No. 24-43

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

Casey Norman
Counsel of Record
Andreia Trifoi
Mark Chenoweth
NEW CIVIL LIBERTIES
ALLIANCE
4250 N. Fairfax Dr.
Suite 300
Arlington, VA 22203
(202) 869-5210
Casey.Norman@ncla.legal
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE FOURTH CIRCUIT'S EXPANSION OF TITLE IX TO ENCOMPASS GENDER IDENTITY DEFIES THE STATUTE'S PLAIN MEANING AND THE SPENDING CLAUSE'S CLEAR STATEMENT REQUIREMENT 5

A. Title IX's Text, Structure, and History Make Clear that "Sex" Means Biological Sex 8

B. Title IX's Regulatory History Further Confirms that "Sex" Does Not Encompass Gender Identity 12

II. THE SPENDING CLAUSE CANNOT BE WIELDED TO CIRCUMVENT THE SEPARATION OF POWERS NOR TO INVADE STATE SOVEREIGNTY 15

A. The Clear Statement Rule Safeguards State Sovereignty 16

B. The Clear Statement Rule Serves as a Vital Limitation on Congress's Spending Power ... 21

C. The Fourth Circuit's Nullification of the Clear Statement Rule Empowers Unaccountable Executive Agencies to Rewrite the Law 26

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.,
57 F.4th 791 (11th Cir. 2022) 9, 10, 12
Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006).....6, 7
B.P.J. v. W. Va. State Bd. of Educ.,
649 F. Supp. 3d 220 (S.D. W. Va. 2023).....19
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98 F.4th 542 (4th Cir. 2024) 7, 9, 17, 18, 19
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470 U.S. 656 (1985).....27
Biden v. Nebraska,
600 U.S. 477 (2023).....31
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572 U.S. 844 (2014).....16, 18
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590 U.S. 644 (2020).....7
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441 U.S. 677 (1979).....11
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Deanda v. Becerra,
96 F.4th 750 (5th Cir. 2024).....29
FCC v. Consumers' Rsch,
606 U.S. ___, 145 S. Ct. 2482 (2025).....27
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501 U.S. 452 (1991).....16
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972 F.3d 586 (4th Cir. 2020).....9
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739 F. Supp. 3d 902 (D. Kan., 2024).....10
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603 U.S. 369 (2024).....8, 28, 31
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743 F. Supp. 3d 824 (N.D. Tex. 2024) 10

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458 U.S. 457 (1982).....23
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531 U.S. 457 (2001).....27
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998 F.2d 168 (3d Cir. 1993) 13
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406 U.S. 205 (1972).....20, 23
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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to a jury trial, to due process of law, and to have laws made by the nation's elected legislators through constitutionally prescribed channels (*i.e.,* the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, executive branch officials, administrative agencies, and even some courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints against the modern administrative state. Although Americans

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[1] No party's counsel authored any portion of this brief, and no party, party counsel, or other person other than *amicus curiae* made a monetary contribution intended to fund this brief's preparation or submission. *See* S. Ct. R. 37.6.

still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

Congress's virtually unfettered practice of imposing "conditions" on federal spending is particularly disturbing. Far too often, Congress attaches sweeping conditions on the receipt of federal funds, thereby insidiously defeating constitutional guarantees. When Congress purports to tell States how to regulate education—a power traditionally recognized as reserved to the States—it necessarily intrudes upon state sovereignty. Whatever legitimacy Congress has to legislate via conditions under the Spending Clause, it exists only to the extent that the States and their institutions knowingly and voluntarily accept those conditions.

NCLA was founded to restore constitutional limits on administrative power and to protect the civil liberties of all Americans, including the right to be governed only by duly enacted laws and the right to public education that is regulated by the respective States—not by Congress or federal agencies. By expanding Title IX to encapsulate gender identity, the Fourth Circuit effectively sanctioned a usurpation of state regulatory authority—authority that is expressly reserved to the States by the Constitution's enumeration of limited federal powers and the Tenth

Amendment. It also flouted the constitutional limits on Congress's Spending Clause authority firmly established under this Court's precedent.

SUMMARY OF ARGUMENT

The Fourth Circuit's ruling nullifies the clear statement requirement of the Constitution's Spending Clause and defies the important limitations the Supreme Court has placed on Congress's ability to legislate via spending conditions. The decision below should therefore be reversed.

The Fourth Circuit ignored the fundamental premise that Title IX was enacted pursuant to Congress's Spending Clause authority, and, in doing so, it failed to grapple with the constitutional requirements that govern the interpretation and application of such legislation. Chief among those requirements—recognized by this Court for decades—is that any conditions attached to federal funding be stated clearly and unambiguously by Congress. That requirement derives from the contract-like nature of Spending Clause legislation: Congress may regulate beyond its enumerated powers via spending conditions only insofar as States knowingly and voluntarily accept the conditions attached to their receipt of federal funds.

