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

In the Supreme Court of the United States

AMERICAN MEDICAL ASSOCIATION, *ET AL.*,
Petitioners,

v.

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

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

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

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NORRIS COCHRAN, ACTING 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.

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

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

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INTRODUCTION

The Court recently granted *certiorari* in these cases to resolve a circuit split concerning the legality of rules governing the provision of funds under Title X. The previous administration promulgated the rules, defended them in court, and sought this Court's review of their legality. But soon after taking office, President Biden issued a presidential memorandum ordering the Secretary of Health and Human Services to consider repealing those rules. It is thus likely that the administration will decline to defend the rules' legality, ask that these cases be placed in abeyance, or take some other step to prevent a timely resolution of the important questions presented.

Ohio, Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia have strong interests in preserving the Title X rules. Ohio, for example, has secured millions of additional dollars in grants as a direct result of the rules' promulgation. Ohio and the other States thus respectfully move for leave to intervene in these cases to defend the rules. Alternatively, they move for permission to present oral argument as *amici curiae* in support of the rules' legality. Both forms of requested relief would allow this Court to hear argument on both sides of the questions presented. And that, in turn, will enable the Court to decide these cases on a normal schedule without regard to the impending shift in federal policy.

STATEMENT

1. Americans disagree about abortion. Passionately. But they can all agree that abortion has long been among the country's most divisive issues. These opposing views make public expenditure in support of abortion highly controversial. As a result, the federal and many state governments avoid funding the practice. *See Rust v. Sullivan*, 500 U.S. 173, 201–02 (1991); *Harris v. McRae*, 448 U.S. 297, 315–17, (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). To be sure, some States provide such funding. And many advocates would like to see more public funding. But the broader national consensus against funding elective abortion remains. *See, e.g.*, Consolidated Appropriations Act, 2021, 116 Pub. L. No. 260, div. H., tit. II, "Family Planning," 134 Stat. 1182 (2020) (barring certain federal funds from elective abortion); Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070–71 (2018) (same).

Title X reflects this consensus. Since its 1970 enactment, the law has funded *non-abortion* family planning. All the while, it has banned the use of Title X funds "in programs where abortion is a method of family planning." 42 U.S.C. §300a-6; Family Planning Services and Population Research Act of 1970, Pub. L. 91-572 §6(c), 84 Stat. 1504, 1508 (1970).

Over the years, HHS has repeatedly changed its regulatory approach to enforcing this congressional mandate. For example, in 1988, HHS determined that earlier regulations had failed to "preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2922, 2923–24 (Feb. 2, 1988). To better promote that dis-

tinction, the agency adopted new rules that, among other things, barred recipients from making abortion referrals and required recipients to maintain a strict financial and physical separation between their non-abortion services and their abortion services (if they provided any).

This Court upheld those rules against regulatory and constitutional challenges in *Rust v. Sullivan*, 500 U.S. 173 (1991). After *Rust*, however, HHS changed course again. In 1993, just two weeks into a new administration, the agency rescinded the just-upheld regulations after determining that they would "inappropriately restrict[] grantees." 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). The agency settled on a new tack, which it promulgated through interim rules. Once finalized in 2000, those rules required grantees to provide "information and counseling regarding" abortion. 42 C.F.R. §59.5(a)(5)(i)–(ii) (2000); 65 Fed. Reg. 41270, 41279 (July 3, 2000). In essence, HHS replaced the ban on abortion referrals with its opposite. HHS justified this shift by claiming that the *Rust*-approved rules had not been shown to work (even though they were in effect for just a short time), and that grantees preferred looser restrictions. 65 Fed. Reg. 41270, 41271 (Jul. 3, 2000).

The 2000 Rules remained in effect until recently. In 2018, HHS proposed new rules, largely identical to the ones this Court upheld in *Rust*. *See* 83 Fed. Reg. 25502 (June 1, 2018). After a lengthy notice-and-comment period, HHS finalized the proposed rules. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019). In promulgating these rules, HHS sought to better comply with Title X's text—and with taxpayers' expectations—by clearly segregating abortion services and Title X funds. *Id.* at 7714–15. HHS explained

that the new rules would "ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning and related statutory requirements." *Id.* at 7714.

