No. 23A470

IN THE
Supreme Court of the United States

STATE OF IDAHO,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF INDIANA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF IDAHO'S EMERGENCY APPLICATION FOR A STAY PENDING APPEAL

Office of the Indiana
Attorney General
302 W. Washington St.
IGC South, Fifth Floor
Indianapolis, IN 46204
(317) 232-0709
James.Barta@atg.in.gov

THEODORE E. ROKITA
Attorney General
JAMES A. BARTA*
Solicitor General
MELINDA R. HOLMES
KATELYN E. DOERING
Deputy Attorneys General

**Counsel of Record*

Counsel for Amici *States*

Additional counsel listed with signature block

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Florida, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of the Emergency Application for Stay Pending Appeal.

Last year, the Court "return[ed] the issue of abortion to the people's elected representatives." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). In many States, including Idaho, the people's elected representatives have voted to protect prenatal life by prohibiting most abortions, exercising States' traditional authority to regulate public health and welfare within their borders.

The United States has attempted to end run this Court's decision in *Dobbs* by obtaining a federal injunction that prevents hospitals receiving Medicare funds in Idaho from complying with Idaho's abortion regulations. More remarkable still, the United States is attempting to prevent private compliance with Idaho law through legislation, the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, enacted under the Spending Clause. Its position is that the federal government can pay private entities to disregard state laws, even in traditional areas of state concern.

If accepted, the United States' position would permit the Executive Branch to seek decrees overriding all manner of state laws and fundamentally transform the relationships among citizens, their States, and the United States. *Amici* States have

a profound interest in the swift rejection of that position to preserve the federalist structure, their power to regulate for the welfare of their citizens, and laws adopted by citizens' representatives to protect unborn children from intentional destruction.

SUMMARY OF THE ARGUMENT

Idaho, like many States, prohibits most abortions to protect unborn children. That generally applicable medical regulation does not directly conflict with EMTALA's direction to hospitals accepting Medicaid funds to stabilize patients with emergency medical conditions. EMTALA does not purport to override State rules about what care is, and is not, medically appropriate. It simply prevents hospitals from refusing to stabilize patients using otherwise lawful medical procedures. EMTALA's stabilization requirement cannot be construed to require hospitals to perform abortions in violation of state law, especially given that the stabilization requirement's protections extend to *both* "pregnant wom[e]n" *and* their "unborn child[ren]."

Construing EMTALA to excuse private hospitals from complying with generally applicable state medical regulations would raise significant constitutional difficulties. EMTALA is Spending Clause legislation. Unlike ordinary legislation, Spending Clause legislation does not require parties to comply by virtue of Congress's legislative power. Whatever the status of federal conditions for other purposes, voluntarily accepted conditions cannot be considered "law" capable of preempting state law under the Supremacy Clause. Treating grant conditions as "law" would radically restructure the relationships among the federal government, States, and citizens. It

would allow the federal government to displace state law by paying private parties, replacing lawmaking by elected state officials with a system of private barter.

This case illustrates the danger. In the United States' view, the federal government can pay hospitals to violate Idaho's abortion laws with impunity—and then itself sue the State of Idaho to enjoin those laws as a matter of federal supremacy. Or put another way, the United States believes that the federal government can establish a financial relationship directly with a citizen that, at the citizen's election, immunizes the citizen from state police power.

A proper understanding of grant conditions and the federal spending power—not to mention the basic dual-sovereign structure of American constitutional government—does not permit such an arrangement. Rather, federal grant recipients continue to be governed by the state police power, which informs whether citizens can qualify for federal grants under specified grant conditions. The proper question in this case is thus not whether Idaho's abortion regulation is preempted by federal law, but whether the Idaho law prevents hospitals from qualifying for federal Medicare grants. The answer to that question is surely "no" under EMTALA's express terms, but framing the question properly is critical to understanding and preserving the proper relationships among the federal government, States, and citizens.

In preventing Idaho from enforcing its laws, the lower courts not only engaged in a constitutionally precarious undertaking at odds with EMTALA's express terms but did so unnecessarily. Under EMTALA, the United States does not have a cause of action to seek injunctive relief against States to prevent enforcement of state laws

that allegedly disqualify hospitals from accepting federal funds. This Court should intervene to prevent the continued, unjustified displacement of state regulation.