Congress spoke clearly and unambiguously when it passed Title IX in 1972. By prohibiting discrimination on the basis of "sex," Congress

unambiguously referred to biological sex, not gender identity. *See* 20 U.S.C. § 1681(a). At that time, States accepting federal funds could only have understood the term "sex" to mean the physiological distinctions between females and males, as contemporaneous sources confirm. Indeed, the concept of gender identity was virtually unknown in 1972 and could not have informed Congress's choice of language.

By holding that Title IX protects against discrimination on the basis of "gender identity," however, the Fourth Circuit impermissibly rewrote the statute, expanding it far beyond its plain meaning. The lower court, in effect, injected ambiguity into a statute that had always been clear, thereby contravening the Constitution's clear statement requirement. That approach not only distorts Title IX but also undermines this Court's longstanding precedent upholding the clear statement requirement as an essential limitation on Congress's power to regulate the States through conditions on spending.

Further, the Fourth Circuit's expansive interpretation of Title IX threatens both State sovereignty and the separation of powers. Accepting its interpretation would seriously erode the clear statement rule—a key structural constraint on Congress's spending power—and effectively license Congress to impose ambiguous spending conditions. Such a result would undermine the States' ability to govern core areas, such as education, extending the

federal government's power over the affairs of the States far beyond its enumerated powers. It would also empower executive agencies to exploit statutory ambiguity, enabling them to wield spending conditions against the States in ways that Congress never clearly authorized.

The Constitution does not permit such a subversion of the separation of powers and federalism. This Court should therefore reject the Fourth Circuit's broad interpretation of Title IX and uphold the clear statement requirement as a meaningful Constitutional limitation on Congress's already broad power under the Spending Clause.

ARGUMENT

I. THE FOURTH CIRCUIT'S EXPANSION OF TITLE IX TO ENCOMPASS GENDER IDENTITY DEFIES THE STATUTE'S PLAIN MEANING AND THE SPENDING CLAUSE'S CLEAR STATEMENT REQUIREMENT

Title IX—as construed by the Fourth Circuit—violates the Spending Clause's clear-statement requirement. Congress's power to attach conditions to federal funds "is of course not unlimited." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Conditions are valid only if Congress states them clearly, so that States may "exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *see also NFIB v.*

Sebelius, 567 U.S. 519, 577 (2012). By expanding Title IX to prohibit gender-identity discrimination, the lower court effectively imposed a funding condition that Congress never enacted, let alone clearly stated. Indeed, the statute prohibits discrimination on the basis of "sex," a term that, in 1972 and for decades thereafter, was universally understood to refer to biological sex. In treating "gender identity" as interchangeable with "sex," the Fourth Circuit stripped Title IX of the clarity that the Constitution demands—namely, that Congress "speak with a clear voice" to the States with respect to federal funding conditions. *See Davis ex rel. LaShona D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

This Court has repeatedly explained that Spending Clause legislation operates "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022); *see also Pennhurst*, 451 U.S. at 17. As with any contract, the terms must be set out clearly. Thus, when Congress seeks to condition States' acceptance of federal funds, it "must do so unambiguously[.]" *Pennhurst*, 451 U.S. at 17. States "cannot knowingly accept conditions … they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The legitimacy of Congress's exercise of the spending power "rests on whether the State voluntarily and

knowingly accepts the terms of the contract." *Pennhurst*, 451 U.S. at 17.

To determine whether States have received the requisite clear notice of a federal funding condition, this Court has instructed that the inquiry must be conducted "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the grant of] funds and the obligations that go with those funds." *Murphy*, 548 U.S. at 296. Congress enacted Title IX in 1972 pursuant to its Spending Clause authority. *See B.P.J. v. W.Va. State Bd. of Educ.*, 98 F.4th 542, 574 (4th Cir. 2024). The relevant question here, then, is straightforward: would the State of West Virginia and its educational institutions have understood Title IX to prohibit discrimination on the basis of gender identity in 1972? The answer is plainly no. The concept of gender identity was "essentially unknown" at the time. *See Bostock v. Calyton County*, 590 U.S. 644, 685 (2020) (Alito, J., dissenting).

The logic of the Fourth Circuit's ruling collapses into one of two possible conclusions—both constitutionally untenable. Either Title IX has been invalid from the outset because it failed to give States clear notice that "sex" encompassed "gender identity," *see Pennhurst*, 451 U.S. at 17, or Title IX now imposes a new, "post-acceptance" condition, surprising States with obligations that they never agreed to when they accepted federal funds—something this Court has

flatly rejected. *See id.* at 24-25 (Congress's Spending Clause power "does not include surprising participating States with post acceptance or 'retroactive' conditions.").

