Nos. 24-38 and 24-43

IN THE

Supreme Court of the United States

BRADLEY LITTLE, GOVERNOR OF IDAHO, *et al.*,

Petitioners,

v.

LINDSAY HECOX, *et al.*,

Respondents.

WEST VIRGINIA, *et al.*,

Petitioners,

v.

B. P. J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF PRESIDENT PRO TEMPORE OF THE IDAHO SENATE KELLY ANTHON AND SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES MIKE MOYLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether laws that seek to protect women's and girls' sports by limiting participation to women and girls based on sex violate the Equal Protection Clause of the Fourteenth Amendment or Title IX of the Education Amendments of 1972.

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INTEREST OF AMICI CURIAE[1]

Amici are President Pro Tempore of the Idaho Senate Kelly Anthon and Speaker of the Idaho House of Representatives Mike Moyle. As elected Idaho representatives, *amici* are committed to protecting women and girls from discrimination in sports, protecting the domain of policymaking tailored to matters of state concern, and ensuring fair opportunities throughout Idaho. To those ends, Idaho enacted the Fairness in Women's Sports Act. And in view of compelling governmental interests in protecting women's and girls' sports due to the "average real differences" between the sexes, *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982), more than half the states in the Nation have followed suit by enacting similar laws. *Amici* have a strong interest in ensuring that such vitally important state laws be properly interpreted and applied. State legislators also have a compelling interest in ensuring that federal law is enforced as intended and consistent with principles of federalism.

SUMMARY OF ARGUMENT

Provisions like those in the Idaho Fairness in Women's Sports Act protect crucial interests in protecting women and girls in athletic opportunities. Reflecting both longstanding commitments to fighting disparities in opportunities and differences between the sexes, Idaho's law has become a model of legislative protections throughout the Nation. *Amici* agree with petitioners: the

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

Court should hold that those protections comport with federal law and reverse the rulings below.

Amici and the success of the Fairness in Women's Sports Act attest to the fact that protecting student athletes is best addressed by state policymakers, not federal courts. Consistent with principles of federalism, entrusting protection of women and girls in sports to state legislative bodies prevents one State from aggrandizing its policy preferences at the expense of other States. That function is critical to "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (cleaned up). And, indeed, states with competing viewpoints have enacted measures for citizens residing in those states. *See, e.g.*, Cal. Educ. Code § 221.5(f) ("A pupil shall be permitted to participate in sex-segregated school programs and activities . . . consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."). This Court should ensure that states' rights like those addressed in the Fairness in Women's Sports Act remain properly grounded in the flexibility that state policymaking is designed to provide.

Moreover, the issues in these cases touch on state functions that are particularly at risk of federal encroachment. Idaho's Act protects women's and girls' sports by requiring public schools and institutions of higher education to designate each of their sponsored sports teams for: (1) "[m]ales, men, or boys"; (2) "[f]emales, women, or girls"; or (3) "[c]oed or mixed." Idaho Code § 33-6203. These distinctions reflect policy choices about how sports programs operate within public schools and institutions of higher education. But for federal funding conditions, those functions—and those

policy choices—would be the exclusive domain of state lawmakers. Here, the Idaho Legislature enacted the Fairness in Women's Sports Act Consistent with those serious responsibilities. Idaho should not be deemed to have ceded its authority by accepting federal funds. As Justice Barrett noted in *Moyle v. United States*, 603 U.S. 324 (2024), whether "Congress, in reliance on the Spending Clause, can obligate recipients of federal funds" to violate state law presents "a difficult and consequential argument." *Id.* at 336 (Barrett, J., concurring). States should not lose primacy over student-athlete protections by accepting federal funds that carry no clear contrary indication. Rather, this Court should continue to afford due respect for the States' policymakers.

ARGUMENT

As legislators in the State whose Fairness in Women's Sports Act became the model for similar legislation nationwide, *amici* offer this Court three perspectives. First, *amici* agree that protections in acts like the Fairness in Women's Sports Act rightly serve compelling governmental interests in protecting women and girls. Second, *amici* urge the Court to allow state policymakers the continued leeway to address such divisive and sensitive matters without a nationally imposed standard sounding in equal protection. Third, *amici* respectfully suggest that the Court should closely adhere to restrictions on the scope of federal power, particularly for spending-clause legislation, given that the alternative would invite federal encroachment on traditional state police powers where Congress could not do so directly.

