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Honorable Scott S. Harris
Clerk
Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *AMA v. Becerra*, No. 20-429; *Becerra v. Mayor and City Council of Baltimore*, No. 20-454; *Oregon v. Becerra*, No. 20-539

Dear Mr. Harris:

This Court ordered the "Acting Solicitor General … to file a letter brief addressing the following question: Whether the Government intends to continue to enforce the challenged rule and regulations outside the State of Maryland until the completion of notice and comment; and, if further litigation is brought against the challenged rule and regulations outside of Maryland, how the Government would intend to respond." The Acting Solicitor General filed her letter brief on May 3. I am writing, on behalf of the Proposed-Intervenor States, in response to that letter brief. The Proposed-Intervenor States wish to make two points.

First, the Acting Solicitor General's letter proves that this case presents, and will continue to present, a live controversy. She reports that HHS will continue enforcing the 2019 Rule unless and until it is properly repealed. Letter 2–3. HHS does not propose finalizing a rule until this fall. *Id.* at 2. Once finalized, the rule will be challenged. Odds are, at least some of those challenges will succeed, leading to a restoration of the 2019 Rule. Those odds are heightened by two aspects of the proposed rulemaking. For one thing, HHS is moving so quickly that it is highly likely to cut corners, make mistakes, or take other actions that create problems under the Administrative Procedure Act. For another thing, HHS's proposed rule seeks comments on changes to the Title X program that are squarely at odds with Title X's text. For example, HHS has proposed allowing Title X grantees to offer Title X services in the same facilities where they perform abortions. *See* 86 Fed. Reg. 19812, 19818 (Apr. 15, 2021). That, however, contradicts Title X's express prohibition on using its funds "in programs *where* abortion is a method of family planning." 42 U.S.C. §300a-6 (emphasis added). In this context, "where" means "at or in the place in which." Webster's Third New International Dictionary 2602 (2003). Any

Title X program hosted in a facility that also offers abortions as a method of family planning is a Title X "program[] where"—in other words, a program "at or in the place in which"—"abortion is used as a method of family planning." So the proposed rule, if finalized, is highly likely to be deemed contrary to law and vacated under the Administrative Procedure Act.

But whatever ultimately comes of these challenges, it will take time to resolve them. Until courts resolve each such challenge, there will remain a "fair prospect" that the 2019 Rules will "again take effect," either nationwide or regionally. *Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020). And that means there is no risk of mootness in this case, even if this Court takes until June of 2022 to issue a ruling. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (quotation omitted). Until all challenges to the proposed rule are defeated, this Court will be able to award the parties effectual relief: as long as there is a meaningful risk that the new rule will be enjoined or vacated, which would cause the 2019 Rule to either remain in effect or to take effect once again, a decision from this Court regarding the validity of the 2019 Rule will meaningfully affect the challengers (who claim they have been and will be harmed by the 2019 Rule) and the Proposed-Intervenor States (who benefit from the 2019 Rule and wish to see it preserved, *see* Intervention Mot. 4–5).

Second, the Acting Solicitor General's letter confirms the importance of allowing the States to intervene in this matter, because it confirms that HHS will not protect the Proposed-Intervenor States' interests. If this Court grants the parties' collusive joint-dismissal motion, the Fourth Circuit's ruling invalidating the 2019 Rule will remain binding within that circuit. *See Mayor of Balt. v. Azar*, 973 F.3d 258 (4th Cir. 2020) (*en banc*). Two of the Proposed-Intervenor States—South Carolina and West Virginia—are within the Fourth Circuit. But HHS will not commit to defending the 2019 Rule if some plaintiff, relying on that binding precedent, sues to enjoin the Rule's effect in South Carolina or West Virginia. To be sure, HHS says it will try to have the case dismissed on standing grounds and that it will also ask that the case be held in abeyance. *See* Letter 3. But what will it do if the courts reject those arguments and proceed to the merits? HHS declines to say. But everyone knows the answer, and this Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quotation omitted). HHS will roll over, just as it did here. And it will do the same thing in suits brought outside the Fourth Circuit, forcing States to expend resources intervening to protect their interests. *Cf., e.g.*, *Texas v. Cook Cty.*, No. 20A150, 2021 U.S. LEXIS 2215, at *1 (Apr. 26, 2021).

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"Post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox*, 567 U.S. at 307 (capitalization altered). The parties in this case, after allowing the Court to rule on their *certiorari*

petitions, quickly tried to dismiss the case instead of allowing the proposed intervenors to defend the 2019 Rule. *See* States' Reply In Support of Intervention 1–2. The Court should not permit this gamesmanship. The Proposed-Intervenor States reiterate their willingness to submit a merits brief with one week's notice, allowing for an expedited resolution. That resolution would inform HHS's now-ongoing rulemaking process. The only conceivable reason that HHS would not want this Court's guidance is that it fears that guidance may undermine its policy preferences. In other words, HHS wants to violate Title X and wants to avoid the risk of a ruling that might make it harder to do so.

Respectfully submitted,

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