Ultimately, the Constitution requires that Congress, not the courts, make policy choices and express them clearly in the text of Spending Clause legislation. Title IX, as written, provides no notice that its prohibition of sex discrimination extends to gender identity. Courts cannot rewrite the law to reflect policy preferences found nowhere in the text of the statute, yet that is precisely what the Fourth Circuit has done here, reading into Title IX a condition that Congress never enacted and that the States never accepted.

A. Title IX's Text, Structure, and History Make Clear that "Sex" Means Biological Sex

Title IX prohibits discrimination "on the basis of *sex*" in any "education program or activity receiving Federal Financial assistance." 20 U.S.C. § 1681(a) (emphasis added). From its enactment, the statute's meaning was plain: "sex" referred to biological sex as determined at birth. Every traditional tool of statutory interpretation—*e.g.*, text, structure, and history—confirms that understanding. *See Loper Bright Enterprises v. Raimondo and Relentless v. Dept. of Commerce*, 603 U.S. 369, 403 (2024) ("Courts interpret statutes, no matter the context, based on the

traditional tools of statutory construction, not individual policy preferences."); *Kisor v. Wilkie*, 588 U.S. 558, 576 (2019).

The plain meaning of Title IX's text is decisive. At the time of its enactment in 1972, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting) (emphasis in original). Contemporary dictionaries defined "sex" simply as "male or female … with reference to their reproductive functions." *B.P.J.*, 98 F.4th at 574 (Agee, J., concurring in part) (internal quotations omitted). The Supreme Court confirmed the same point just one year later, recognizing sex as "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Courts across the country have come to the same conclusion: that, in 1972, the ordinary public meaning of "sex" was biological sex, not gender identity. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022); *Roe v. Critchfield*, 137 F.4th 912, 929 (9th Cir. 2025); *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Texas 2016).

Title IX's structure and statutory carve-outs likewise confirm that Congress understood "sex" in binary, biological terms. For example, the statute delays its application to institutions that "admit[] only

students of one sex" while such institutions transition to admitting "students of both sexes." 20 U.S.C. § 1681(a)(2); *see also Kansas v. Dep't of Educ.*, 739 F. Supp. 3d 902, 920 (D. Kan., 2024) ("It is clear from [Title IX's] statutory language that the term 'sex' refers to the traditional binary concept of biological sex."). Other express exceptions in the statute—*e.g.*, for separate living facilities, *see* 20 U.S.C. § 1686(a), and for father-son or mother-daughter activities, 20 U.S.C. § 1681(a)(8)—make sense only if "sex" refers to biological males and females. If "sex" were instead a fluid or subjective concept, rather than an immutable physiological characteristic, such provisions would effectively be meaningless as students could claim simultaneous access to facilities and activities designated for both their biological sex and their asserted gender identity, whenever the two diverge. *Adams*, 57 F.4th at 813; *see also Louisiana v. Dep't of Education*, 737 F. Supp. 3d 377, 399 (W.D. La. 2024). That interpretation of "sex" would nullify the carefully drawn statutory exceptions, in direct violation of the canon against surplusage, which is "strongest when an interpretation would render superfluous another part of the same statutory scheme." *City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)).

The history and context of Title IX further reinforce that its protections extend only to discrimination on the basis of biological sex. *See Texas v. Cardona*, 743 F. Supp. 3d 824, 875 (N.D. Tex. 2024)

(recognizing that "what dictionaries say" about the meaning of "sex" in Title IX, "'statutory and historical context' confirm.") (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001)). "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *accord Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 & n.36 (1979). As the statute's chief sponsor, Senator Birch Bayh of Indiana, explained, Title IX was enacted to "provide for the women of America something that is rightfully theirs—an equal chance … to develop the skills they want." 118 CONG. REC. 5808 (1972).

The feminist movement that preceded and spurred Congress's enactment of Title IX did not argue that there are no biological differences between men and women, but instead "challenged the perception of womanhood as understood in relation to social and domestic roles" by insisting that a "woman's social roles should not be defined by her body." Seth Lucas, *Equality on What Basis? Evaluating Title IX*'s *Requirements in the Transgender Context*, 31 Geo. Mason. L. Rev. 389, 397 (2023). And Title IX sent a "clear message" that women's bodies should not determine their opportunities. *Id.* at 419. Far from blurring the lines between male and female, Title IX recognized that, although men and women have immutable physiological differences, those differences

provide no basis for denying women the opportunity to pursue their goals. *Id. at* 437.