I. Idaho's Fairness in Women's Sports Act, Like Its Analogues in West Virginia and Other States, Properly Protects Compelling Fairness Interests.

The Fairness in Women's Sports Act emerged from decades of progress in expanding athletic opportunities for women and girls, coupled with a recognition of enduring biological differences between the sexes. As the sponsor of Idaho's pioneering law has put it, "One of our society's greatest recent triumphs is the cultural and legal consensus in favor of women's sports." Br. of Rep. Ehardt et al. in Support of *Little* Pet. 3. Unlike some areas of public life where equality is understood to require identical treatment, "women's sports have been a special case," and in this "limited area, our nationwide consensus has been that equal opportunity for women requires providing separate facilities and programs for them." *Id.* Representative Ehardt, as well as many other female legislators, have voiced their personal stories of how women's sports opened doors and built lifelong leadership skills. *Id.* at 9-11.

This approach draws support from this Court's own precedent, which notes that "[p]hysical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Eligibility for participating in women's and girls' sports has thus widely been understood to reflect the biological and physical characteristics that make a person female. The Fairness in Women's Sports Act tracks that commonsense understanding. Nonetheless, the rise of gender identity as a concept separate from biological sex has prompted some to argue that athletic participation should be based not on biology but on, as the Ninth Circuit put it "a person's sense of being . . . female." *Little* Pet. App. 13a. But if

biological criteria are abandoned, women face disadvantages because in almost every sport "boys and men tend to be significantly stronger and faster, physically, than girls and women." Ehardt Br. at 14.

The Fairness in Women's Sports Act thus mandates that student sports be designated "based on biological sex" and further directs that sports "designated for females, women, or girls shall not be open to students of the male sex." Idaho Code § 33-6203(1)-(2). This approach ensures that women and girls are not forced to compete against men and boys who, on average, benefit athletically from "enduring" physical differences. *Virginia*, 518 U.S. at 533. These differences were carefully catalogued by the Idaho Legislature in detailed legislative findings supporting the Act. Among those findings were that physiological distinctions between males and females affect athletic performance, differences in testosterone levels, and even distinctions in muscle fibers. Idaho Code § 33-6202(1)-(10). The legislative findings were further backed by this Court's precedent and by an academic study of sex differences in sport and athletics. *E.g.*, *id.* § 33-6202(6), (10) (citing *Virginia*, 518 U.S. at 533; Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't Abandon Title IX*, WASHINGTON POST (Apr. 29, 2019)).

The Act was thus designed to safeguard women's opportunities by codifying long-recognized biological criteria in sport. In the years since the Idaho's Fairness in Women's Sports Act became the first law of its kind, more than half the States have "enacted statutes affirming that participation in women's sports depends on biology." Ehardt Br. at 5. Against this backdrop, it is misguided to suggest that the Act or similar protections were somehow contrived for no other purpose than "to

exclude transgender and intersex people." *Little* Pet. App. 29a. And it was equally wrong to suggest that the sole reason to define a person's sex "only by their reproductive biology and genetics at birth" is "to exclude transgender girls from the definition of 'female' and thus to exclude them from participation on girls sports teams." *B.P.J.* Pet. App. 24a. The Court should reject both suggestions.

In fact, this Court has often stressed the role of deference in other constitutional contexts. In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), this Court emphasized that "judges lack the on-the-ground expertise and experience of school administrators" and so "we have cautioned courts in various contexts to resist substituting their own notions" of good policy when it comes to students. *Id.* at 686. Universities, for instance, "enjoy a significant measure of authority" and the Court gives "due decent respect" when considering constitutional objections. *Id.* at 687. Respecting the views of state policymakers warrants no lesser caution given that the complexities of such decisions are equally ill-suited for federal courts. *See, e.g.*, *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982) (cautioning courts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review").

The Court should thus also reject any notion that the Act is constitutionally infirm. The Act comports with equal protection because it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981). Defining eligibility for women's and girls' sports by biological sex is also essential to properly recognize women's athleticism and athletic achievements,

which would be lost without opportunities "designated specifically for women" based on biological criteria. *Little* Pet. Br. 6. Separating sports teams based on sex furthers the State's compelling interest in promoting "equality" for women "by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities" and "to obtain recognition and accolades, college scholarships, and other long-term benefits." Idaho Code § 33-6202(12). And the Act is supported by detailed findings explaining why "[t]he benefits that natural testosterone provides to male athletes" cannot be "diminished through the use of puberty blockers and cross-sex hormones." *Id.* § 33-6202(11).

