No. 23-726

IN THE
Supreme Court of the United States

MIKE MOYLE, SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, *ET AL.*,
Petitioners,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari before Judgment to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of America's Future, Judicial Action Group, U.S. Constitutional Rights Legal Def. Fund, Conservative Legal Def. and Education Fund, and Virginia Delegate Eric Zehr in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Judicial Action Group, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Eric Zehr is a member of the Virginia House of Delegates, representing the 51st District.

STATEMENT OF THE CASE

In 2020, the Idaho legislature passed its "Defense of Life Act" which proscribes abortion except in the cases of rape, incest, or threat to the life of the mother. The law was written to take effect 30 days after the Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), which occurred with this Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), making the law's effective date August 25, 2022.

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

On August 2, 2022, the Justice Department filed suit against the State of Idaho in the U.S. District Court for the District of Idaho, to enjoin the Defense of Life Act on the theory that it violated a July 11, 2022, post-*Dobbs* interpretation which the Secretary of the Department of Health and Human Services ("HHS") has given to the "Emergency Medical Treatment and Active Labor Act of 1986" ("EMTALA"), 42 U.S.C. § 1395dd.[2] That law is commonly referred to by the practice it was enacted to prevent — the Patient Anti-Dumping Act. The district court granted an injunction against the Act on August 24, 2022, the day before the Idaho law was to take effect. *See United States v. Idaho*, 623 F. Supp. 3d 1096 (D. Id. 2022). Reconsideration was denied. *See United States v. Idaho*, 2023 U.S. Dist. LEXIS 79235 (D. Id. 2023).

A panel of the Ninth Circuit granted a stay on September 28, 2023. The United States sought rehearing *en banc*, which was granted on October 10, 2023, vacating the panel's stay and reinstating the district court's injunction. *See United States v. Idaho*, 2023 U.S. App. LEXIS 26827 (9th Cir. 2023). Petitioners requested the full Ninth Circuit to again stay the injunction, which was denied. *See United States v. Idaho*, 2023 U.S. App. LEXIS 30135 (9th Cir. 2023).

Petitioners then sought a stay of the injunction from this Court, which was denied but treated as a

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[2] Complaint, *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Aug. 2, 2022), ECF No. 1 ("Complaint").

petition for writ of certiorari before judgment and granted it on the question of "[w]hether EMTALA preempts state laws that protect human life and prohibit abortions, like Idaho's Defense of Life Act." *See Idaho v. United States*, 2024 U.S. LEXIS 3, 217 L. Ed. 2d 287 (2024).[3]

SUMMARY OF ARGUMENT

This Court's ruling in *Dobbs v. Jackson Women's Health Org,* returned the abortion issue to the states. The challenged Guidance Documents constitute an attempt by the HHS Secretary, under orders from President Biden, to defy and circumvent *Dobbs*, by preempting state restrictions on abortion as to patients presenting in hospital emergency rooms.

Authority for the Guidance Documents promoting abortion cannot be found anywhere in the EMTALA statute. EMTALA makes no mention of abortion, disclaims any intention to regulate the practice of medicine, and states it does not preempt any state law except in the case of a direct conflict not present here. Amendments to EMTALA require the physician and hospitals to treat the "unborn child" as much a patient as the mother. By repeatedly describing an abortion as a mere "stabilizing treatment," it seeks to sanitize the fact that the life of a human being is being ended.

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[3] The Fifth Circuit recently affirmed an injunction entered in the Northern District of Texas against the Guidance Documents barring their application in Texas. *See Texas v. Becerra*, 89 F.4th 529 (5th Cir. 2024).

This Court has explained that "a healthy balance of power between the States and the Federal Government ... reduce[s] the risk of tyranny and abuse from either front...." *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). Americans' most cherished liberties are protected by that "tension between federal and state power." *Id.* at 459. Without any Congressional involvement, the Biden Administration impermissibly seeks to negate state laws by asserting a federal police power that overrides state police powers. This Court should uphold Idaho's right to exercise its police powers for the health, safety, and welfare of its citizens.

ARGUMENT

I. THE HHS SECRETARY HAD NO STATUTORY AUTHORITY TO ISSUE THE HHS GUIDANCE DOCUMENTS.

A. The Guidance Documents.

Just 17 days after this Court's *Dobbs* decision, Secretary of Health and Human Services Xavier Becerra issued a Guidance Letter to American hospitals designed to nullify the effect of any state law regulating abortions for patients presenting at hospital emergency rooms after the *Dobbs* decision.[4]

> In light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health*

[4] Letter from Xavier Becerra to Health Care Providers, Secretary of Health and Human Services (July 11, 2022) (emphasis added).

> *Organization*, I am writing regarding ... enforcement of the Emergency Medical Treatment and Active Labor Act (EMTALA). As frontline health care providers, the federal EMTALA statute protects your clinical judgment and the action that you take to provide stabilizing medical treatment to your pregnant patients,[5] **regardless of the restrictions in the state where you practice**.