B. Title IX's Regulatory History Further Confirms that "Sex" Does Not Encompass Gender Identity

Though Title IX itself is silent on athletics, its implementing regulations make clear that the statute was enacted to provide women with more opportunities to participate in school sports. *See Adams*, 57 F.4th at 816. Those regulations provide, *inter alia*, that "[n]o person shall, on the basis of sex, be excluded from participation in … any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a). They also clarify that schools may "sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* § 106.41(b).

The impact of this framework following Title IX's inception has been dramatic. In the year prior to its enactment, "fewer than 300,000 female students participated in interscholastic athletics." Deborah Blake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 15 (2000). In 2025, there are over 3.5 million female students participating in high school sports, alone. *See Participation in High School Sports Hits Record*

High with Sizable Increase in 2024-25, Nat'l Fed. of State High Sch. Assn's (Sept. 9, 2025).[2] It is undeniable that the passage of Title IX sparked a "virtual revolution for girls and women in sports." Blake, *supra*, at 15. Although purposivism alone cannot supply the meaning of statutory text, *see Ysla v. United States*, 171 Fed. Cl. 333, 347 (2024), Title IX's purpose remains a relevant aid in confirming its proper interpretation: "It would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993).

This Court has recognized that agency regulations can, under certain circumstances, provide the notice required under the Spending Clause. *See Davis,* 526 U.S.at 630. Here, the Department of Education's Title IX regulations only reinforce that Title IX has long been understood to encompass only biological sex. *See Tennessee v. Cardona*, 737 F. Supp. 3d 510, 558 (E.D. Ky. 2024). For decades, the Department construed "sex" as a male-female binary, and only after *Bostock* did it attempt—unsuccessfully—to revise its Title IX regulations to include gender identity. *See* Nondiscrimination on the

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[2] https://nfhs.org/stories/participation-in-high-school-sports-hits-record-high-with-sizable-increase-in-2024-25.

Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (proposed July 12, 2022).

Courts have since made clear that *Bostock* did not "expand the meaning of 'sex' within Title IX" and, thus, that ruling—made in the context of Title VII, rather than Title IX—does not serve as a basis for departing from the longstanding understanding of "sex" in Title IX as a binary, biological construct. *Tennessee*, 737 F. Supp. 3d at 559; *see Oklahoma v. Cardona*, 743 F. Supp. 3d 1314, 1330 (W.D. Okla. 2024) (*"Bostock* was never intended to have a sweeping impact on Title VII, let alone Title IX."); *see Louisiana*, 737 F. Supp. 3d at 399 ("Bostock does not apply [to Title IX] because the purpose of Title VII to prohibit discrimination in hiring is different than Title IX's purpose to protect biological women from discrimination in education."). Neither the Department of Education's attempt at redefining "sex" in 2022—50 years after Title IX was enacted—nor the Supreme Court's *Bostock* opinion provided States with any semblance of clear notice that accepting federal education funds over the decades since Title IX's enactment meant agreeing to prohibit gender-identity discrimination. On the contrary, the Department's long history of treating Title IX's reference to sex as binary only further confirms that the term signifies biological sex.

Title IX does not now—and never has—prohibited discrimination on the basis of gender identity. Indeed, from its enactment, both the courts and the Department of Education have consistently construed the statute as addressing only biological sex. *See Frontiero*, 411 U.S. at 686. It is thus inconceivable that West Virginia (or any other state for that matter) could have understood Title IX to impose a condition requiring the prohibition of gender-identity discrimination when determining whether to accept federal funds. *Pennhurst*, 451 U.S. at 17.

II. THE SPENDING CLAUSE CANNOT BE WIELDED TO CIRCUMVENT THE SEPARATION OF POWERS NOR TO INVADE STATE SOVEREIGNTY

While this Court has recognized that the Spending Clause permits Congress to spend for the general welfare under a contract-based theory of state consent, *see Pennhurst*, 451 U.S. at 17, courts have, at the same time, cautioned that "Congress's unbridled use of the Spending Clause [could] undermine the balance of powers in our dual-sovereign federalist system." *State v. Yellen*, 539 F. Supp. 3d 802, 809 (S.D. Ohio 2021). As this Court observed, if Congress could, through the use of spending conditions, regulate indirectly what it could not regulate directly, then the spending power would "become the instrument for total subversion of the governmental powers reserved to the individual states." *United States v. Butler*, 297 U.S. 1, 75 (1936). Courts must

therefore police the boundaries of state consent with vigilance to ensure that Spending Clause conditions do not erode federalism or violate the Constitution's separation of powers. The Fourth Circuit's decision below cannot stand because it undermines those structural constraints and invites Congress to extend its reach far beyond constitutional bounds.

