Nos. 20-429, 20-454, 20-539

# In the Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION, *ET AL.*,

*Petitioners,*

v.

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS FOR THE NINTH CIRCUIT*

## REPLY IN SUPPORT OF MOTION OF OHIO AND 18 OTHER STATES FOR LEAVE TO EITHER INTERVENE OR TO PRESENT ORAL ARGUMENT AS *AMICI CURIAE*

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XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,
*Petitioners*,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

OREGON, *ET AL.*,
*Petitioners*,

v.

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL*,
*Respondents.*

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

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## REPLY

The Department of Justice is supposed to represent the legal interests of the United States—to help the President take care that the laws be faithfully executed. That is what makes its conduct in recent weeks so surprising. In one case, the Department stipulated to the dismissal of an appeal challenging a nationwide injunction. *See* Mtn. to Dismiss, *Cook County v. Wolf*, No. 20-3150, Doc.23 (7th Cir. March 9, 2021). In another, it informed this Court that it would decline to defend a favorable judgment *on the day* that its merits brief was due, complicating the Court's ability to decide the case this Term. *See* Letter of Respondent United States, *Terry v. United States*, No. 20-5904 (March 15, 2021). And here, the Department stipulated to the dismissal of three cases, including one in which the Department itself petitioned for review.

What explains the change in position here? The Department says that "one reason why the government decided to stipulate to dismissal of these cases" is that clarification on the meaning of Title X has the potential to disrupt future rulemaking efforts. Fed.Resp.17. The Department does not share the other reasons. Nor does it explain why, if a resolution might be so harmful, it allowed its own *certiorari* petition to remain pending for *over a month* between President Biden's taking office and this Court's agreeing to hear the case. But here is one possibility: the Department wanted to keep the cases docketed, have them put in abeyance, and then to eventually seek vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That would allow the Department to do away with a Ninth Circuit decision in which it prevailed, but that it now regards as incorrectly decided. This plan (if it

was the plan) hit a snag when the States and the private medical associations moved to intervene. So, in an attempt to keep the Court from ruling on those motions, the Department stipulated to dismissal.

Whatever the reason for the Department's conduct, no neutral observer would view it as anything other than gamesmanship. As the Court has recognized, "post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). In this context, as in others, the Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

To deter future gamesmanship, and to protect the interests of affected parties, the Court should grant the intervention motions and reject the stipulated dismissals. None of the parties' counterarguments justify any other resolution.

***Rule 46.1.*** The parties argue that Rule 46.1 requires dismissal. But they do not claim that the rule strictly binds this Court. Nor could they: this Court's rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64 (1970). For at least three reasons, the circumstances here justify relaxing Rule 46.1's requirements.

*First*, if the United States can use collusive stipulations to block interested parties from intervening at the Supreme Court, then the States, and all other interested parties, will have no choice but to seek intervention in lower courts long be-

fore the government has a chance to take a fall. That will impose needless costs on everyone. The better course is to let parties seek intervention in this Court when the government changes positions.

*Second*, collusive stipulations hinder the ability of non-parties to protect their interests. A non-party to a lower-court case may petition for *certiorari* if it is "vitally affected" by a lower court's ruling and if the "party who had represented the non-party's interest" does "not intend to seek certiorari." Stephen M. Shapiro, *et al.*, Supreme Court Practice §2.50, 90 (10th ed. 2013); *see, e.g.*, *Banks v. Chi. Grain Trimmers*, 390 U.S. 459 (1968). Collusive stipulations enable the parties in the lower court to prevent non-parties from protecting their rights: the parties can continue to prosecute the case and then stipulate to dismissal once it is too late for the non-party to file its own *certiorari* petition.

*Third*, and as the States have already said, gamesmanship of the sort at issue here will never stop until there is a price to be paid for it. *Cf. City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) (arguing that the Court should manage its *certiorari* docket in a manner that "deter[s] … snookering"). The government faults the "prospective intervenors" for failing to "identify" a "case in which the court has ever approved an intervention motion on similar facts." Fed.Resp.13. The observation is true, but irrelevant. The proposed intervenors found no such case because, as far as they can tell, the government has never tried to prevent review in an already-granted case by stipulating

to dismissal before the Court could decide already-pending intervention motions. If the gambit works this time, it will happen again.

