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May 10, 2021

Hon. Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, NW
Washington, DC 20543-0001

RE: No. 20-429, *American Medical Association* v. *Cochran*
No. 20-454, *Cochran* v. *Mayor & City Council of Baltimore*
No. 20-539, *Oregon* v. *Cochran*

Dear Mr. Harris:

On April 26, 2021, the Court ordered the Acting Solicitor General to file a letter brief addressing whether the United States intends to enforce the 2019 Rules outside of Maryland until the notice-and-comment process is complete and, if further litigation is brought against the 2019 Rules outside of Maryland, how the government intends to respond. Proposed intervenors the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG), the Christian Medical and Dental Associations (CMDA), and the Catholic Medical Association (CMA) file this response.

In 42 U.S.C. 300a-6, Congress directed that no Title X funds "shall be used in programs where abortion is a method of family planning." To enforce that mandate, the 2019 Rules *bar* Title X providers from referring and advocating for abortions. Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7717 (Mar. 4, 2019). Yet HHS's proposed rule *requires* that grantees provide abortion referrals and counseling, and the rule treats abortion as "appropriate medical care" and a method of family planning in violation of Title X. Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 19812, 19817 (Apr. 15, 2021). HHS gives policy reasons for the proposed rule. 86 Fed. Reg. at 19815–16. But "no amount of policy-talk can overcome [Title X's] plain statutory command." *Niz-Chavez* v. *Garland*, __ S. Ct. __, No. 19-863, 2021 WL 1676619, at *9 (Apr. 29, 2021).

The Acting Solicitor General's brief illustrates the United States' abandonment of the 2019 Rules—and Title X's text—in three ways. First, the government presents the 2019 Rules as a dead letter and defending them as a waste. Acting S.G.'s Letter

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Br. ("S.G.Br.") 1 (HHS expects to "issue any resulting final rule by early fall"); *id.* at 2 ("Given that HHS proposes to replace the 2019 rule and expects to finalize any new rule by early fall—before this Court would decide these cases . . . ."); *id.* at 3 ("If HHS finalizes a new rule, all existing grant recipients would then become subject to that rule."). The United States essentially argues that any defense of the 2019 Rules would be futile because they will soon be gone. But HHS's proposed rule conflicts with the statutory text and will likely be enjoined and tied up in courts for years, during which time the 2019 Rules will remain in effect. The United States' abandonment of those Rules now is premature.

Second, the United States plans no effectual measures to enforce the 2019 Rules. The government says that Title X recipients are still bound by the Rules on paper, and HHS's normal enforcement mechanisms remain available. S.G.Br.2–3. But audits, site visits, and Office of Inspector General investigations take resources, and HHS pledges no resources to enforce the Rules it is committed to overturning.

Third, the United States makes clear that it will offer no substantive defense when the 2019 Rules are inevitably challenged outside Maryland. The government commits only to procedural maneuvers and delay tactics that are unlikely to succeed. S.G.Br.3. The United States obliquely suggests that Title X litigation might be barred by laches. *Ibid.* Yet it fails to explain what "harm[ ]" or "prejudice" from delay the government could possibly assert, *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 121–22 (2002), especially when it intends to scuttle the 2019 Rules. The United States also alludes to making use of standing or jurisdictional defects, S.G.Br.3, though those requirements have posed no challenge to litigation, as the Fourth and Ninth Circuit litigation illustrates. The government also promises to seek an abeyance until its proposed rule is finalized. *Ibid.* But the United States gives no basis for such an abeyance, nor is a district court likely to grant one when the government shares the plaintiffs' goal of replacing the 2019 Rules at the earliest opportunity. Last, the United States posits no "sound basis . . . to rapidly adjudicate" a Fourth Circuit lawsuit outside Maryland, *ibid.*, even though a plaintiff in Virginia or West Virginia could file a complaint and motion for preliminary injunction and obtain a ruling based on the Fourth Circuit's controlling en banc decision in a matter of weeks—adversely affecting proposed intervenors' members in those States.

Most telling is what the Acting Solicitor General does not say. The United States gives no assurance that it will defend the 2019 Rules on the merits—which is evidence that it won't. AAPLOG, CMDA, and CMA have no comfort that the federal government will defend their interests. Every indication of the United States' brief is that—on the merits—the government will not even try, because the executive branch is committed to circumventing through regulation what Congress demanded in 42 U.S.C. 300a-6.

The Court should not dismiss this case; it should hear and decide it on the merits. First, the government has not provided reasonable assurance to AAPLOG, CMDA, CMA, and their members that the United States will defend a challenge to the 2019 Rules while the 2021 proposed rule is being processed or litigated. And even if the United States was willing to defend, it would do no good. AAPLOG has physician members who currently provide prenatal and other medical care at Title X clinics in Virginia and West Virginia and benefit from the 2019 Rules' conscience protections. AAPLOG Reply in Support of Intervention 5–6 and Addendum A thereto. When a plaintiff inevitably files suit and moves to enjoin the 2019 Rules in those states, a district court will be required to grant the motion under the Fourth Circuit's en banc opinion. Only this Court's ruling can prevent that imminent harm.

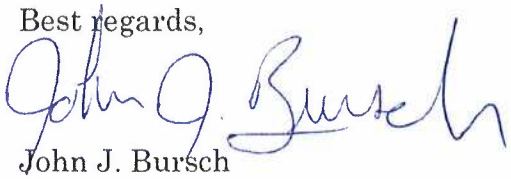
Second, AAPLOG, CMDA, and CMA have members across the country who currently benefit from the 2019 Rules' conscience protections. When one of those members' employers violates the 2019 Rules, the United States has offered no adequate assurance that it will enforce the 2019 Rules against that employer. Again, only an opinion reversing the Fourth Circuit can avert that impending injury.

Third, HHS commonly cites judicial decisions as sustaining its "reasoned analysis" for a new rule, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020), or "satisfactory explanation" for a regulatory change, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (quotation omitted). When AAPLOG, CMDA, CMA, and others submit comments to HHS supporting retention of the 2019 Rules' conscience protections, the agency will doubtless reject their concerns based on the Fourth Circuit erroneous ruling. And the United States will use the Fourth Circuit's flawed opinion to defend against the legal challenges to the proposed rule that Intervenors and others will file. Only a ruling from this Court can avoid those tangible harms.

Finally, since *Rust* v. *Sullivan*, 500 U.S. 173 (1991), Title X recipients have successfully thwarted 42 U.S.C. 300a-6 by persuading sympathetic administrations to issue rules that circumvent the statute and by tying up in court regulations like the 2019 Rules that enforce the statutory mandate. This pattern will continue unless this Court upholds the 2019 Rules, clearing the way for future administrations to promulgate similar rules without seeing those rules enjoined by lower courts while this Court is continually sidelined by changes in the administration.

Because the medical associations meet all relevant requirements, the Court should grant their motion to intervene. To the extent there are timing concerns despite the prospect of lengthy litigation over the proposed rule, the Court could hear this case before the October 2021 Term, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, No. 08-205 (argued Sept. 9, 2009), and issue a decision promptly thereafter.

Best regards,



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