A. The Clear Statement Rule Safeguards State Sovereignty

The Fourth Circuit's holding that West Virginia's Save Women's Sports Act ("the Act") violates Title IX is irreconcilable with this Court's Spending Clause precedent because it circumvents the clear statement rule. That rule exists to ensure 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 . A clear statement that is "plain to anyone reading the [statute]" is especially critical where, as here, Congress is claimed to have imposed a condition that strikes at the core of state sovereignty, such as the regulation of public education. *See Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991).

Congress's intent must be "clear and manifest" when a statute encroaches upon the "historic police powers of the States." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Bond v. United States*, 572 U.S. 844, 860 (2014) (requiring a "clear indication" from Congress before interpreting

"expansive language in a way that intrudes on the police power of the States."). This "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted). Conversely, Congress's imposition of "post-acceptance or 'retroactive' conditions," *see Pennhurst*, 451 U.S. at 25, or burdens "of unspecified proportion and weight, to be revealed only through case-by-case adjudication," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982), significantly intrudes upon State sovereignty. Thus, for legislation enacted pursuant to Congress's spending power, the clear statement rule is not merely a canon of statutory construction or an interpretive aid, but a constitutional requirement.

By reaffirming its decision in *Grimm* and declaring that "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX," the Fourth Circuit muddied the meaning of a statute that had long been clear. *B.P.J.*, 98 F.4th at 563 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)). Any construction of "sex" that extends beyond its plain, biological meaning—as all funding recipients would have understood it—necessarily implies that Congress failed to "speak with a clear voice" when it enacted Title IX. *See Davis*, 526 U.S. at 640 (citation omitted). Yet the Fourth Circuit disregarded both the clear

statement rule and the fact that Title IX was enacted under the Spending Clause. The lower court's flawed interpretation of Title IX not only violates this Court's precedent, but it also threatens to seriously intrude upon West Virginia's sovereign authority to regulate education and protect the public good. *See Bond*, 572 U.S. at 854.

The Act begins from a commonsense premise: "inherent differences between biological males and biological females … are cause for celebration." W. Va. Code § 18-2-2-25d. Recognizing that those differences matter in competitive skill or contact sports, the Act acknowledges that "biological males would displace females to a substantial extent if permitted to compete on teams designated for biological females." *Id.* Consistent with that acknowledgement, the Act prohibits biological males from competing on women's or girls' teams, but it does not prohibit biological females from competing on men's or boys' teams. *Id.* The Act does not exclude either sex from sports altogether, nor does it treat transgender athletes differently from other athletes. *Id.*; *see also B.P.J.*, 98 F.4th at 569 (Agee, J., concurring in part).

Far from conflicting with Title IX, the Act mirrors the statute's core purpose: "promoting equal athletic opportunities for the female sex." W. Va. Code § 18-2-2-25d. West Virginia reasonably determined that allowing biological males to compete in women's sports would diminish those opportunities and, in

many contexts, create serious safety risks for female athletes. *See B.P.J. v. W. Va. State Bd. of Educ.*, 649 F. Supp. 3d 220, 230 (S.D. W. Va. 2023); *B.P.J.*, 98 F.4th at 569 n.3. These concerns are neither speculative nor unique to West Virginia. At least 27 other states have adopted or proposed similar measures mandating that student athletes compete on teams aligned with their biological sex.[3]

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[3] *See* Zoe Christen-Jones, *The Bans on Transgender Athletes – 6 Facts*, CBS News (June 7, 2021), https://www.cbsnews.com/news/transgender-athlete-bans-facts/. West Virginia's concerns are not misguided. Take, for example, the transgender-identifying biological males that won high school girls' state track championships in five states last year. *See* Valerie Richardson, *Girls Left in Dust as Male-Born Transgender Athletes Take State Track Titles in Five States*, Wash. Times (June 16, 2024), https://www.washingtontimes.com/news/2024/jun/16/transgender-athletes-leave-girls-dust-winning-trac/. Or consider the serious injury a female high school field hockey player sustained from a shot by a male player during a game in Massachusetts. *See Massachusetts School Calls for Change After Female Field Hockey Player Hurt by Boy's Shot*, CBS News (Nov. 6, 2023), https://www.cbsnews.com/boston/news/massachusetts-field-hockey-male-female-injury-swampscott-dighton-rehoboth/.

While these are only two examples, in the past five years, there have been numerous instances of biological male athletes displacing female athletes in women's sports. *See e.g.*, Ray Lewis, *Transgender Runner Breaks Two Women's Records for New York College, Sparking Debate*, ABC 3340 News (Jan 30, 2024), https://abc3340.com/news/nation-world/transgender-runner-breaks-two-womens-records-for-new-york-college-sparking-debate-rochester-institute-of-technology-track-and-

The Act is a reasonable exercise of the State's police powers, enacted to protect female athletes in the State's grade schools, secondary schools, and universities. This Court has long recognized that education sits at "the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). If Congress truly intended to displace that core authority and require that women's interscholastic sports teams accommodate biological males, it was obligated to say so clearly and unambiguously. *Dole*, 483 U.S. at 207; *Pennhurst*, 451 U.S. at 17. It did not, and it has not. 20 U.S.C. § 1681(a). Nor may Congress "surpris[e] … States with post-acceptance" conditions by attaching to long-established federal funding streams a novel and unforeseeable redefinition of "sex." *NFIB*, 567 U.S. at 584.