ARGUMENT

I. EMTALA Does Not Preempt Generally Applicable State Laws Regulating the Medical Profession, Including Laws Protecting Unborn Lives

Idaho's prohibition against intentionally causing "the death of [an] unborn child," Idaho Code § 18-604, represents a traditional exercise of the state police power. "[T]he regulation of health and safety matters is primarily[,] and historically, a matter of local concern." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). It thus "follows that the States may regulate abortion for legitimate reasons." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

In areas "the States have traditionally occupied," this Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* To succeed on a preemption claim, the challenger therefore "must . . . present a showing . . . of a conflict . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough*, 471 U.S. at 716.

Preemption generally comes in three forms: express preemption, field preemption, and implied preemption. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901

(2019). In EMTALA, however, Congress expressly limited the statute's preemptive effect through an anti-preemption clause. *See Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."). That clause provides that "[t]he provisions of this section *do not preempt* any State or local law requirement, *except* to the extent that the requirement *directly conflicts* with a requirement of this section." 42 U.S.C. § 1395dd(f) (emphasis added). The preemption issue here thus reduces to whether Idaho law "directly conflicts" with EMTALA. And "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Idaho's law does not "directly conflict" with EMTALA. 42 U.S.C. § 1395dd(f). Where an individual with "an emergency medical condition," comes to a hospital taking Medicaid funds, EMTALA requires the hospital to "stabilize the condition" or transfer the individual. *Id.* § 1395dd(b). "[T]o stabilize" means "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." *Id.* § 1395dd(e)(3)(A). EMTALA, however, does not purport to establish a national definition of what constitutes appropriate "medical treatment" for every serious medical condition. It leaves that task to the States. *See Id.* § 1395. It cannot be that, by directing hospitals to

stabilize indigent patients, EMTALA creates an affirmative right to demand whatever procedure an individual patient or doctor might wish, without regard to state medical regulations.

It is even more implausible that EMTALA requires hospitals to perform abortions prohibited by generally applicable state medical regulations. EMTALA defines an "emergency medical condition" to include one that "could reasonably be expected to result" in "placing the health of the individual (or, with respect to a pregnant woman, *the health of the woman or her unborn child*) in serious jeopardy." 42 U.S.C. § 1395dd(e)(1)(A) (emphasis added). EMTALA thus places obligations on hospitals with respect to both the "pregnant woman" and "her unborn child." But performing an abortion necessarily places the "health of . . . [an] unborn child . . . in serious jeopardy"—indeed, it results in the child's destruction. To read EMTALA as mandating abortions prohibited by state law therefore would set the statute against itself. *See Texas v. Becerra*, 623 F. Supp. 3d 696, 726–27 (N.D. Tex. 2022).

There are other problems with the theory that EMTALA codifies a national standard of care that includes abortions prohibited by generally applicable state medical regulations. For one, EMTALA's anti-preemption provision requires a "direct[]" conflict. If a state statute countermanded EMTALA's command that hospitals receiving federal grants stabilize patients, or required those hospitals to hand over a percentage of their federal grants to the State, that might qualify as a "direct[] conflict." *See Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260–68

(1985) (declaring preemption of state law that channeled grants received by local governments in conflict with a federal statute). But there is no "direct[]" conflict where a State establishes a generally applicable rule as to what constitutes appropriate medical treatment. Any conflict is "merely incidental" and hence "preemption does not apply." *In re T.D. Bank, N.A.*, 150 F. Supp. 3d 593, 607 (D.S.C. 2015).

For another, a hospital may comply with both state and federal law simply by turning down federal money. Some hospitals in Idaho are not Medicare providers. *See* D. Ct. Dkt. 17-9 at 2 (noting "[t]here are 52 Medicare-participating hospitals in Idaho"); *III.B. Overview of the State - Idaho – 2023*, HRSA Maternal & Child Health, https://mchb.tvisdata.hrsa.gov/Narratives/Overview/da820095-c0e3-4708-a1a7-abb733cde3af (listing a total of 53 hospitals in Idaho). Such hospitals do not violate federal law even if they refuse a service that the Department of Justice deems required by EMTALA. Rejecting or being ineligible for further federal grants does not amount to "violating" federal law. There is no direct conflict between EMTALA and Idaho's generally applicable prohibition on terminating unborn children.

