Nos. 20-429, 20-454 and 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.

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

*v.*

MAYOR AND CITY COUNCIL OF BALTIMORE

STATE OF OREGON, ET AL., PETITIONERS

*v.*

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

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

**FEDERAL PARTIES' RESPONSE IN OPPOSITION TO THE MOTIONS FOR LEAVE TO INTERVENE**

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The Acting Solicitor General, on behalf of the federal parties (petitioners in No. 20-454 and respondents in

Nos. 20-429 and 20-539), respectfully submits this response in opposition to the motions for leave to intervene filed by Ohio and 18 other States and by a group of medical associations. The motions should be denied.

Denial is appropriate on either of two alternative grounds. First, on March 12, 2021, the parties stipulated to dismiss these cases under this Court's Rule 46.1. As relevant here, Rule 46.1 requires dismissal upon the agreement of "all parties." Prospective intervenors are not "parties," so "all parties" to these cases have stipulated to dismissal. The cases should accordingly be dismissed under Rule 46.1, and the intervention motions should be denied as moot.

In the alternative, the Court should deny the intervention motions and then dismiss the cases under Rule 46.1. The prospective intervenors have no cognizable interest in continuing to litigate cases before this Court that *neither* the plaintiffs *nor* the defendants wish to pursue. And dismissal would not harm the prospective intervenors in any meaningful way; if the cases are dismissed, the 2019 rule challenged in this case will remain applicable to every Title X grant in the Nation except two in Maryland. Neither set of prospective intervenors asserts any harm arising from that outcome, which simply reflects the status quo before the certiorari petitions were filed. Just as the prospective intervenors would not have had standing to bring these cases to this Court at that time, see *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986), they do not have standing to keep the cases in this Court now.

Even if the prospective intervenors had a cognizable interest in continuing to litigate these cases, this Court should not exercise its discretion to grant intervention, because the cases are likely to become moot before they

can be decided on the merits. On January 28, 2021, President Biden issued a memorandum directing the Department of Health and Human Services (HHS) to review the rule at issue in these cases. App., *infra*, 3a. Based upon that review, HHS has determined to issue a Notice of Proposed Rulemaking (NPRM) by April 15, 2021, that will propose rescinding the 2019 rule at issue in this case and replacing it with a different rule substantively similar to the version that was in place from 2000 to 2019. *Id.* at 6a. HHS expects to have any final rule in place by early fall and effective before the 2022 Title X funding announcement issued in December 2021. *Id.* at 7a. These cases accordingly will likely become moot before they can be decided. No precedent or principle supports the extraordinary step of granting intervention in cases the parties have agreed to dismiss, involving a rule the agency proposes to repeal, when the cases are unlikely to ever be decided.

Finally, even if the Court could resolve the cases, any practical benefits to the prospective intervenors would be modest. The questions before the Court are whether the 2019 rule was within HHS's statutory authority and was reasonably explained. Resolution of those questions would have minimal significance to the prospective intervenors if the 2019 rule is soon replaced. And resolution of those questions would not affect the legality of the new rule HHS plans to propose. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 184, 188-189 (1991) (concluding that Title X's key language "is ambiguous" and that a prior rule similar to the current rule reflects one "permissible construction"). Yet virtually all of the prospective intervenors' substantive objections are based on harms that they believe will arise from a new rule. That un-

derscores that these intervention motions are mistargeted. If the prospective intervenors oppose a new rule that HHS adopts, the appropriate course is to challenge that rule, not prolong the litigation over this one.

## STATEMENT

These cases involve challenges brought by state and local governments, as well as private entities, to a 2019 HHS rule implementing Title X of the Public Health Service Act (Title X), 42 U.S.C. 300 *et seq.* The Ninth Circuit sitting en banc upheld the rule as within the agency's authority and reasonably explained. 20-429 Pet. App. 1a-94a. The Fourth Circuit sitting en banc found the rule invalid and affirmed an injunction barring application of the rule in Maryland. 20-454 Pet. App. 1a-132a. Three petitions for writs of certiorari were filed from those decisions. On February 22, 2021, this Court granted the petitions and consolidated the cases for briefing and argument. On March 8, 2021, Ohio and 18 other States who are not parties to the cases (the States) moved to intervene in this Court. On March 12, 2021, a group of medical associations who are not parties to the cases (the Associations) also moved to intervene in this Court. Later that day, the parties to the cases jointly stipulated to dismiss all three cases pursuant to this Court's Rule 46.1.