The new regulations achieved this in a few key ways. For one thing, the new rules eliminated the requirement that Title X recipients make abortion referrals, adopting a new policy that permits (but does not require) non-directive counseling about the availability of abortion. *Id.* at 7716–17. For another, the new rules required Title X recipients to maintain stricter physical and financial separation between abortion services and programs that spend Title X money. *Id.* at 7763–67; 42 C.F.R. §59.15.

Together, the 2019 Rules "protect against the intentional or unintentional commingling of Title X resources with non-Title X resources of programs." 84 Fed. Reg. at 7715. Preventing such commingling is necessary to give effect to Congress's prohibition on using Title X funds "in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. And by addressing "the potential for ambiguity between approved Title X activities and non-Title X activities and services," the new rules eliminate what would otherwise be the "significant risk" of "public confusion over the scope of Title X services, including whether Title X funds are allocated for, or spent on, non-Title X services, including abortion-related purposes." 84 Fed. Reg. at 7715.

2. These rules greatly benefited many States. First, because States operate Title X programs themselves, the new rules eliminated any confusion about

the States' involvement in the provision of abortion. By eliminating this confusion, the new rules helped ensure that States that run Title X programs would not be misunderstood as putting their imprimatur on abortion—an imprimatur that many States and many of their citizens legitimately seek to withhold. *See, e.g., Planned Parenthood of Greater Ohio v. Hodges,* 917 F.3d 908, 910 (6th Cir. 2019) (*en banc*).

But the rules benefited certain States in more tangible ways, too. Take, for example, Ohio. In the Buckeye State, before the new rules went into effect, only two grantees received money through the Title X program: Planned Parenthood and the State of Ohio. (The State then subgranted the funds to other entities, including, for example, county boards of health.) In March 2019, Planned Parenthood of Greater Ohio was awarded $4 million, and the Ohio Department of Health was awarded $4.3 million. *HHS Awards Title X Family Planning Service Grants*, Office of Population Affairs (March 29, 2019), https://perma.cc/VY8D-QH4F. Once the new rules went into effect, however, Planned Parenthood left the program rather than comply with the 2019 Rules. *California v. Azar,* 950 F.3d 1067**,** 1099 n.30 (9th Cir. 2020) (*en banc*). As a result, HHS used the funds that Planned Parenthood affiliates relinquished, granting $33.6 million in supplemental funds to Title X grantees. Because the State of Ohio's Department of Health was the only grantee left in Ohio once Planned Parenthood quit the program, funding that would otherwise have gone to Planned Parenthood went to the Department instead. *See HHS Issues Supplemental Grant Awards to Title X Recipients*, Office of Population Affairs (Sept. 30, 2019), https://perma.cc/5XF5-MAER.

3. Numerous parties challenged the 2019 Rules in courts across the country. Ohio led a group of States in supporting the rules, filing *amicus* briefs supporting the rules' legality in cases presenting such challenges. *See California v. Azar*, Nos. 19-15974, 19-15979, 19-35386, & 19-35394 (9th Cir.); *Mayor of Baltimore v. Azar*, No. 19-1614 & 20-1215 (4th Cir.); *Mayor of Baltimore v. Azar*, No. RDB-19-1103 (D. Md.); *Family Planning Ass'n of Me. v. HHS*, No. 19-cv-100 (D. Maine); *Oregon v. Azar*, No. 19-cv-317-MC (D. Or.); *Washington v. Azar*, 19-cv-3040 (E.D. Wash.); *California v. Azar*, Nos. 19-cv-1184, 19-cv-1195 (N.D. Cal.).

Ultimately, the courts split regarding the legality of the 2019 Rules. *Compare California,* 950 F.3d 1067 *and Family Planning Ass'n of Me. v. United States HHS*, 466 F. Supp. 3d 259, 266 (D. Me. 2020) *with Mayor of Baltimore v. Azar*, 973 F.3d 258, 280 (4th Cir. 2020) (*en banc*). On February 22, 2021, this Court granted *certiorari* to the Fourth and Ninth Circuits to review their conflicting decisions.