II. The United States' Expansive Preemption Theory Raises Significant Constitutional Difficulties of Great Importance to the States

Construing EMTLA to excuse private hospitals from complying with Idaho's prohibitions on abortion would raise serious constitutional difficulties. EMTALA is Spending Clause legislation. Any conditions it imposes on States depends on States accepting them knowingly. Under the United States' theory, however, Congress may cut out the States by paying private parties to ignore state law. That theory—which has no readily discernable limits—threatens to "undermine the status of the States

as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

A. The Supremacy Clause applies to federal law, not conditions on federal grants

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme law of the land." U.S. Const. art. VI. Although Spending Clause legislation may be "law" for some purposes, *see Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 178 (2023), it is not "law" for purposes of the Supremacy Clause, Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 132 (2021).

Conditions imposed by Spending Clause legislation are not self-executing. "Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,' Spending Clause legislation operates based on consent," *i.e.*, the consent of the individual accepting a federal grant, as opposed to the consent of the people writ large. *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562, 1570 (2022) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–17 (1981)). Consequently, a grantee need not accept a federal condition in the first instance, and if it does, the "typical remedy" is "action by the Federal Government to terminate funds." *Talevski*, 599 U.S. at 183 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002)).

The distinction is critical to a proper understanding of the Spending Clause and its limits. Because spending "conditions do not purport to bind . . . in the manner of law," "[n]o federal condition, by whatever means adopted, should be understood to defeat the obligation of contrary state law." Hamburger, *supra*, at 131. It would be

odd to treat spending conditions as "law" for purposes of the Supremacy Clause because "Congress' legislative powers cannot be avoided by simply opting out." David Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. Rev. 496, 498 (2007). And embracing a theory of "law" that allows private parties to excuse themselves from state laws by accepting federal dollars would "displace public representative self-government . . . with private barter." Hamburger, *supra*, at 92.

"[R]ead[ing] the Supremacy Clause in the context of the Constitution as a whole," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015), the Supremacy Clause does not require States to give way in their traditional areas of regulation simply because private entities have accepted federal grant money. "Hamilton wrote that the Supremacy Clause 'only declares a truth, which flows immediately and necessarily from the institution of a Federal Government.'" *Id.* at 325 (quoting The Federalist No. 33, p. 207 (J. Cooke ed. 1961)). Such a description "would have been grossly inapt if the Clause were understood to give affected parties a constitutional . . . right," *id.*, to subject the States' laws to preemption unilaterally.

The United States cited below, D. Ct. Dkt. 17-1 at 26, only a single preemption case involving a federal grant where this Court invalidated a state statute restricting how localities could spend federal grants authorized by Congress for "any" purpose. *See Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260–68 (1985). But this Court did not squarely address whether grant conditions are properly understood to constitute "law" under the Supremacy Clause. And that case at most can be understood to preclude States from interfering with the relationship between

an eligible federal grant recipient and the grantor—not as a case precluding the State from enacting generally applicable police-power statutes that may preclude grant eligibility.

Treating grant conditions as "law" that trumps a generally applicable state exercise of the police power substitutes private barter for representative government. It threatens a fundamental alteration of the relationships among citizens, their States, and the federal government, whereby the federal government may induce citizens to violate state law with impunity. This Court has never—and should not now—countenance such a capacious understanding of congressional power.

B. Treating conditions as law capable of displacing state police power would raise serious concerns under the Tenth Amendment and the Republican Form of Government Clause

The United States' theory that federal conditions can exempt private entities from traditional exercises of the state police power embraces a model of general federal governance that the Constitution does not permit.