***The Proposed-Intervenor States' Interests.*** The government next says that "the prospective intervenors have no cognizable interest in forcing these cases to continue in this Court." Fed.Resp.14. That is incorrect, for at least three reasons.

*First*, two of the Proposed-Intervenor States—South Carolina and West Virginia—are located within the Fourth Circuit. The *en banc* Fourth Circuit's *judgment* does not bind them. But its holding will bind all district courts and three-judge panels within the circuit. And the *en banc* Court did little to hide the fact that it would have imposed a national injunction if the plaintiffs there had cross-appealed the limited geographic scope of the district court's injunction. *Mayor of Baltimore v. Azar,* 973 F.3d 258, 293–95 (4th Cir. 2020). The decision thus invites those who oppose the 2019 Rules to sue for a nationwide, or at least circuit-wide, injunction. So while the Fourth Circuit's judgment caused no direct harm to the Proposed-Intervenor States that would have necessitated intervention earlier, the Department of Justice has harmed the States by deciding to abandon its challenge to an incorrectly decided Fourth Circuit precedent.

*Second*, and more fundamentally, these cases present this Court with an opportunity to hold that aspects of the 2019 Rules—for example, the requirement that there be a strict physical and financial separation of Title X facilities and abortion facilities—are in fact *mandated* by Title X's text. The government, it is true, has

defended the 2019 Rules by arguing that they were "within the agency's statutory authority and reasonably explained," not by arguing that Title X *required* the Rules' adoption. *See* Fed.Resp.18–19. But the Court is always free to uphold an agency action, in whole or in part, on the ground that the law compelled it. *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544–45 (2008).

*Finally*, Ohio, at least, has a direct financial interest in the preservation of the 2019 Rules. The reason is that the 2019 Rules caused one major provider of Title X services (Planned Parenthood) to leave the program, which made more funding available for the State of Ohio itself. Ohio, *et al.*, Mot. to Intervene 9–10. The "predictable effect" of retaining some aspects of the 2019 Rules is that Planned Parenthood will not re-enter the program, leaving more funds available for Ohio. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). That is enough to give Ohio Article III standing to litigate. *Id.* The petitioner States, led by New York, argue otherwise. They say that Ohio's financial interest is traceable not to the 2019 Rules, but rather to third parties' decisions regarding whether to participate in the Title X program. *See* States Resp.16–17. That argument fails; it contradicts precisely the theory of standing that New York itself persuaded this Court to adopt in the 2019 census case. *Dep't of Commerce*, 139 S. Ct. at 2566.

Regardless, Ohio does not even *need* Article III standing, because the United States itself has standing to litigate, no matter what it thinks of the present policy. The Fourth Circuit affirmed an injunction that forbids the government from withholding Title X funds to providers in Maryland based on their non-compliance with

the 2019 Rules. That financial injury gives the United States standing, and so satisfies Article III *regardless* of whether the Proposed-Intervenor States have standing on their own. *See United States v. Windsor*, 570 U.S. 744, 757–58 (2013). Thus, if this Court rejects the efforts to dismiss this case, at least one group of petitioners (the federal petitioners in case 20-454) will have standing to sue, satisfying Article III.

***Intended Mootness***. The government next says that the case will likely be mooted by future rulemaking. The Court can avoid the concern entirely by hearing this case on an expedited basis. The Proposed-Intervenor States will be prepared to submit a merits brief with one week's notice and to argue this case in late April or early May. In any event, the adoption of new rules will not moot this case. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 567 U.S. at 307 (quotations omitted). Thus, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," except when the conduct "cannot reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotation omitted). Given the certainty of numerous challenges to any replacement rule, and the likelihood that at least a few courts will find that the government violated the APA in finalizing a not-yet-promogulated rule rushed out by the Fall of 2021, *see* Fed.Resp.17, there is a fair prospect that the 2019 Rules will remain in effect in many places *even if* the agency attempts to repeal them. Indeed, "given the recent

proliferation of nationwide injunctions," there is a fair prospect the 2019 Rules will "again take effect nationwide" even after those rules are repealed. *Ohio v. United States EPA*, 969 F.3d 306, 310 (6th Cir. 2020) (Kethledge, J.).

Respectfully submitted,

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