Between the decisions below and this Court's grant of *certiorari*, however, President Biden took office. And in one of his first acts as President, he issued a memorandum ordering the "Secretary of Health and Human Services" to:

> 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 [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 Administrative Procedure Act.

Memorandum on Protecting Women's Health at Home and Abroad §2 (Jan. 28, 2021), https://perma.cc/24K8-BMAJ.

The Department of Justice has not yet stated whether it will continue to defend the 2019 Rules in this Court.

ARGUMENT

I. THE COURT SHOULD GRANT THIS MOTION TO INTERVENE.

This Court may, pursuant to its "general equity powers," permit States to intervene in appropriate cases. *United States v. Louisiana*, 354 U.S. 515, 516 (1957) (*per curiam*). The question whether to allow intervention occurs most frequently in original actions. *Id.*; *see also, e.g.*, *New Jersey v. New York*, 345 U.S. 369, 371 (1953). But it occurs in cases on this Court's discretionary docket, too. *See, e.g.*, *BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019); *Gonzales v. Oregon*, 546 U.S. 807 (2005); *Insurance Co. of Pennsylvania v. Ben Cooper, Inc.*, 498 U.S. 894 (1990); *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1968); *Mullaney v. Anderson*, 342 U.S. 415, 416–17 (1952). Intervention before this Court is especially appropriate when the intervenor's rights would be "vitally affected" by the ruling and where the party who had previously supported the intervenor's position stops doing so. Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 427 (10th ed. 2013).

The Court should grant the Proposed-Intervenor States' motion to intervene. They have a concrete interest in the 2019 Rules. That interest will be substantially affected by the resolution of these cases. And while the United States has protected the States' interests so far, that is highly likely to change: President Biden ordered HHS to consider replacing the 2019 Rules, so one can reasonably expect that the Solicitor General will fail to defend those rules in this Court, either by changing positions or asking this Court to hold the cases in abeyance. The Court should therefore grant the motion to intervene so that the 2019 Rules receive the defense they deserve.

A. The States have a direct stake in this litigation.

The States have a direct stake in the outcome of this litigation. At least one of the States—Ohio—has a direct financial interest. As detailed above, Planned Parenthood dropped out of the Title X program instead of complying with the 2019 Rules. And as detailed above, Ohio's Department of Health received millions of dollars in supplemental Title X funding as a direct result of Planned Parenthood's exit. *HHS Issues Supplemental Grant Awards to Title X Recipients*, Office of Population Affairs (Sept. 30, 2019), https://perma.cc/5XF5-MAER. Thus, Ohio has a direct and significant financial interest in defending the 2019 Rules' legality. That financial interest will be "vitally affected" by the Court's resolution of these cases. Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 427.

On top of this financial interest, the Proposed-Intervenor States have an interest in retaining their

ability to operate a Title X program without appearing to put their imprimatur on abortion. Abortion is a deeply controversial practice. As a result, many States legitimately choose not to provide actual or apparent support for the practice. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges,* 917 F.3d 908, 910 (6th Cir. 2019) (*en banc*); *Planned Parenthood Assn. of Hidalgo Cty. Texas, Inc. v. Suehs,* 692 F.3d 343, 346–47 (5th Cir. 2012). The 2019 Rules, by creating a strict separation between the provision of Title X services and the provision of abortion services, ensure that States can participate in the important Title X program without appearing to approve of abortion.

These interests justify the States' intervening. And if the Court allows the States to intervene and "defend" the 2019 Rules "on appeal," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997), the Court can eliminate any risk that any change in position by the United States might deprive the Court of Article III jurisdiction.

The "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, (2006); *accord Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020); *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2006). And here, at least one of the Proposed-Intervenor States—Ohio—has standing to litigate these cases against the 2019 Rules' challengers. States have a direct stake in any challenge to a federal policy that affects the federal funding available to them. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565

(2019). And Ohio, because the 2019 Rules caused Planned Parenthood to leave the Title X program, has secured additional funding that was not previously available. Thus, the "predictable effect" of leaving in place the 2019 Rules is to preserve the higher degree of funding available to Ohio. *Dep't of Commerce*, 139 S. Ct. at 2566. That is precisely the sort of direct stake that confers Article III standing. *Id*.