Consistent with federalism principles and the Tenth Amendment, this Court has emphasized that Congress's power to spend money comes with limits lest it "undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.); *see Pennhurst*, 451 U.S. at 15–18 & n.13. For example, Congress may not coerce States by using federal spending programs to lure States into dependence and then radically changing the terms of the program. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 582 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). State

hospitals that participate as Medicare providers subject to the conditions of EMTALA find themselves in such a position. They have become dependent on the Medicare program to provide services desired by state elected leaders, and then are threatened with deprivation if they refuse to violate generally applicable state law governing abortion. That is exactly the sort of "gun to the head" that members of the Court deemed unconstitutional in *NFIB*. *Id.* at 581 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

But this Court has recognized another species of coercion that also runs afoul of the Tenth Amendment. That occurs where Congress uses its taxing-and-spending power to enter the arena of general police power and override contrary state laws. So, for example, in *Linder v. United States*, 268 U.S. 5 (1925), the Court rejected use of the power to tax for the general welfare to regulate the practice of medicine. It stated that "[o]bviously, direct control of medical practice in the states is beyond the power of the federal government," which meant that "[i]ncidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure." *Id.* at 18; *see United States v. Doremus*, 249 U.S. 86, 93 (1919) (invalidating a federal regulation of physicians predicated on the taxing power because it invaded the police power of States and observing, "[o]f course Congress may not in the exercise of federal power exert authority wholly reserved to the states").

Similarly, in *United States v. Butler*, 297 U.S. 1 (1936), the Court invalidated a federal grant program under the Agricultural Adjustment Act that involved transfer payments from producing farmers to non-producing farmers. The statute, the Court explained, "invade[d] the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government." *Id.* at 68. And the grants were a critical part of that invasion: "The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end." *Id.* Critically for this case, any choice of the citizen to participate was irrelevant, because even so "[a]t best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." *Id.* at 72.

That is precisely what the United States advocates here—a purchase of citizen submission to federal regulation—with the added problem that such submission would (at least according to the federal government's theory) directly subvert state law on a matter reserved to the States. For after *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), there can be no doubt that state police power encompasses abortion regulation. *See id.* at 2284 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion."). And the Court in *Butler* was crystal clear that using the spending power to undermine core state police powers at the election of the citizen is unconstitutional: "An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution." 297 U.S. at 73. That same observation applies here.

The United States' attempt to use private bargaining under EMTALA to suspend state-police-power regulations without the State's consent also implicates the Republican Form of Government Clause. *See* U.S. Const. art. IV, § 4. A Republican Form of Government is one where the people are governed by legislatively enacted laws, not one where a different sovereign tempts some citizens to exempt themselves from state laws. *See* Hamburger, *supra*, at 147. Manifestly, "the purchase of submission is not what traditionally was understood as a republican form of government." *Id.* That observation is particularly apt where submission is not undertaken by the State itself, but by a citizen being paid by the federal government to violate state law.

Although this Court has never directly enforced the Guarantee Clause against the United States, the Court has observed that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *New York v. United States*, 505 U.S. 144, 185 (1992); *see Democratic Party of Wis. v. Vos*, 966 F.3d 581, 589 (7th Cir. 2020) ("We do not interpret *Rucho* or any other decision by the Supreme Court as having categorically foreclosed all Guarantee Clause claims as nonjusticiable, even though no such claim has yet survived Supreme Court review."). One type of claim that this Court has not foreclosed is a claim arising from Congress (or the Executive Branch) "actively interfer[ing] in the states' republican self-governance." Hamburger, *supra*, at 147. That is the case here. The United States' attempt to pay hospitals to violate valid state laws enacted by elected state officials constitutes a paradigmatic violation of the Republican Form of Government Clause.

III. The United States Lacks a Cause of Action To Sue States To Enforce Conditions of Federal Grants to Non-State Entities

Ultimately, this Court need not address any constitutional question. It could simply hold that EMTALA does not preempt Idaho's laws by its terms. Or this Court could hold that the United States lacks a cause of action to seek an injunction preventing Idaho from enforcing its laws against entities within its borders.