### A. Statutory and Regulatory Background

1. Title X authorizes HHS to make grants to, and enter into contracts with, public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. 300(a). Grants and contracts under the Title X program "shall be made in

accordance with such regulations as the Secretary may promulgate." 42 U.S.C. 300a-4(a). As relevant here, "[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.

2. HHS's implementation of that condition on Title X funding has undergone many shifts over time.

a. In the early years of the program, HHS legal opinions permitted—and then 1981 HHS guidelines required—projects receiving Title X grants to offer pregnant patients nondirective counseling about options including abortion and to provide referrals for abortion upon request. See 20-429 Pet. App. 7a-8a.

b. In 1988, HHS issued a notice-and-comment rule (the 1988 rule) that generally prohibited projects receiving Title X funds from providing abortion counseling or referral. 53 Fed. Reg. 2922, 2945 (Feb. 2, 1988). The 1988 rule also required that projects receiving Title X funds maintain physical and financial separation from abortion-related activities. *Ibid.*

The 1988 rule was upheld by this Court in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). As pertinent here, the Court held that the "language" of Title X's key funding condition "is ambiguous" because it "does not speak directly to the issues of counseling, referral, advocacy, or program integrity." *Id.* at 184. The Court then concluded that the 1988 rule reflected a "permissible construction of the statute," *id.* at 187-188, entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

c. HHS suspended the 1988 rule in 1993 and replaced it in 2000 with a notice-and-comment rule (the 2000 rule) that largely restored the agency's prior

position—*i.e.*, projects receiving Title X funds must offer nondirective counseling about options including abortion and provide referrals for abortion upon request. See 20-429 Pet. App. 14a-15a. The 2000 rule also eliminated the 1988 rule's physical and financial separation requirement. *Ibid.* Those core aspects of the 2000 rule remained in place for the next 19 years. *Id.* at 15a-17a.

The 2000 rule was enforced subject to an important exception. Under a federal statute known as the Church Amendment, "[n]o individual shall be required to perform or assist in the performance of any part of a health service program" funded by HHS "if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." 42 U.S.C. 300a-7(d); see 42 U.S.C. 300a-7. HHS accordingly made clear that, under the 2000 rule, "grantees may not require individual employees who have" religious or moral objections "to provid[ing abortion] counseling" or referrals to comply with those aspects of the rule. 65 Fed. Reg. 41,270, 41,274 (July 3, 2000); see 84 Fed. Reg. 23,170, 23,191 n.64 (May 21, 2019) (indicating HHS's continued adherence to that exception in the Title X program).

3. In March 2019, HHS adopted a new notice-and-comment rule (the 2019 rule) that largely restored the 1988 rule. 84 Fed. Reg. 7714 (Mar. 4, 2019) (42 C.F.R. 59.1-59.19). Like the 1988 rule, the 2019 rule prohibits projects receiving Title X funds from making abortion referrals and requires them to maintain physical and financial separation from abortion-related activities. 42 C.F.R. 59.14(a) and 59.15. The 2019 rule allows—but does not require—nondirective counseling that discusses abortion. 42 C.F.R. 59.14(e)(5).

**B. Proceedings Below**

1. The 2019 rule was challenged by state and local governments, along with private entities, in numerous jurisdictions. The litigation at issue in these cases unfolded in the Fourth and Ninth Circuits. As relevant here, the challengers contended that the 2019 rule was (1) barred by an annually enacted appropriations provision stating that, within the Title X program, "all pregnancy counseling shall be nondirective," Department of Health and Human Services Appropriations Act, 2020, Pub. L. No. 116-94, Div. A, Tit. II, 133 Stat. 2558; (2) barred by Section 1554 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 259, which prohibits HHS from adopting a regulation that, *inter alia*, "interferes with communications regarding a full range of treatment options between the patient and the provider," restricts "full disclosure of all relevant information to patients making health care decisions," "creates any unreasonable barriers" to obtaining "appropriate medical care," or "impedes timely access to health care services," 42 U.S.C. 18114; and (3) arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because it was not the product of reasoned decisionmaking.