B. Intervention is appropriate under these circumstances.

This Court's rules do not set forth any standard for determining when intervention is appropriate. This Court has made clear, however, that it looks to the "Federal Rules of Civil Procedure, and the general equity powers of the Court," for guidance. *Louisiana*, 354 U.S. at 516. Here, both the federal rules and principles of equity justify intervention.

1. Begin with the federal rules. While these rules are not binding except in federal district courts, they provide insight into the "policies underlying intervention" that "may be applicable in appellate courts." *Int'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965). When the rules are satisfied, so are the policies underlying intervention. *See id*.

The relevant rule of civil procedure is Rule 24, which permits intervention of right in some cases and permissive intervention in others. Parties that file a "timely" motion have a right to intervene if they have "an interest relating to the property or transaction that is the subject of the action," and if they are "so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest, unless existing parties ad-

equately represent that interest." Fed. R. Civ. P. 24(a)(2). Parties without a right to intervene can seek permission to do so anyway. Courts "may" grant a "timely motion" for permissive intervention by any party that "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(A). In deciding whether to allow permissive intervention, courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The Proposed-Intervenor States meet every requirement.

First, and for the reasons already discussed, the States have "an interest in … the subject of this action." Fed. R. Civ. P. 24(a)(2). And because the Proposed-Intervenor States wish to defend the legality of the 2019 Rules against the challengers' attacks, the States have a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

Second, given the President's memorandum ordering HHS to consider a repeal of the 2019 Rules, *see Memorandum on Protecting Women's Health at Home and Abroad* §2 (Jan. 28, 2021), https://perma.cc/24K8-BMAJ, it is doubtful that the "existing parties" will "adequately represent" the Proposed-Intervenor States' interests. Fed. R. Civ. P. 24(a)(2).

Finally, the request is "timely," Fed. R. Civ. P. 24(a)(1) & (b)(1), and the intervention will not "delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "Timeliness is to be determined from all the circumstances," not simply the stage of the case at which the party sought to in-

tervene. *NAACP v. New York*, 413 U.S. 345, 366 (1973); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–96 (1977). Thus, a party acts timely if it moves to intervene "promptly" once it is clear that doing so is necessary to protect its interests. *United Airlines*, 432 U.S. at 394.

Judged according to these standards, this motion to intervene is timely. Until this Court granted *certiorari*, the Proposed-Intervenor States had no reason to intervene. The Ninth Circuit upheld the rules, leaving them in place in each of the Proposed-Intervenor States. And while the Fourth Circuit's ruling affirmed an injunction and vacatur of the 2019 Rules, its decision forbids the 2019 Rules' enforcement *only* in Maryland—the plaintiffs in that case failed to cross-appeal the limited territorial scope of the relief awarded. *See Mayor of Baltimore v. Azar*, 973 F.3d 258, 295 n.23 (4th Cir. 2020) (*en banc*). Because Maryland is not one of the States now seeking to intervene here, the Fourth Circuit's decision caused the Proposed-Intervenor States no direct harm. On top of all this, the previous administration was, and the current administration still is, for now, defending the 2019 Rules. Considering all of this, the Proposed-Intervenor States acted "promptly" once they learned that their interest in these cases likely "would no longer be protected." *United Airlines*, 432 U.S. at 394. And because the States will defend the same rules on the same briefing schedule that would otherwise apply to the parties, intervention will not "unduly delay or prejudice" the original parties' rights. Fed. R. Civ. P. 24(b)(3).

In sum, the policies embodied by intervention practices under Rule 24 support allowing the Proposed-Intervenor States to intervene here.