To sue a State, "the federal government," "like any other plaintiff," "must first have a cause of action." *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980). But no statute provides the United States a cause of action here. In fact, EMTALA implies that the United States lacks a cause of action. It provides a comprehensive enforcement scheme under which the federal government can seek civil monetary penalties against *hospitals and physicians* who "negligently violate[]" EMTALA's stabilizing requirements, 42 U.S.C. § 1395dd(d)(1), and exclude hospitals and physicians who violate EMTALA from participating in other federal programs, *id.* § 1395cc(b)(2); *id.* § 1395a-7(b)(5). EMTALA, however, does not provide a cause of action against States for injunctive relief. "[T]he 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Armstrong*, 575 U.S. at 328 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

No constitutional provision expressly authorizes the United States to seek an injunction where state law prevents a private party from accepting a federal grant, either. As this Court has repeatedly emphasized in recent years, gone is the "'*ancien regime*'" in which courts "assumed it to be a proper judicial function" to imply causes of action. *Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017); *see, e.g.*, *Hernandez v. Mesa*, 140

S. Ct. 735, 742 (2020); *Sandoval*, 532 U.S. at 287–93. Now, the "watchword is caution." *Hernandez*, 140 S. Ct. at 742. If Congress "does not itself so provide, a private cause of action will not be created through judicial mandate." *Ziglar*, 582 U.S. at 133. That is true even where federal and state law conflict. *See Armstrong*, 575 U.S. at 325–27. As this Court explained in *Armstrong*, the Supremacy Clause "instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Id.* at 325.

Of course, "'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'" *Armstrong*, 575 U.S. at 327 (quoting *Carroll v. Safford* 44 U.S. 441, 463 (1845)). But what constitutes a "proper case" is defined by historical practice. *See id.* As this Court explained long ago, a suit at equity must fall "within some clear ground of equity jurisdiction." *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 285 (1909). Federal courts have "no authority" to create causes of action or "remedies previously unknown to equity jurisprudence." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Their inherent equitable authority extends no further than that exercised by equity courts "at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." *Id.* at 318; *see Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939). Here, the United States has not identified a single case permitting it to seek injunctive relief against States where state law allegedly conflicts with grant conditions.

Common-law principles applicable to Spending Clause legislation, moreover, further militate against an implied cause of action. *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) (explaining that general contract principles "limit[] 'the scope of available remedies' in actions brought to enforce Spending Clause statutes" (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998))). At common law, nonparties to a contract neither could sue to enforce, nor be compelled to comply with, that contract's terms. "[O]nly a person who is a party to a contract c[ould] incur liability under it." Charles G. Addison, *A Treatise on the Law of Contracts* 313 (11th ed. 1911).

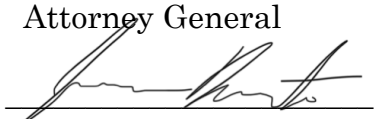
This case is, in effect, a lawsuit by one party to a contract against a stranger to the contract to enforce the contract's terms. Here, the hospital itself, not the State, opts to participate in the program and enters into the spending agreement directly with the federal government. Because the State is not a party, common-law contract principles foreclose a right of action by the United States to bring this suit, *i.e.*, to enforce its grant conditions against a State as a non-party. The United States' attempt to obtain a federal-court order enjoining Idaho's law protecting unborn life on the basis that it is preempted by a spending program in which non-state entities in Idaho participate is gravely concerning well beyond this context.

CONCLUSION

The Court should grant the emergency application for stay pending appeal.

Respectfully submitted,

THEODORE E. ROKITA
Attorney General



JAMES A. BARTA*
Solicitor General
MELINDA R. HOLMES
KATELYN E. DOERING
Deputy Attorneys General

Counsel for Amici *States*

Office of the Indiana
Attorney General
302 W. Washington St.
IGC South, Fifth Floor
Indianapolis, IN 46204
(317) 232-0709
James.Barta@atg.in.gov

**Counsel of Record*

November 27, 2023

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW H. WRIGLEY
Attorney General
State of North Dakota

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

JONATHAN SKRMETTI
Attorney General and Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

BRIDGET HILL
Attorney General
State of Wyoming

PATRICK MORRISEY
Attorney General
State of West Virginia