In other words, the Act reflects understandable "trade-offs between equality and practicality." *Clark*, 695 F.2d at 1132. Idaho, like the other States enacting similar protections, need not "maximize equality" in its line-drawing. *Id.* at 1131. That is especially true here where, as described above, advances in opportunities for women and girls could be threatened or erased by mistaken attempts to remove biology from the playing field. The Court should ensure that the constitutional standard preserves lawmakers' ability to make "predictive judgment[s]" necessary to protect the advances made for women and girls in sports. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

II. Preserving Laws Like Those in Idaho and West Virginia Serves the Aims of Federalism.

Federalism protects the Nation by diffusing power between the States and the federal government, and also among all fifty States. Reversal of the decisions below will help ensure the proper spheres of state influence

over complex policy choices that federalism was meant to protect.

A. The Framers feared the accumulation of power in any single person or body, rejecting the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter, ed. 1961). To foreclose that result, the Framers created the "compound republic of America," in which "the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter, ed. 1961). Such federalism principles track the separation of powers. *See New York*, 505 U.S. at 181; *see also Printz v. United States*, 521 U.S. 898, 918-22 (1997). Together, federalism and separation of powers form the "double security" protecting "the rights of the people." THE FEDERALIST NO. 51, at 320.

But an equally important separation of power was the division among the fifty States themselves. For the Framers, this additional separation was necessary so that state and federal governments would "control each other, at the same time that each will be controlled by itself." *Id.* at 323. That "structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Federalism thus "allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own

times without having to rely solely upon the political processes that control a remote central power." *Id.*

The Framers believed that the States would compete with one another for influence, guarding against abuse "from either front." *Gregory*, 501 U.S. at 458-59 (citing THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter, ed. 1961)). Maintaining proper separation among the components of our federal system was crucial to guard against "danger from interested combinations of the majority." THE FEDERALIST NO. 51, at 324. Of course, "each State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its sister States." *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 245 (2019) (cleaned up). But the Framers did not give the States "an untouchable domain of judicially protected jurisdiction" to protect their interests. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 286 (2000). The Framers instead relied on the States' "ability to influence national politics" and "capacity to compete effectively for political authority." *Id.*

States must "recognize, and sometimes defer to, the laws, judgments, or interests of another." Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309, 1309 (2015). "[W]hile an individual state may make policy choices for its own state," the Constitution does not permit a State to directly "impose those policy choices on the other states." Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 ORE. L. REV. 275, 292 (1999) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)). This Court's precedents balance the tension between

restrictions on state legislation that discriminates against other States versus "the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

In practice, this balance means that policy judgments in one State must often be respected even if those in other States might disagree. To maintain equilibrium, federalism relies on the citizen's ability to seek political accountability from those responsible for State policymaking. Indeed, an inability to hold "the government answerable to the citizens" may be "more dangerous than devolving too much authority to the remote central power." *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring). The Court must thus maintain "the autonomy of the individual States" versus one another and in relation to federal power. *Healy*, 491 U.S. at 336.

But the Framers also understood the States' tendency "to aggrandize themselves at the expense of their neighbors." THE FEDERALIST NO. 6, at 60 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). The goal of the federal system is thus "to assign political responsibility, not to obscure it." *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Otherwise, "[u]nrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984). When the "burden [of regulation] falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *Id.* (cleaned up). So, when disagreement arises, federal courts respond by ensuring that political accountability

is assigned correctly. *See, e.g.*, *Ticor Title*, 504 U.S. at 636.

State policymakers must thus remain free to tailor their legislation to local needs, since "smaller units of government have an incentive . . . to adopt popular policies." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987). Federalism thus "provides an additional level of freedom to individuals, beyond that provided by specific guarantees of individual rights, by conferring the freedom to choose from among various diverse regulatory regimes the one that best suits the individual's preferences." Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard*, 51 Duke L.J. 75, 138-39 (2001). The "point of federalism" is "to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems." Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 912 (1994).

B. By effectively federalizing the issue of women's and girls' sports and imposing a contrary view on States, the decisions below embody the sort of threat to liberty that federalism was designed to prevent. For instance, the Ninth Circuit denied State sovereign interests in protecting spaces reserved exclusively for "tens of millions of female athletes." *Little* Pet. 3-4. The Ninth Circuit wrongly interfered with citizens' "elected representatives in half the states from relying on sex-based distinctions to save women's sports." *Id.* at 9. Removing these complex policy choices from the fifty state legislatures "runs the risk of making them harder to solve." *Id.* at 27 (citation omitted). Line-drawing about athletics and sex categories belongs to state legislatures, not to those

who wish to impose contrary viewpoints on all the States by resorting to federal court.

