable to administer the Title X program effectively in Maryland with that limited injunction in place. Indeed, the current state of affairs in Maryland is simply the pre-Rule status quo, under which the Title X program is administered pursuant to regulations in place for two decades. Under these circumstances, the government cannot show prejudice from a modest postponement of this Court’s decision on whether to review this case. Moreover, a less hurried approach would benefit the government respondents ultimately affected by the Court’s disposition of this case by allowing the incoming administration time to present its views here.

the similar possibility of a future policy change.” U.S. Extension Resp. 2. But those petitions were fully briefed by November 4, before the election results were known, and no party raised even the prospect of a policy change as relevant to the Court’s consideration.

CONCLUSION

The Court should hold this petition and the *Oregon* and *Baltimore* petitions until the incoming administration has had the opportunity to inform the Court of its views.

Respectfully submitted.

BRIAN D. VANDENBERG
 LEONARD A. NELSON
 DIANA T. HUANG
 KYLE A. PALAZZOLO
 ERIN G. SUTTON
 AMERICAN MEDICAL
 ASSOCIATION
 Office of General Counsel
 330 N. Wabash Ave.
 Chicago, IL 60611
*Counsel for American
 Medical Association and
 Oregon Medical Association*

MARK A. BONANNO
 OREGON MEDICAL ASSOCIATION
 11740 SW 68th Parkway
 Suite 100
 Portland, OR 97223
*Counsel for American
 Medical Association and
 Oregon Medical Association*

DAVID D. COLE
 AMERICAN CIVIL LIBERTIES
 UNION FOUNDATION
 915 15th St. NW
 Washington, DC 20005
*Counsel for National
 Family Planning &
 Reproductive Health
 Association, Feminist
 Women's Health Center,
 and Deborah Oyer, M.D.*

PAUL R.Q. WOLFSON
Counsel of Record
 KIMBERLY A. PARKER
 ALBINAS J. PRIZGINTAS
 ELIZABETH P. PHILLIPS
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 1875 Pennsylvania Ave. NW
 Washington, DC 20006
 (202) 663-6000
 paul.wolfson@wilmerhale.com
*Counsel for Planned
 Parenthood Federation of
 America, Inc., Planned
 Parenthood of Southwestern
 Oregon, Planned Parenthood
 Columbia Willamette, and
 Thomas N. Ewing, M.D*

ALAN E. SCHOENFELD
 JULIA C. PILCER
 RYAN CHABOT
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 7 World Trade Center
 New York, NY 10007
*Counsel for Planned
 Parenthood Federation of
 America, Inc., Planned
 Parenthood of Southwestern
 Oregon, Planned
 Parenthood Columbia
 Willamette, and Thomas N.
 Ewing, M.D.*

RUTH E. HARLOW
 BRIGITTE AMIRI
 WHITNEY WHITE
 AMERICAN CIVIL LIBERTIES
 UNION FOUNDATION
 125 Broad St., 18th Floor
 New York, NY 10004
*Counsel for National
 Family Planning &
 Reproductive Health
 Association, Feminist
 Women's Health Center,
 and Deborah Oyer, M.D.*

LEAH E. RUTMAN
 JOHN MIDGLEY
 AMERICAN CIVIL LIBERTIES
 UNION OF WASHINGTON
 FOUNDATION
 P.O. Box 9782
 Seattle, Washington 98112
*Counsel for National
 Family Planning &
 Reproductive Health
 Association, Feminist
 Women's Health Center,
 and Deborah Oyer, M.D.*

JOE SHAEFFER
 MACDONALD HOAGUE &
 BAYLESS
 705 Second Ave., Suite 1500
 Seattle, Washington 98104
*Counsel for National
 Family Planning &
 Reproductive Health
 Association, Feminist
 Women's Health Center,
 and Deborah Oyer, M.D.*

HELENE T. KRASNOFF
 CARRIE Y. FLAXMAN
 PLANNED PARENTHOOD
 FEDERATION OF AMERICA,
 INC.
 1110 Vermont Ave. NW
 Suite 300
 Washington, DC 20005
*Counsel for Planned
 Parenthood Federation of
 America, Inc., Planned
 Parenthood of Southwestern
 Oregon, Planned
 Parenthood Columbia
 Willamette, and Thomas N.
 Ewing, M.D.*

MICHELLE S. YBARRA
 SOPHIE HOOD
 SARAH SALOMON
 CONNIE P. SUNG
 DIVYA MUSINIPALLY
 KEKER, VAN NEST &
 PETERS LLP
 633 Battery Street
 San Francisco, CA 94111
*Counsel for Essential
 Access Health, Inc. and
 Melissa Marshall, M.D.*

DECEMBER 2020