Nos. 23-726 and 23-727

In the

Supreme Court of the United States

MIKE MOYLE, SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, *ET AL.*,
Petitioners,

v.

UNITED STATES,
Respondent.

STATE OF IDAHO,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuits

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states and the people. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including, including *Bond (2) v. United States*, 572 U.S. 844 (2014), *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), *Arizona v. United States*, 567 U.S. 387 (2012), and *Bond (1) v. United States*, 564 U.S. 211 (2011), to name a few.

SUMMARY OF ARGUMENT

The President disagreed with this Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and ordered the Department of Health and Human Services to find ways to prevent the Court's decision from taking effect. In the directive, the President specifically mentioned the statute at issue here, which requires hospitals that offer emergency services and that accept Medicare payments to provide stabilizing care to anyone who seeks help in the hospital's emergency room and who requires emergency services. This statutory requirement only applies to those hospitals accepting federal

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

funds. It is not a requirement that Congress could impose under the Commerce Clause or any of its other enumerated powers. It is authorized, if at all, by Congress's authority under the Spending Clause. Pursuant to the President's directive, the Department of Health and Human Services reinterpreted this statute (by a "guidance," not by a regulation), to require participating hospitals and doctors to perform abortions as "stabilizing" emergency medical care regardless of state laws outlawing abortion. In this case, the United States relies on this reinterpretation of a Spending Clause statute as the basis for invoking the Supremacy Clause to strike down Idaho's statute outlawing abortion in most cases.

It is important to note, however, that this case is not about abortion. The real issue is the constitutional framework that recognizes dual sovereigns. The Constitution only grants limited, enumerated powers to the federal government. All other governmental power is reserved to the States, or the people. The Constitution does not grant a general police power to Congress to make laws for the health, safety, and morals of the nation.

Notwithstanding this limitation on Congress's powers, the United States seeks to convert the Spending Clause into a general police power – completely eviscerating the vertical separation of powers that the founders designed into the Constitution. That vertical separation of power was part of the constitutional design to protect individual liberty.

This is not a case where a state has agreed to accept federal funds with strings that require the state to give up some of its sovereignty. This Court has ruled that states can freely contract away portions of

their sovereignty by accepting conditions attached to federal funding programs. Here, however, the United States is arguing that it can enter into an agreement with any individual or entity and that agreement operates as a waiver of state sovereignty even without the participation of the state. Such an argument effectively gives Congress a police power rather than limited, enumerated power.

ARGUMENT

I. Vertical Separation of Powers in the Design of the Constitution Protects Individual Liberty.

It remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the entire residuum of power to be exercised by the state governments or by the people themselves. *See*, *e.g.*, Federalist No. 39, at 256 (Madison) (Clinton Rossiter, ed. (1961); Federalist No. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on by way of the Tenth Amendment. *See* U.S. Const. Amend. X ("The powers not delegated

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the Constitution itself. *See* U.S. Const. Art. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); U.S. Const. Art. I, Sec. 8 (enumerating powers so granted); *Bond (2) v. United States*, 572 U.S. at 854; *see also M'Culloch*, 17 U.S. (4 Wheat.), at 405; *United States v. Lopez*, 514 U.S. 549, 552 (1995).

The constitutionally mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself. Rather, it "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S., at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Bond (1)*, 564 U.S. at 221 (2011). *see also United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people – the so-called police power. *See, e.g.*, Federalist No. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States v. E. C. Knight Co.*, 156 U.S. 1,

11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The power at issue in this case – whether to allow doctors to terminate the life of an unborn baby – is within the core of the police powers reserved to the states or to the people. *See Dobbs*, 597 U.S. at 300-01.

II. A Hospital that Chooses to Accept Medicare Payments Cannot Waive State Sovereignty.

The statute at issue (42 U.S.C. §1395dd or EMTALA) is clearly enacted pursuant to Congress's power to "provide for the … general welfare," which is referred to as the "Spending Clause." The statute is part of the Medicare program and is not related to any of the other enumerated powers of Congress. The statute dictates that hospitals with emergency departments that receive Medicare reimbursements must provide appropriate screening and stabilizing care to anyone who requests care and who needs emergency treatment.