In the Fourth Circuit litigation, a district court in Maryland entered preliminary and permanent injunctions that collectively enjoined enforcement of the 2019 rule in Maryland based on the three arguments outlined above. 20-454 Pet. App. 135a-177a, 213a-225a. The en banc court of appeals affirmed the permanent injunction based on all three rationales. See *id.* at 1a-132a.

In the Ninth Circuit litigation, district courts in California, Oregon, and Washington each enjoined the rule. 20-429 Pet. App. 95a-134a, 135a-158a, 159a-269a. The

en banc court of appeals vacated the injunctions on the ground that the challengers "will not prevail on the merits of their legal claims." *Id.* at 68a; see *id.* at 1a-94a.

3. In October 2020, the government filed a petition for a writ of certiorari (No. 20-454) asking this Court to review the Fourth Circuit decision. That same month, two groups of challengers filed petitions for writs of certiorari (Nos. 20-429 and 20-539) asking this Court to review the Ninth Circuit decision. On February 22, 2021, this Court granted review and consolidated the cases.

**C. Subsequent Developments**

1. While the petitions were pending, President Biden took office. On January 28, 2021, he issued a presidential memorandum that discussed Title X generally and the 2019 rule in particular. See App., *infra*, 1a-5a. The memorandum observed that Title X "specifies that [grant] funds may not be used in programs where abortion is a method of family planning, but places no further abortion-related restrictions on recipients" of those funds. *Id.* at 1a-2a. The memorandum then described the 2019 rule and noted that it had "caused the termination of Federal family planning funding for many women's healthcare providers and puts women's health at risk by making it harder for women to receive complete medical information." *Id.* at 2a. The memorandum directed HHS to "review the [2019 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 to "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 [APA]." *Id.* at 3a.

2. HHS conducted its review of the 2019 rule as promptly as possible, while giving thorough consideration to the significant questions involved and addressing the many other serious health-policy matters (including the COVID-19 pandemic) confronting the agency and the country. Based upon that review, HHS has determined to issue a NPRM that proposes to rescind the 2019 rule and to replace it with a new rule substantively similar to the 2000 rule. See App., *infra*, 6a. The agency anticipates that it will issue the NPRM by April 15, 2021, and that it will complete any final rule by early fall, which would allow a final rule to take effect before the December 2021 funding announcement for the 2022 Title X funding cycle. See *id.* at 6a-7a.

Given that these cases are unlikely to be argued before October 2021, at which point they will have been overtaken by the forthcoming rulemaking proceedings, HHS—in consultation with the Department of Justice—determined to stipulate to dismissal of the cases before this Court. That approach would preserve the status quo (*i.e.*, the 2019 rule would be enforceable everywhere except Maryland) while allowing the agency to devote its resources to the new rulemaking and ensuring that this Court does not receive briefing or argument in cases that are very likely to become moot. On March 12, the parties filed joint stipulations to dismiss the cases under this Court's Rule 46.1.

3. On March 8—two weeks after this Court granted certiorari and four days before the parties filed their joint stipulation—the States moved for leave to intervene in this Court. On March 12, the Associations moved for leave to intervene. On March 15, both sets of

prospective intervenors filed supplemental briefs asking this Court to address their intervention motions before dismissing the cases under Rule 46.1.

**ARGUMENT**

The motions for leave to intervene should be denied for either of two alternative reasons. First, "all parties" have stipulated to dismiss the cases under Rule 46.1, and the plain language of the Rule requires "an order of dismissal" in each case. In the alternative, the Court should decline to exercise its discretion to grant leave to intervene. Now that the parties have stipulated to dismiss the cases, the prospective intervenors have no cognizable interest in forcing the cases to continue, because the prospective intervenors would not be harmed in any way by a preservation of the status quo. Granting leave to intervene with the aim of enabling a decision on the merits would also likely be futile, because the cases will likely become moot before they can be resolved. And even if the cases could be decided, a favorable decision would provide little practical benefit to the prospective intervenors, because a holding that the 2019 rule was lawful would have no direct bearing on the legality of the new rule that HHS plans to propose.

At bottom, it would be an extraordinary step to allow non-parties to force this Court to retain jurisdiction over cases that *both* the plaintiffs who challenged the rule *and* the federal agency that adopted the rule agree should come to an end, particularly when the agency has committed to commence a rulemaking to rescind and replace the challenged rule in short order with the likely effect that the cases will become moot. The prospective intervenors identify no case in which this Court has granted intervention on facts remotely like those here.