The proper, "gradualist approach" also serves the interests of federalism because it "lowers the political temperature." Richard A. Epstein, *The Constitutionality of Proposition 8*, 34 HARV. J.L. & PUB. POL'Y 879, 881 (2011). It prevents the States who disagree from imposing their policy preference on the States that protect women's and girls' sports. *See* Baker & Young, *supra*, at 110. Only when competition for the "benefits of government" exists can we perceive which legal rules actually "make things better for most people." McConnell, *supra*, at 1494, 1499. Reversal limits States' ability to expand their reach at the expense of other States and preserves each State's influence in that competition.

That balance is especially important for *amici* given their authority as legislators to protect the State's youngest citizens. For instance, the Idaho Constitution provides that "[t]he stability of a republican form of government depend[s] mainly upon the intelligence of the people," and "it shall be the duty of the legislature of Idaho[] to establish and maintain a general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, sec. 1. Idaho must defend itself from lawsuits attacking policy choices it makes in that context. *E.g.*, *Zeyen v. Boise Sch. Dist. No. 1*, 522 F. Supp. 3d 788, 802 (D. Idaho 2021) (involving challenge based on Idaho's policy choice not to require a school district to offer kindergarten). It would be unfair to require Idaho lawmakers to remain accountable for addressing complex policy problems in schools while tying their hands in other respects, such as with respect to student safety.

Unless the Court intervenes, federal courts will continue to prove attractive venues for displacing state

legislative authority. Separating the political and judicial branches of government respects the "integrity, dignity, and residual sovereignty of the States." *Bond*, 564 U.S. at 221. And doing so helps to "ensure that States function as political entities in their own right." *Id.*; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 707 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (listing "federalism and separation of powers" among the "most important" "structural protections" in our Constitution). But an unelected judiciary is not among the politically accountable branches that can be safely "relied upon to respect th[ose] States." Calvin R. Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL'Y 887, 891 (1997). Unlike federal courts, political branches of government like those served by *amici* face "localized accountability." MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 138 (1995).

Rather than judicial superintending, federalism relies heavily on political efforts like State-focused lobbying efforts and state political-party pressure. D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 633-39 (1985). The "success of American federalism" would be undermined "[i]f the federal government were free to evade federal lawmaking procedures by shifting substantial lawmaking authority to unelected officials (such as independent agencies or federal courts)." Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 337 (2001). Of course, "[p]ermitting the federal government to avoid these constraints" would also "allow it to exercise more power than the Constitution contemplates" and to do so "at the expense of state authority." Clark,

supra, at 1324. Unlike bodies that are effectively insulated from political forces, the legislative process provides far "more opportunities and more access points to provide input." Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 365 (2010). Reversing here helps ensure that "a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920.

Especially in divisive controversies like the debate over women's and girls' sports, federalism lets each State decide how best to proceed without undue federal pressure. If "sex" must yield to "gender identity" here, there is little reason why the reasoning below would not also jeopardize countless other laws, such as "sex-based medical laws or regulations, even where such rules would be best medical practice." *United States v. Skrmetti*, 145 S. Ct. 1816, 1839 (2025) (Thomas, J., concurring). Depriving citizens of a choice in state policies like these frustrates a crucial vehicle for expressing political preferences apart from the ballot box. *See* Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, 55 NOMOS 83, 85 (2014) (explaining how "foot voting" supplements the ballot box to ensure that "people themselves are able to select the policies they prefer"). And it undercuts the aim of making government "more responsive by putting the States in competition" for those mobile citizens. *Gregory*, 501 U.S. at 458.

As long States can present citizens an option among localized policy choices "in a meaningful way, localism promotes diversity as an important barrier" against the sort of national overreach the Framers feared. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1872 (1995). Idaho's Act and other States' analogous protections follow from that spirit of localism

essential to American federalism. The Court should reverse to uphold those ideals.

III. The Court Should Carefully Police Restraints on Federal Spending Power in the Student-Athlete Context.

By finding an Equal Protection violation in the Fairness in Women's Sports Act, the Ninth Circuit undermined the freedom and flexibility needed to address this complex issue. That result is especially troubling in view of the Fourth Circuit's decision, which functionally extended federal authority by virtue of Title IX even where Congress could not act on the States directly. The Court should uphold the Constitution's careful guardrails against the expansion of federal power, preserving the scope of authority reserved to Idaho, West Virginia, and the other States.