Congress plainly did not extend Title IX's protections to discrimination on the basis of gender identity when it enacted Title IX in 1972, and the

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field-sprint-athlete-sports-ncaa-lgbt; Ryan Gaydos, *Trans Athlete Fires Message Toward Critics After Dominating Girls' 400 for State Title*, Fox News (June 2, 2025), https://www.foxnews.com/sports/trans-athlete-fires-message-toward-critics-after-dominating-girls-400-state-title; Madeline Coggins, *Trans Athlete Sparks Outrage After Toppling Women's Powerlifting World Record: 'Completely Unfair*,' Fox Business (Aug 20, 2023), https://www.foxbusiness.com/politics/trans-athlete-sparks-outrage-toppling-womens-powerlifting-world-record-completely-unfair.

statute offered the States nothing approaching the clear notice required before conditions may be imposed under the Spending Clause. The Fourth Circuit's contrary interpretation disregards the clear statement rule and conflicts with this Court's Spending Clause jurisprudence. It should therefore be rejected.

B. The Clear Statement Rule Serves as a Vital Limitation on Congress's Spending Power

"[T]he Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). It does so by "confer[ring] on Congress not plenary legislative power but only certain enumerated powers," where "all other legislative power is reserved for the States," under the Tenth Amendment. *Murphy v. NCAA*, 584 U.S. 453, 471 (2018). Historically, regulation was "a matter of public congressional enactment" and Congress was "reluctan[t] … to use conditions as a means of national domestic regulation." Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 91 n.* (2021).

As this Court's precedent instructs, however, Congress can incentivize desired behavior short of commanding it by attaching conditions to its grant of federal funds, based on purported state consent. *Cummings*, 596 U.S. at 219; *Dole*, 483 U.S. at 206-07;

Pennhurst, 451 U.S. at 17. In other words, through spending, Congress can regulate indirectly where it could not otherwise regulate directly. *See* Hamburger, *supra*, at 148.

In Federalist 41, James Madison emphasized that the Spending Clause's reference to the "general welfare" was cabined by Congress's specifically enumerated powers and thus was not "a power to legislate in all cases whatsoever." *See* The Federalist No. 41, at 278 (James Madison) (Jacob E. Cooke ed., 1961). Likewise, in Federalist 45, Madison assured that "the States will retain under the proposed Constitution a very extensive portion of active sovereignty," while federal powers would be "few and defined," directed primarily toward external concerns, such as war, peace, diplomacy, foreign commerce, and federal taxation. The Federalist No. 45 (James Madison). James Wilson made a similar point in his State House Speech of 1787, emphasizing that the Constitution's federalist structure ensured that, for state governments, "everything which is not reserved is given." James Wilson, State House Speech, October 6, 1787, in *Pennsylvania and the Federal Constitution 1787-1788* 142, 143 (John Bach McMaster & Frederick D. Stone, eds., 1888). Education appears nowhere among Congress's enumerated powers, so it remains by constitutional design a matter reserved to the States. *Cf.* Neal McCluskey, *Schoolhouse*

Burning: Public Education and the Assault on American Democracy, Cato Journal (2021).[4]

This Court has repeatedly affirmed that the regulation of education is a core police power of the States. As the Court explained, "States traditionally have been accorded the widest latitude in ordering their internal governmental processes, and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476 (1982) (citation omitted); *see also Yoder*, 406 U.S. at 213. Congress itself has recognized the same constitutional boundary. Indeed, in the Department of Education Organization Act, Congress expressly declared that "in our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States." 20 U.S.C. § 3401(4); *see also* 20 U.S.C. § 3403(a)-(b) ("The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local

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[4] https://www.cato.org/cato-journal/fall-2021/schoolhouse-burning-public-education-assault-american-democracy ("[D]ig into the Constitutional convention debates, and they confirm that the Framers overall neither desired nor included a federal role in education.").

school systems and other instrumentalities of the States.").

Simply put, Congress has no power to regulate education directly. Setting aside whether the Constitution actually authorizes Congress to regulate education indirectly through its spending power—a proposition that some scholars[5] have called into question—at a minimum, the Constitution requires some limitations on that power to preserve federalism and the separation of powers. *See* Hamburger, *supra*, at 148 (The "unconstrained reach of federal conditions makes them especially dangerous for federalism.").