If such a step were ever warranted, there would have to be far stronger interests at stake than exist here.

### A. The Court Should Dismiss The Cases Under Rule 46.1 And Deny The Intervention Motions As Moot

These cases can be resolved on a straightforward basis. Rule 46.1 provides that "whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal." Here, "all parties" filed stipulations of dismissal under Rule 46.1. Accordingly, "an order of dismissal" should be entered in each case, and the motions to intervene should be dismissed as moot.

The prospective intervenors do not suggest that Rule 46.1 is not satisfied. In particular, they do not contend that they are currently "parties" to the cases, such that the stipulated dismissals are ineffective because they were not joined by "all parties." To the contrary, the prospective intervenors appear to concede that they are not currently parties. *E.g.*, States Supp. Br. 2 ("*If* the Court grants intervention, *then* the States (or the private groups) *will become parties* to the case, *at which point* the Court will *no longer* have an agreement to dismiss from 'all parties.'") (emphases added).

That concession follows from the plain language of Rule 46.1, as well as its history and purpose. Since 1858, this Court's Rules have given parties "the absolute right to dismiss their appeal without judicial scrutiny." *Utah Pub. Serv. Comm'n* v. *El Paso Nat. Gas Co.*, 395 U.S. 464, 475 (1969) (Harlan, J., dissenting). "The rule is not a mere technicality but is predicated upon the classical

view that it is the function of this Court to decide controversies between parties only when they cannot be settled by the litigants in any other way." *Id.* at 476.

Those same principles underlie Federal Rule of Civil Procedure 41(a)(1)(ii), which similarly provides for "a stipulation of dismissal signed by all parties who have appeared." As a leading treatise explains, a "stipulation filed during the pendency of a motion to intervene is effective to dismiss the action, because the proposed intervenors do not become parties within the meaning of the Rule until their motion is granted." 8 James William Moore et al., *Moore's Federal Practice* § 41.34[4][b] (3d ed. 2020) (collecting cases).

Accordingly, lower courts have routinely held that a "stipulation of dismissal filed under Rule 41(a)(1)(A)(i) or (ii) is self-executing and immediately strips the district court of jurisdiction over the merits." *De Leon* v. *Marcus*, 659 F.3d 1276, 1283 (10th Cir. 2011); see, *e.g.*, *Anago Franchising, Inc.* v. *Shaz, LLC*, 677 F.3d 1272, 1277-1278 (11th Cir. 2012) ("Most of our sister circuits have directly or implicitly found, in published and unpublished opinions, that a stipulation filed under Rule 41(a)(1)(A)(ii) is self-executing and dismisses the case upon filing."); *Gamble* v. *Deutsche Bank AG*, 377 F.3d 133, 139 (2d Cir. 2004) ("Generally, * * * filing in the district court of a stipulation of dismissal signed by all parties pursuant to Rule 41(a)(1)(ii) divests the court of its jurisdiction over a case, irrespective of whether the district court approves the stipulation.").

The Associations identify (Supp. Br. 3-6) a handful of cases in which lower courts have allowed intervention by plaintiffs after a stipulated dismissal was entered to permit appeal to a higher court. For example, when a district court declined to certify a putative class action

and the named plaintiff then stipulated to dismissal of the case, the D.C. Circuit allowed intervention by putative class plaintiffs to prevent a "Catch-22" barring review of the class-certification denial. *In re Brewer*, 863 F.3d 861, 868 (2017); see *Odle* v. *Flores*, 683 Fed. Appx. 288, 289 (5th Cir. 2017) (per curiam) (similar); cf. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977) (approving lower-court intervention after judgment by putative plaintiffs in a class action).

Whatever the merits of those decisions, they are inapplicable here. The prospective intervenors are not putative plaintiffs seeking to enter a dismissed case to appeal an adverse determination that would otherwise escape review. They instead ask this Court not to enter orders of dismissal in the first place, even though that result is compelled by the text of Rule 46.1, so they can defend a rule the agency proposes to repeal. The prospective intervenors identify no case in which this Court has ever approved an intervention motion on similar facts. And while they contend (Associations Supp. Br. 3-4) that the "mandatory" language of Rule 46.1 is not "jurisdictional" and thus can admit of "equitable exceptions," they identify no such exception applicable here. Cf. *Utah Pub. Serv. Comm'n*, 395 U.S. at 466 (identifying "an exception where the dismissal implicates a mandate [the Court has] entered in a cause"). The Court should accordingly apply the straightforward direction of Rule 46.1, dismiss these cases pursuant to the parties' stipulation, and deny the intervention motions as moot.

