No. 20-429

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

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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]

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[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[ihood]" 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-

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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]

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[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.

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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.

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DECEMBER 2020