If this Court were to accept the Fourth Circuit's interpretation of Title IX, the clear statement rule would effectively lose its force as a structural check on Congress's power to legislate via spending

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[5] Some scholars reject that Congress has any power to spend "for the general Welfare" as a threshold matter. *See* Hamburger, *supra*, at 86 ("Most basically, there is no general spending power."); *see also* Benjamin Ayanian & Ilan Wurman, *The Constitution Provides Answers to Our Federal Debt Problem*, RealClear Pol. (Jan. 24, 2025), https://www.realclearpolitics.com/articles/2025/01/24/the_constitution_provides_answers_to_our_federal_debt_problem_152236.html (recognizing that "the historical evidence … overwhelmingly supports the proposition that this clause was intended only as a grant of the single power to tax for the national purposes specified in the grant, namely, 'to pay the Debts and provide for the common Defence and general Welfare.'").

conditions—particularly where, as here, Congress intrudes on the State's power to regulate public education. The lower court's reading of the statute would preempt the laws of more than 20 States that, like West Virginia, have enacted measures to preserve fair competition and protect the interests of girls and women in interscholastic sports. *See* Christen-Jones, *supra* note.3. Such preemption would upend the contractual understanding on which Title IX funding rests: States can be bound only to conditions of which they had clear notice in advance of when they accepted federal funding. *See NFIB*, 567 U.S. at 578 (recognizing that the danger of Congress acting without accountability is "heightened when [it] acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers."). That result would undermine this Court's clear statement rule precedent while also destabilizing the federal-state balance at the core of our constitutional order.

Congress must not be afforded even more leeway to "compromise the structural framework of dual sovereignty" through its already vast spending power. *Printz v. United States*, 521 U.S. 898, 932 (1997); *see also* Hamburger, *supra*, at 148 (explaining that dangers to federalism posed by Congress's abuse of its spending power hurt not only the States, but "[t]he people of the United States" who enjoy "a constitutional freedom not to be subject to power that violates the Constitution's structures."). This Court

must uphold the constitutional boundaries of state-based consent and reaffirm the clear statement rule as an essential safeguard against federal overreach under the Spending Clause.

C. The Fourth Circuit's Nullification of the Clear Statement Rule Empowers Unaccountable Executive Agencies to Rewrite the Law

The Fourth Circuit's Title IX holding also carries sweeping implications for the executive branch's role in administering spending conditions. By construing Title IX to prohibit gender-identity discrimination when the statute expressly bars only discrimination "on the basis of sex," 20 U.S.C. § 1681(a), the lower court injected ambiguity into the statute where none existed, in violation of the clear statement rule. If Congress were permitted to enact ambiguous Spending Clause legislation (as the Fourth Circuit's reasoning suggests), administrative agencies tasked with enforcement would inevitably seize the opportunity to fill in the gaps with their own policy judgments.

Even if the Constitution does, in fact, grant Congress broad power to impose conditions on spending, it is Congress—and Congress alone—that must clearly specify the terms of those conditions, not administrative agencies. *See Dole*, 483 U.S. at 206; *Pennhurst*, 451 U.S. at 17. If "[t]he requisite clarity … is provided by [Congress]," as was the case in

Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 666 (1985), an agency may issue regulations to administer those terms. Absent such clarity, however, an agency cannot divine Congress's intent, and any regulations would require the agency to substitute its own policy preferences for whatever the Congressional will might be. That dynamic would transform ambiguous statutes into a blank check for agency lawmaking, amounting to an unconstitutional delegation of Article I's Spending Clause power that would arguably even fail the lenient "intelligible principle" test. *See FCC v. Consumers' Rsch*, 606 U.S. ___, 145 S. Ct. 2482, 2497-98 (2025); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001); *Gundy v. United States*, 588 U.S. 128, 167-68 (2019) (Gorsuch, J., dissenting).

"The idea that an agency can cure an unconstitutionally standardless delegation of power" is "internally contradictory." *Am. Trucking Assocs.*, 531 U.S. at 473. That is because "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority." *Id.* (emphasis omitted). The same reasoning applies to ambiguous Spending Clause conditions: any attempt to "cure" such ambiguity through rulemaking would inherently require the agency to invent the missing conditions according to its own policy preferences. But that very choice is itself an unconstitutional exercise of legislative power because it is the agency, rather than

Congress, determining what conditions bind the States. *See* Hamburger, *supra*, at 92 (explaining that the danger of regulatory conditions is that agencies "exercise both executive and legislative power, which the Constitution separates."). And, of course, the Constitution vests the spending power in Congress alone; the Executive Branch has no power of the purse.