### B. In The Alternative, The Court Should Deny The Intervention Motions And Then Dismiss The Cases Under Rule 46.1

In the alternative, if the Court chooses to address the intervention motions before the Rule 46.1 stipulation,

the Court should deny the intervention motions and then dismiss the cases under Rule 46.1. This Court permits intervention only in "unusual circumstances" in which "extraordinary factors" support the addition of new parties. Stephen M. Shapiro et al., *Supreme Court Practice* 427 (10th ed. 2013). Because the Court's Rules do not expressly provide a standard for intervention, the Court has looked for guidance to the Federal Rules of Civil Procedure and the Court's "general equity powers." *United States* v. *Louisiana*, 354 U.S. 515, 516 (1957) (per curiam). The Court has emphasized that the propriety of intervention depends on "all the circumstances," *NAACP* v. *New York*, 413 U.S. 345, 366 (1973), and is "always to some extent bound up in the facts of the particular case," *Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam). The extraordinary step of granting intervention is unwarranted in these circumstances for multiple reasons.

***1. The prospective intervenors have no cognizable interest in forcing these cases to continue in this Court now that the parties have stipulated to dismissal***

First, and dispositive, the prospective intervenors have no cognizable interest in forcing these cases to continue in this Court now that the parties have stipulated to dismissal. The effect of dismissing these cases would be to preserve the status quo: the 2019 rule can be enforced everywhere in the Nation except at the two projects in Maryland that receive Title X funds, which are subject to the Maryland-only injunction upheld by the Fourth Circuit. See 20-454 Pet. App. 61a-64a.

Neither set of prospective intervenors can claim any cognizable harm from that result. The States seeking to intervene acknowledge that "the Fourth Circuit's * * * decision forbids the 2019 Rules' enforcement *only*

in Maryland." Mot. 12. "Because Maryland is not one of the States now seeking to intervene here," the States explain, "the Fourth Circuit's decision caused the [States] no direct harm." *Ibid.* The States likewise acknowledge that the "Ninth Circuit upheld the [2019] rules, leaving them in place in each of the Proposed-Intervenor States." *Ibid.* Thus, under the status quo that existed before the certiorari petitions were filed and that would be preserved if the cases are dismissed, the States concededly have "no reason to intervene." *Ibid.*

The Associations likewise identify no cognizable harm resulting from dismissal of these cases. The Associations state that they each have "[s]everal * * * members" working at facilities that receive Title X funds, Mot. 3-4, but nowhere in their intervention motion, accompanying declarations, or supplemental brief do they indicate that they have any members working for the two Maryland grantees that receive Title X funds. There is accordingly no indication that they would suffer any harm by preserving the status quo—*i.e.*, allowing the 2019 rule to be enforced everywhere in the Nation except Maryland.

Even if the Associations did have members affiliated with the Maryland grantees, the injunction of the 2019 rule there would still not produce the harm they assert. They claim that, without the 2019 rule, "conscience protections" for individuals who object to abortion counseling or referral on religious or moral grounds would "disappear." Mot. 11. That understanding is mistaken. As explained above, federal *statutes* require conscience protections of the kind the Associations reference. See, *e.g.*, 42 U.S.C. 300a-7 (Church Amendment); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2020,

Pub. L. No. 116-94, Div. A, Tit. V, § 507(d), 133 Stat. 2607 (Weldon Amendment). HHS accordingly did not apply the 2000 rule—which was in force nationwide for 19 years and is now in force in Maryland—to require conscientious objectors to engage in abortion counseling or referral. See p. 6, *supra*.