Laws related to provision of medical care are health and welfare regulations, and thus within the "police power" of the States and not part of the enumerated powers of Congress. *See Dobbs*, 597 U.S. at 301 ("A law regulating abortion" is a "health and welfare" law); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (legislation promoting health and welfare is within the police power of the state).

This Court has ruled that in exercising its power under the Spending Clause, Congress is not limited to enacting spending programs related to its specifically enumerated powers. *United States v. Butler*, 297 U.S. 1, 65 (1936). In a future case, the Court should reconsider that ruling since it leads to precisely the problem presented here. Instead of insisting on the limits of enumerated powers, the Court has ruled that the spending program must merely be for the "general welfare," yet the Court defers to Congress to determine what constitutes the "general welfare." *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937). These decisions that allowed the vast expansion of federal power are contrary to the original design of government as contemplated by the Framers and Ratifiers of the Constitution. They have led the Court to rule that the spending power allows Congress to enact grant programs that come with restrictions which restrictions can exceed the enumerated powers under Article I, Section 8. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

Nonetheless, this Court has put *some* limits on this power. For instance, in *Pennhurst* the Court ruled that the restrictions or grant conditions must be unambiguously expressed in the congressional enactment. In this case, for example this Court could rule that Congress did not unambiguously provide that abortion is an emergency "stabilizing" treatment required by EMTALA. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

This Court need not, however, rule on whether terminating the life of an unborn child constitutes "stabilizing treatment" for an "emergency condition." The Court has recognized another limit on the attempt to

use the Spending Clause to intrude on a state's sovereignty. A state needs to agree to the federal grant in order to be bound by the grant restrictions. The arrangement is "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Id.*; *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). As Chief Justice Roberts noted in his opinion in *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519 (2012): "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."'" *Id.* at 577 (quoting *Pennhurst*, 451 U.S. at 17) (opinion of Roberts, C.J.); *see Dole*, 483 U.S. at 211.

Coercing a state to accept the federal conditions destroys the unique role of states in the federal system of vertical separation of powers. *NFIB*, 567 U.S. at 676 (joint dissent). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). An attempt by Congress to coerce a State to accept conditions on a federal grant program is unconstitutional. *NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.), 677 (joint dissent).

In this case, however, the State has not agreed to anything. EMTALA is a restriction on *hospitals* that accept Medicare funding. The argument of the United States boils down to an assertion that the Spending Clause "contract" can be with any private individual or entity in the state. Once the individual accepts the terms of the grant, any contrary state law is preempted. But that allows the spending power to become a police power that will always override state

sovereignty regardless of whether the State has agreed to the grant condition. This shatters one of the few limits the Court has recognized in Spending Clause cases.

In effect, the United States argues that private individuals and entities have the power to waive state sovereignty. Such an argument strikes at the heart of our federal system of dual sovereigns. This would grant Congress the power to "obliterate distinctions between national and local spheres of interest and power." *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting).

The Court's decision in *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) does not support the government's attempt to restrict state lawmaking where the state never agreed to the grant at issue. The Court in *Lawrence County* struck down a state law that dictated how federal in-lieu tax grants could be spent by local governments. The Court ruled that the state could not interfere with the federal plan for how the federal grant money would be spent by the local government that received the grant. *Id*. at 268. Although the dissent complained that the majority decision allowed interference between the state and its political subdivisions (*id*. at 271), the majority noted that the federal grant restrictions applied only to how the federal money was spent and not how state money was spent (*id*. at 269). In any event, the Court did not discuss whether the State could bar the County from accepting the federal funds in the first place, thus preserving the State's sovereign choice for how to direct the spending of its political subdivisions.

In this case, Idaho has no choice. The federal grant was agreed to by private entities rather than the State. Based on that *private* contract, the United States argues it has the power to preempt generally applicable State legislation enacted pursuant the State's police power. This is all based on a new interpretation of a preexisting statute to accomplish the President's desire to overturn a decision of this Court. Such an interpretation of the Spending Clause destroys the states as co-sovereigns in the federal scheme. Neither the text nor the history of the Spending Clause supports such a radical interpretation.

CONCLUSION

The Court should reject the attempt of the United States to convert the Spending Clause into a general police power that eviscerates the sovereignty of State governments.

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