The clear statement rule has thus been recognized as a type of "nondelegation canon" because it prevents "administrative agencies from making decisions on their own." Peter J. Smith, Pennhurst*,* Chevron*, and the Spending Power*, 110 Yale L.J. 1187, 1204 (2001) (citing Cass. R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000)). By requiring Congress to speak clearly, the rule ensures that elected legislators, accountable to the people, decide what conditions accompany federal funds. *Id.* at 1203. Conversely, allowing agencies—which are entirely unaccountable to the people—to "impose conditions on the states' receipt of federal funds risks undermining [structural] protections, and creates the potential that agencies will impose conditions that were not within Congress's contemplation." *Id.* Nor is this concern cured by judicial review. Even though this Court has recently reaffirmed that "courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," *Loper Bright/Relentless*, 603 U.S. at 412, that review often comes too late to prevent agencies

from regulating through backdoor, quasi-private arrangements. *See* Hamburger, *supra*, at 91 ("Though regulation was once a matter of public congressional enactment, it nowadays is divested to agency decisions and even private deals.").

The Fourth Circuit's decision and its resulting weakening of the clear statement rule risks further empowering agencies to unilaterally wield spending legislation against States. Recent history underscores the danger. The prior administration's Department of Education sought, and failed, to promulgate a rule that would have redefined "sex" to encompass gender identity. *See Tennessee v. Cardona*, 762 F. Supp. 3d 615, 626 (E.D. Ky. 2025) (vacating final rule because Title IX "does not unambiguously condition the receipt of funds on the prohibition of gender identity discrimination."), *appeal docketed sub nom.*, *Tennessee v. McMahon*, No. 25-5206 (6th Cir. Mar. 12, 2025). Likewise, the prior administration sought to stretch unambiguous statutory language to condition States' Medicaid funding on their covering gender-transition procedures, *see Tennessee v. Becerra*, 739 F. Supp. 3d 467, 480-82 (S.D. Miss. 2024), and to override state laws requiring parental consent for abortions, *see Deanda v. Becerra*, 96 F.4th 750, 762 (5th Cir. 2024)—all solely through agency rulemaking.

The divestiture[6] of regulatory conditions from elected lawmakers to unelected bureaucrats is dangerous not only because it transfers legislative authority from elected representatives to unelected bureaucrats, but also because it obscures regulation from public scrutiny. As Professor Hamburger has explained, "Regulatory conditions take effect only with private consent, and so legislative power is shifted out of Congress not merely to agency decisions, but ultimately to private bargains." Hamburger, *supra*, at 91. While the Constitution authorizes regulation through public Acts of Congress, and the administrative state at least proceeds by publicized rules, when conditions are used to regulate, regulation occurs entirely through private transactions. *See* Mark Seidenfeld, *The Bounds of Congress's Spending Power*, 61 Ariz. L. Rev. 1, 4 (2019) ("[W]hen the government spends to achieve an end it must engage in a voluntary transaction with a willing buyer, just as any private entity would have to do."). "Not merely a matter of constitutional structure—or of congressional power—this divesting and privatization of regulation threatens the freedom of Americans to govern themselves through elective consent." Hamburger, *supra*, at 92. For that reason, limitations on Congress's use of spending conditions must be

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[6] The term "divestiture" is used here because "the Constitution does not generically delegate its powers," but commands "that legislative powers shall be 'vested' in Congress." Hamburger, *supra*, at 90.

vigilantly enforced to ensure that representative self-government is not displaced by agency regulations and the private transactions that flow from them. *Id.*

Recent decisions of this Court underscore that it has never been more vital to maintain and uphold the structural protections of federalism and the separation of powers, which serve as essential checks on the rise of centralized power in the administrative state and as safeguards of liberty. *See Biden v. Nebraska*, 600 U.S. 477, 505 (2023) ("It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."); *SEC v. Jarkesy*, 603 U.S. 109, 128 (2024) (recognizing that combining "the roles of prosecutor, judge, and jury in the hands of the Executive Branch … is the very opposite of the separation of powers that the Constitution demands."); *see also Loper Bright/Relentless*, 603 U.S. at 413 (Thomas, J., concurring) (recognizing that *Chevron* deference violates the Constitution's separation of powers). This Court should not retreat from those principles here, but instead it should apply them with equal force to prevent the Spending Clause from becoming a vehicle for imposing conditions that Congress never enacted and that the States never accepted.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court reverse the Fourth Circuit, reaffirm that, under the Spending Clause, Congress—not courts or agencies—must clearly state the conditions for federal funding, and hold that Title IX does not impose a gender identity mandate on the States.

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Respectfully submitted,

/s/ *Casey Norman*
Casey Norman
Counsel of Record
Andreia Trifoi
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
Phone: (202) 869-5210
Casey.Norman@ncla.legal

Counsel for Amicus Curiae
New Civil Liberties Alliance