2. At bottom, however, the question whether to allow intervention is an equitable one; the Court allows intervention when it is in "the interests of justice." Shapiro, *Supreme Court Practice* at 427; *see, e.g.*, *Louisiana*, 354 U.S. at 516; *Utah v. United States*, 394 U.S. 89, 92 (1969); *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (*per curiam*). Here, the interests of justice favor intervention. The Proposed-Intervenor States stand to gain from the resolution of these cases in this Court, and they are at risk of being denied that resolution by a federal government that, based on the policy preferences of a new administration, refuses to vigorously defend federal law. Alas, that is not a new problem. In recent years, the Executive Branch has maneuvered to keep this Court from reaching issues that might thwart the administration's preferred policies. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 552 n.4 (2015) (Thomas, J., dissenting); Motion to Vacate the Judgments of the Court of Appeals and Remand, *Cochran v. Gresham*, Nos. 20-37 & 20-38 (U.S., Feb. 22, 2021). This trend slows the development of law, and leaves unresolved issues that matter a great deal to the States and the American people. Where a party stands willing to intervene to make arguments the federal government abandons, the interests of justice require letting it do so.

That conclusion finds support in a recent order of this Court. In *BNSF Railway*, the Court granted an intervention motion by an individual who wanted to defend a judgment that materially benefited him and that the Solicitor General declined to defend before this Court. 140 S. Ct. 109; Russell Holt's Motion for Leave to Intervene as a Respondent to File a Brief in

Opposition 5–6, *BNSF Railway*, No. 18-1139 (Aug. 22, 2019). In the cases now before the Court, as in *BNSF Railway*, the interests of justice are best served by allowing a party affected by the United States' abandonment of a prior position to step in.

II. ALTERNATIVELY, THE COURT SHOULD ALLOW THE PROPOSED-INTERVENOR STATES TO PRESENT ORAL ARGUMENT AS *AMICI*.

In the alternative, the Proposed-Intervenor States respectfully ask this Court to allow them time at argument, as *amici curiae*, to defend the legality of the 2019 Rules.

The States, if not granted leave to intervene, will file an *amicus* brief under Rule 37.4. They have already filed such briefs in the lower-court cases addressing the legality of the 2019 Rules. *See California v. Azar*, Nos. 19-15974, 19-15979, 19-35386, & 19-35394 (9th Cir.); *Mayor of Baltimore v. Azar*, Nos. 19-1614 & 20-1215 (4th Cir.); *Mayor of Baltimore v. Azar*, No. RDB-19-1103 (D. Md.); *Family Planning Ass'n of Me. v. HHS*, No. 19-cv-100 (D. Maine); *Oregon v. Azar*, No. 19-cv-317-MC (D. Or.); *Washington v. Azar*, 19-cv-3040 (E.D. Wash.); *California v. Azar*, Nos. 19-cv-1184, 19-cv-1195 (N.D. Cal.). In doing so, the Proposed-Intervenor States have developed expertise on Title X in general and the questions presented in particular. Should the Solicitor General decline to offer a full-throated, timely defense of the 2019 Rules, the States will be able to draw on their expertise to offer this Court a "perspective" that is "distinct" from the parties' perspectives. Dan Schweitzer, *A Modern History of State Attorneys Ar-*

guing as Amici Curiae in the U.S. Supreme Court, 22 Green Bag 2d 143, 153 (2019).

The Court has allowed *amici* to appear at argument in a variety of cases in which the *amici* have interests distinct from those of the parties. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Blair*, 139 S. Ct. 783 (2019); *Gamble v. United States*, 139 S. Ct. 582 (2018). Indeed, the Court has appointed *amici* to defend judgments that prevailing parties refused to defend. *See, e.g.*, *Lange v. California*, 141 S. Ct. 644 (2020); *Seila Law LLC v. Consumer Fin. Protection Bur.*, 140 S. Ct. 2183, 2195 (2020); *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765 (2020). The same concerns that justify the award of argument time in those cases—in particular, the Court's interest in subjecting cases to a true adversarial process—justify allowing the Proposed-Intervenor States to present argument in these cases.

CONCLUSION

This Court should either allow the Proposed-Intervenor States to intervene in these cases, or else permit them to present oral argument in support of the 2019 Rules' legality.

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