The prospective intervenors thus fall far short of establishing the kind of interest that would justify the "unusual" step of allowing them to intervene in this Court to protect "vitally affected" rights. *Supreme Court Practice* 427; cf. Fed. R. Civ. P. 24(a)(2). Indeed, it is far from clear that the prospective intervenors would have standing to continue the cases now that the parties have stipulated to dismiss them. In *Diamond* v. *Charles*, 476 U.S. 54 (1986), this Court held that a doctor who had intervened in the lower court to defend an Illinois abortion regulation lacked standing in this Court when the State declined to seek review of the court of appeals' adverse decision. *Id.* at 64-67; cf. *Hollingsworth* v. *Perry*, 570 U.S. 693, 707-709 (2013). Here, the parties' stipulation to dismiss the cases in this Court would produce the same practical result as Illinois's decision not to seek review in *Diamond*. See *Moore's Federal Practice* § 41.34[6][d] (explaining that a stipulated dismissal "terminates the action as if it were never filed"). Neither the States nor the Associations suggest that they could have asked this Court to decide these cases if the parties had not petitioned for certiorari. For the same reason, they cannot force the Court to retain jurisdiction over these cases now that the parties have stipulated to dismissal. "Any justification for making them parties has" thus "disappeared." *United States* v. *Paramount Pictures*, 334 U.S. 131, 178 (1948).

***2. Intervention is unwarranted because the cases are likely to become moot before decision***

Even if the prospective intervenors were able to establish a cognizable interest, intervention would be unwarranted because the cases are likely to become moot before they can be decided. This Court should "exercise * * * its sound discretion" to reject the extraordinary step of granting intervention when it is highly likely that the cases cannot be decided. *NAACP*, 413 U.S. at 366; see *Supreme Court Practice* 427.

Because this Court granted certiorari in these cases in late February 2021, they presumably will not be argued until October 2021 at the earliest. A decision would presumably come some months after that. But as HHS has now explained, it plans to issue a NPRM by April 15, 2021, that proposes to rescind the 2019 rule and replace it with a new rule that is substantively similar to the 2000 rule. See App., *infra*, 6a. HHS has further explained that it plans to finalize any new rule by early fall of this year so that it can take effect in time for the 2022 Title X funding cycle. See *id.* at 7a. These cases accordingly are likely to become moot before this Court could resolve them—which would defeat the central purpose of allowing intervention. See, *e.g.*, *American Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 158-159 (1989) (per curiam) (dismissing as moot a case involving a regulation withdrawn by the agency during the case's pendency before the Court).

Requiring a futile process of briefing and argument in these cases would not serve the interests of this Court or the parties. In particular, such a process has "the potential [to] seriously disrupt[]" the agency's rulemaking, which is one reason why the government decided to stipulate to dismissal of these cases. *NAACP*, 413 U.S.

at 369. Those considerations of judicial efficiency and prejudice to the parties further weigh against a discretionary grant of intervention. *Ibid.*; see *Supreme Court Practice* 427; Fed. R. Civ. P. 24(b)(3).

***3. Deciding the cases would have little practical effect***

Finally, even if the Court were able to decide these cases, its decision would likely have limited practical effect in light of HHS's decision to propose a new rule. The questions presented in these cases are whether the 2019 rule was within the agency's statutory authority and was reasonably explained. See, *e.g.*, 20-454 Pet. I. The litigation has not turned on the separate question whether Title X *requires* the interpretation adopted in the 2019 rule. Relying on *Rust* v. *Sullivan*, 500 U.S. 173 (1991), which held that the similar 1988 rule was "a *permissible* construction" of Title X's "ambiguous" language, *id.* at 184, 187-188 (emphasis added), the government's position throughout this litigation has been that the 2019 rule is statutorily *authorized*—not that it is statutorily *required*, see, *e.g.*, 20-454 Pet. 12-19. That is the position the en banc Ninth Circuit adopted, explaining that HHS had "reasonably" interpreted the relevant statutes in adopting the 2019 rule. 20-429 Pet. App. 34a, 36a, 39a-40a. And that is the position that several of the prospective intervenors have asked this Court to affirm. See, *e.g.*, 20-454 American Ass'n of Pro-Life Obstetricians & Gynecologists Cert. Amicus Br. 14-17.

The prospective intervenors have objections to the policies embodied in the 2000 rule, see States Mot. 3-5; Associations Mot. 7-8, which is substantively similar to the rule that HHS plans to propose, see App., *infra*, 6a. But resolving the questions presented here—*i.e.*, determining whether the 2019 rule was within the agency's statutory authority and reasonably explained—will

shed little light on whether the new rule that HHS plans to propose is lawful. After all, this Court has already held that the relevant Title X language is "ambiguous," which means it is by definition capable of multiple interpretations. *Rust*, 500 U.S. at 184. And the Court has recognized that deference was due to HHS's construction of Title X's language even when it represented "a sharp break" from prior interpretations. *Id.* at 186.