A. Congress "can exercise only the powers granted to it." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *see also* THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined . . . . 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 . . . ."). Congress does not exercise plenary lawmaking power over student athletes and has not yet purported to do so on the subject of women's and girls' sports in public schools. Rather, States derive the power to enact provisions like Idaho's Fairness in Women's Sports Act or West Virginia's sister legislation from state police powers, which Congress lacks. Legislative authority for health, safety, and

athletics in public schools or institutes of higher education are core traditional state powers. *B.P.J.* Pet. Br. 32-33.

Congress does not enjoy that latitude because the Constitution left those powers to the States. U.S. CONST. Amend. X. The ability to dictate terms of participation for student-athlete opportunities is notably absent from Congress's enumerated powers and from its historic practice. U.S. CONST. art. I, § 8; *see also NFIB*, 567 U.S. at 549 ("Sometimes the most telling indication of a severe constitutional problem . . . is the lack of historical precedent' for Congress's action." (cleaned up)). States retain their sovereign authority and may only give it up knowingly and voluntarily. "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577.

B. Congress may, within the scope of a contract formed under the Spending Clause, require that the States surrender specific authority to be a party to the contract. But that background rule provides no support for the challengers here.

If States are to cede some power to the federal government by entering into a contract, they must do so knowingly. This well-established understanding rightly respects both governments as the co-equal powers they are, upholding core federalism principles. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470-71 (2018) (noting the Framer's rejection of a Constitution that would allow Congress to "control state legislatures"). Notably, "[t]he Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Id.* at 470 (quoting THE FEDERALIST No. 39, at 245 (James

Madison) (Clinton Rossiter, ed. 1961)); *see also* U.S. CONST. Amend. X.

This Court has thus steadfastly maintained the primacy of the contractual relationship inherent in Spending Clause legislation, emphasizing that the federal government must provide a clear understanding of obligations to the States, or the States cannot be held to those obligations. *NFIB*, 567 U.S. at 577. Congress may attach conditions to federal funds, but only clearly and unambiguously with notice of the conditions. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *accord South Dakota v. Dole*, 483 U.S. 203, 207 (1987). When States agree to surrender any of their authority, such surrender is "strictly construed . . . in favor of the sovereign." *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (cleaned up); *accord Moyle*, 603 U.S. at 347 (Alito, J., dissenting). In other words, if Congress expects States to agree to certain terms before accepting funds, it would be required to make this explicitly clear.

Here, Congress has chosen not to force States to let men and boys to participate in women's and girl's athletic opportunities. "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (cleaned up) (describing this principle as an "ordinary rule of statutory construction"). The necessary clear statement is entirely absent from Title IX. *See, e.g.*, *B.P.J.* Pet Br. 32. Because an explicit grant of power has not been made, States retain their authority to protect women's and girls' sports here.

States may come within the scope of some federal power by accepting federal funding for schools.

However, the Court should reject any notion that States wholly surrender their police power by doing so. No relevant federal-spending program clearly states a condition that males be allowed to participate in female public-school athletic activities, *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (conditions must be stated "unambiguously"); *accord Moyle*, 603 U.S. at 347 (Alito, J., dissenting). "[T]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *NFIB*, 567 U.S. at 584. And a condition sweeping as potentially broadly as some suggest Title IX be read here, implicating vast amounts of federal funding, would almost surely raise serious doubts in view of this Court's restrictions on coercive funding conditions. *See id.* at 580-81.

Without reversal, *amici* agree that the problem is sure to worsen. *See B.P.J.* Pet. Br. 32-33. Emboldened by the legal challenges like those brought here, plaintiffs will bring more challenges to States' management of public schools and institutes of higher education. In other States that wish to adopt competing understandings of female athletic participation, however, there will be no comparable opportunity for individuals to bring challenges to those programs once a blanket rule has been imposed via Title IX as a matter of federal law. Because the federal government could not accomplish this directly through spending requirements, the Court should not countenance that result indirectly either.

This issue requires the Court's correction and, particularly, close adherence to the limits of federal power. Affirming the decision below will ensure that the States' ability to protect their youngest citizens will continue to erode. A reversal stops that course.

CONCLUSION

The Court should reverse the judgments below.

Respectfully submitted.

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