Under that directive, any hospital receiving funds from the Centers for Medicare and Medicaid Services ("CMS") must provide abortions as emergency stabilizing care, as provided in a CMS summary published the same day:

> If a physician believes that a **pregnant patient** presenting at an emergency department is experiencing an emergency medical condition ... and that **abortion is the stabilizing treatment necessary** to resolve that condition, the physician must provide that treatment. **When a state law prohibits abortion ... that state law is preempted**.[6]

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[5] Demonstrating their relentless commitment to Newspeak, pregnant women are termed "pregnant patients," presumably to ensure that pregnant men are treated equally.

[6] Centers for Medicare & Medicaid Services, "Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss" (July 11, 2022) (emphasis added). The July 11, 2022 Letter from Secretary Becerra, *supra*, and this CMS publication are collectively referred to as the "Guidance

Determining when "abortion is the stabilizing treatment necessary" will be a source of great uncertainty and confusion, which will lead to arbitrary enforcement.

B. EMTALA Never Required Abortions to Be Performed.

In issuing the Guidance Documents, Secretary Becerra purported to exercise his authority under EMTALA — a federal law enacted in 1986 to address the problem of hospitals "patient dumping" by refusing to provide care to uninsured patients or transferring those patients to other facilities. EMTALA provides that hospitals receiving funds from CMS are required to screen patients, as follows:

> if any individual ... comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for **an appropriate medical screening examination** within the capability of the hospital's emergency department. [42 U.S.C. § 1395dd(a) (emphasis added) (App.1).]

EMTALA also requires stabilizing care:

> [i]f any individual ... comes to a hospital and the hospital determines that the individual

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Documents." App.31, *et seq*.

> has an **emergency medical condition**, the hospital must provide either ... within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required **to stabilize** the medical condition, **or ... for transfer** of the individual to another medical facility.... [42 U.S.C. § 1395dd(b)(1) (emphasis added) (App.2).]

The injunction entered below was utterly unsupported by EMTALA. First, EMTALA contains an express prohibition on interference with the manner in which medical services are provided. *See* 42 U.S.C. § 1395 (App.14). Second, none of the EMTALA statutory provisions mention abortion in any context. Third, EMTALA expressly provides that there would be no preemption except in the case of a "direct conflict[]" which does not exist here. 42 U.S.C. § 1395dd(f) (App.12). *See* Brief for Petitioners ("Pet. Br.") at 20-21.

Nevertheless, the Biden Administration asserts that its Guidance Documents preempting state regulation of abortion are authorized by EMTALA. The penalty for violation of these Guidance Documents is severe, including monetary penalties and even more serious actions **against both hospitals and physicians**.

> If the results of a complaint investigation indicate that a hospital violated one or more of the provisions of EMTALA, a **hospital may be subject to termination of its Medicare**

> **provider agreement** and/or the imposition of **civil monetary penalties**. Civil monetary penalties may also be imposed against **individual physicians** for EMTALA violations. Additionally, physicians may also be subject to **exclusion from the Medicare and State health care programs**.... [Letter from Xavier Becerra (emphasis added).]

Petitioners have demonstrated that there is no "direct conflict" between Idaho's abortion law as amended in 2023 and providing stabilizing care (Pet. Br. 28-35), but the awareness that severe sanctions, could be imposed by a government agency determined to advance "abortion rights," will alter the medical calculus when a pregnant woman presents at an Emergency Room. For example, if a woman is "spotting" and demanding an abortion, would the physicians be obligated to provide it as "stabilizing care" even though there is no active bleeding? If a pregnant woman has taken drugs and says she fears for the health of her unborn child seeking an abortion, would the physician be obligated to perform it? If a woman seeks an abortion, stating that she would harm herself if she is forced to deliver her unborn child, does that require an abortion be provided as "stabilizing care." In these and other circumstances, when do the Guidance Documents require abortions be performed as "stabilizing care"? Will pro-abortion activists come into Emergency Rooms to set up a conflict, much as has been done by homosexual activists demanding a Christian baker provide a cake for their wedding ceremony? When a woman who was refused an abortion in these and many other scenarios files a

complaint with CMS administered by bureaucrats under orders to advance abortion rights, will they assess penalties.

Additionally, under this system, no one speaks for the unborn child. The reality is that a complaint with CMS can only be filed by the mother. Thus, the physician is incentivized to perform a requested abortion as "stabilizing care," and to disregard the interests of the unborn child despite the fact that the child is also a patient of the physician, under the 1989 Amendments to EMTALA, discussed *infra*.

C. The Guidance Documents Undermine the 1989 Amendments to EMTALA.

Congress amended EMTALA in 1989 to extend the protections of that law with respect to an "emergency medical condition" by redefining that term to include "with respect to a pregnant woman, the health of the woman or her **unborn child**." 42 U.S.C. § 1395dd(e)(1)(A)(i) (emphasis added). With this and other EMTALA Amendments, Congress required medical staff to treat an "unborn child" as a patient when making a determination about whether an emergency medical condition exists, and if so, what treatment may be required. The Guidance Documents not only fail to address the 1989 amendments protecting the "unborn child," but they also actually can be seen to encourage hospitals to violate these provisions of EMTALA.