To the extent the proposed intervenors contend that the public "need[s] an answer now," Associations Mot. 14, regarding "unresolved issues that matter a great deal," States Mot. 13, they overstate the significance of the questions presented in light of HHS's announcement regarding a future rulemaking and the parties' stipulated dismissals that will leave the current rule in place in 49 of the 50 States. To the extent the proposed intervenors seek to argue (cf. States Supp. Br. 1; Associations Supp. Br. 2) that this Court should address a different question than the one that has been the subject of this litigation—*i.e.*, to urge the Court to hold that Title X *requires* the 2019 rule—that weighs heavily *against* allowing intervention. The proposed intervenors would not be continuing the government's defense of the 2019 rule—a defense they acknowledge "protected the[ir] interests," States Mot. 8—by unveiling a new defense of that rule for the first time in this Court. This Court should not grant them leave to do so; the proper course would be for them to bring a challenge to any new rule. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (cautioning that this Court is "a court of review, not of first view").

Relatedly, the proposed intervenors appear to misapprehend the effect of the stipulated dismissals on the course of this litigation. As noted, denying the motions

to intervene and dismissing these cases would mean that the 2019 rule can be enforced in every State except Maryland and with respect to 71 of the Nation's 73 Title X grant recipients. See HHS, Office of Population Affairs, *Title X Family Planning Directory* 1-136 (2021), https://opa.hhs.gov/sites/default/files/2021-03/title-x-family-planning-directory-february2021.pdf. Reaching an agreement that produces that result, while ending contentious litigation and preventing likely futile briefing and argument before this Court, is hardly "affirmatively undermining federal law," States Supp. Br. 2, or threatening the "separation of powers," Associations Supp. Br. 7. It is the prospective intervenors' position —which would force this Court to adjudicate disputes that none of the parties wants to pursue regarding a rule that the Executive Branch is proposing to repeal in cases that are likely to become moot—that "has broad separation of powers implications." *Ibid.* Those considerations further weigh against granting the prospective intervenors' extraordinary requests to prolong this obsolete litigation.

**CONCLUSION**

The motions for leave to intervene should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Acting Solicitor General*

MARCH 2021

**APPENDIX A**

**THE WHITE HOUSE** 

Briefing Room

**Memorandum on Protecting Women's Health at Home and Abroad**

Jan. 28, 2021 • Presidential Actions

MEMORANDUM FOR THE SECRETARY OF STATE, THE SECRETARY OF DEFENSE, THE SECRETARY OF HEALTH AND HUMAN SERVICES, THE ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

Section 1. Policy. Women should have access to the healthcare they need. For too many women today, both at home and abroad, that is not possible. Undue restrictions on the use of Federal funds have made it harder for women to obtain necessary healthcare. The Federal Government must take action to ensure that women at home and around the world are able to access complete medical information, including with respect to their reproductive health.

In the United States, Title X of the Public Health Services Act (42 U.S.C. 300 to 300a-6) provides Federal funding for family planning services that primarily benefit low-income patients. The Act specifies that Title X funds may not be used in programs where abortion is a method of family planning, but places no further abortion-

related restrictions on recipients of Title X funds. *See* 42 U.S.C. 300a-6. In 2019, the Secretary of Health and Human Services finalized changes to regulations governing the Title X program and issued a final rule entitled "Compliance With Statutory Program Integrity Requirements," 84 Fed. Reg. 7714 (Mar. 4, 2019) (Title X Rule), which prohibits recipients of Title X funds from referring patients to abortion providers and imposes other onerous requirements on abortion providers. The Title X Rule has caused the termination of Federal family planning funding for many women's healthcare providers and puts women's health at risk by making it harder for women to receive complete medical information.

It is the policy of my Administration to support women's and girls' sexual and reproductive health and rights in the United States, as well as globally. The Foreign Assistance Act of 1961 (22 U.S.C. 2151b(f)(1)), prohibits nongovernmental organizations (NGOs) that receive Federal funds from using those funds "to pay for the performance of abortions as a method of family planning, or to motivate or coerce any person to practice abortions." The August 1984 announcement by President Reagan of what has become known as the "Mexico City Policy" directed the United States Agency for International Development (USAID) to expand this limitation and withhold USAID family planning funds from NGOs that use non-USAID funds to perform abortions, provide advice, counseling, or information regarding abortion, or lobby a foreign government to legalize abortion or make abortion services more easily available. These restrictions were rescinded by President Clinton in 1993, reinstated by President George W. Bush in 2001, and rescinded by President Obama in

2009. President Trump substantially expanded these restrictions by applying the policy to global health assistance provided by all executive departments and agencies (agencies). These excessive conditions on foreign and development assistance undermine the United States' efforts to advance gender equality globally by restricting our ability to support women's health and programs that prevent and respond to gender-based violence. The expansion of the policy has also affected all other areas of global health assistance, limiting the United States' ability to work with local partners around the world and inhibiting their efforts to confront serious health challenges such as HIV/AIDS, tuberculosis, and malaria, among others. Such restrictions on global health assistance are particularly harmful in light of the coronavirus disease 2019 (COVID-19) pandemic. Accordingly, I hereby order as follows:

Sec. 2. Revocations and Other Actions. (a) 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.

(b) The Presidential Memorandum of January 23, 2017 (The Mexico City Policy), is revoked.

(c) The Secretary of State, the Secretary of Defense, the Secretary of Health and Human Services, the Administrator of USAID, and appropriate officials at all

other agencies involved in foreign assistance shall take all steps necessary to implement this memorandum, as appropriate and consistent with applicable law. This shall include the following actions with respect to conditions in assistance awards that were imposed pursuant to the January 2017 Presidential Memorandum and that are not required by the Foreign Assistance Act or any other law:

(i) immediately waive such conditions in any current grants

(ii) notify current grantees, as soon as possible, that these conditions have been waived; an

(iii) immediately cease imposing these conditions in any future assistance awards.

(d) The Secretary of State, the Secretary of Defense, the Secretary of Health and Human Services, and the Administrator of USAID, as appropriate and consistent with applicable law, shall suspend, revise, or rescind any regulations, orders, guidance documents, policies, and any other similar agency actions that were issued pursuant to the January 2017 Presidential Memorandum.

(e) The Secretary of State and the Secretary of Health and Human Services, in a timely and appropriate manner, shall withdraw co-sponsorship and signature from the Geneva Consensus Declaration (Declaration) and notify other co-sponsors and signatories to the Declaration and other appropriate parties of the United States' withdrawal.

(f) The Secretary of State, consistent with applicable law and subject to the availability of appropriations, shall:

(i) take the steps necessary to resume funding to the United Nations Population Fund; and

(ii) work with the Administrator of USAID and across United States Government foreign assistance programs to ensure that adequate funds are being directed to support women's health needs globally, including sexual and reproductive health and reproductive rights.

(g) The Secretary of State, in coordination with the Secretary of Health and Human Services, shall provide guidance to agencies consistent with this memorandum.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of State is authorized and directed to publish this memorandum in the *Federal Register*.

JOSEPH R. BIDEN JR.

## APPENDIX B

**Office of Population Affairs Statement on Proposed Revision of Title X Regulations:**

On January 28, 2021, President Biden issued a "Memorandum on Protecting Women's Health at Home and Abroad," directing the Department of Health and Human Services (HHS) to review the 2019 Title X Final Rule and "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."[1] HHS conducted an extensive review and consideration of the 2019 Title X Final Rule (84 Fed. Reg. 7714) pursuant to this Presidential memorandum. The memorandum specifically directed HHS to ensure that undue restrictions are not put on the use of federal funds or on women's access to medical information.

After reviewing the 2019 rule, HHS plans to propose revised regulations substantively similar to those issued in 2000 (65 Fed. Reg. 41270), under which the program operated successfully for years, with a few definitional updates that account for minor operational changes over the past 20 years. HHS is working on promulgating a new Notice of Proposed Rulemaking (NPRM), and it expects to have this NPRM published in the *Federal Register* no later than April 15, 2021. HHS will review and

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[1] *Memorandum on Protecting Women's Health at Home and Abroad*, The White House (Jan. 28, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/.

carefully consider all comments submitted in response to this NPRM and plans to have any Title X Final Rule in place by early fall and effective in time for the Fiscal Year 2022 funding announcement, which is expected to be issued in December 2021.