First, the Guidance Documents focus exclusively on duties owed to the "pregnant patient," providing not

even one word about the physician's duties under EMTALA to the "unborn child." Likewise, the more extensive CMS Memorandum of July 11, 2022 which purports to "restate existing guidance ... in light of new state laws prohibiting or restricting access to abortion" contains a passing reference to "unborn child," but only with respect to transferring patients, and nothing on stabilizing care, which is the EMTALA provision with respect to which federal preemption is being claimed.

Second, when the Guidance Documents address stabilizing conditions, they actually instruct physicians to consider only the health of the mother: "**If a physician believes that a pregnant patient** presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and that **abortion** is the stabilizing treatment necessary to resolve that condition, the physician **must** provide that treatment." Pet. Br. App.33 (emphasis added). By its exclusive focus on the "pregnant patient," this instruction implicitly tells the physicians that they are not to consider the interests of the "unborn child," in violation of EMTALA.

Third, the Guidance Documents devalue the "unborn child," whose death is termed a "stabilizing treatment" for the mother. The EMTALA amendment's use of the term "unborn child" demonstrates that Congress viewed the physicians and hospitals as dealing with two human beings — the mother (a/k/a "pregnant patient") and the "unborn child." The latter term is defined in EMTALA as "an individual organism of the species Homo sapiens from

fertilization until live birth." Pet. Br. App.46. Use of cavalier "stabilizing" language might have been necessary for the Guidance Documents to shoehorn a supposed right to abortion into a statutory right of stabilizing care, but it is shocking nonetheless.[7]

Even if EMTALA had never been amended to protect expressly the life of the "unborn child," it would not offer a direct conflict with and justify preemption of Idaho state law. However, the fact that EMTALA provides such protection, and that the Biden Administration Guidance Documents ignore that part of the statute, demonstrates the extent to which the HHS Secretary is willing to go to legitimatize abortion from conception to the moment before birth.

The Guidance Documents cannot be considered to be an effort to give any reasonable meaning to the EMTALA law. Rather, the Biden Administration appears to have cast about to find a vehicle through which it could promote abortion and override state pro-life laws, and landed on EMTALA. Petitioners demonstrate that the HHS Guidance Documents constitute a complete rewriting of EMTALA to include abortion without congressional authorization. There

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[7] By repeatedly describing an abortion as mere "stabilizing treatment," the Guidance Documents seeks to avoid the fact that the life of a human being is being ended. To be sure, as Idaho law provides, there are instances where it is understood that a pregnancy will lead to the death of the "unborn child," such as an ectopic pregnancy, and this inevitable outcome is being controlled and facilitated by the physician to protect the mother. However, the government should still treat the baby with respect, and not just as a destabilizing force to be dispensed with.

is no direct conflict requiring preemption and no basis for finding an application of the Supremacy Clause, particularly since Congress has not imposed this requirement. The Executive Branch cannot give new meaning to this statute to create a right to an abortion, and then claim there is a direct conflict between EMTALA and Idaho law. *See* Pet. Br. at 42-43.[8]

But even more fundamentally, upholding the district court's injunction would both defy this Court's effort to return the issue of abortion regulation to the states (*see* section II, *infra*), as well as sanction the assertion of a federal police power under the guise of a spending condition (*see* section III, *infra*).

II. THE LOWER COURTS' INJUNCTION AGAINST IDAHO LAW UNDERMINES THIS COURT'S DECISION IN *DOBBS*.

A. *Dobbs* Returned the Issue of Abortion to the States.

This Court's decision in *Dobbs v. Jackson Women's Health Org.* was highly controversial, but simple in design: it reversed this Court's nationalization of the abortion issue in *Roe v. Wade*, returning the issue of abortion to the states. While most remember *Dobbs* only for overturning *Roe*'s constitutional "right to an abortion," just as important was its commitment to

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[8] Moreover, the district court's speculation about conflicts between EMTALA and the Idaho law are no longer relevant after Idaho's 2023 Amendments. *See* Pet. Br. at 8-10; App.53.

honor each state's authority to chart its own course addressing that controversial issue.

The *Dobbs* Court recited the nation's long history of state regulation of abortion. It explained that "[f]or the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens." *Dobbs* at 225. "By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow." *Id.* at 241. "This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority — 30 States — still prohibited abortion at all stages except to save the life of the mother."[9] *Id.* at 249. But then, *Roe v. Wade* improperly "imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State." *Id.* at 228.

The authority of a state to regulate abortion is found in the state's police powers to protect the health, safety, and welfare of its citizens. *Dobbs* explained, "[F]or more than a century after 1868 — including 'another half-century' after women gained the constitutional right to vote in 1920 ... it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of

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[9] Idaho's enjoined law is more permissive than these 1973-era statutes.

state regulatory authority." *Id.* at 261. The Court admitted that *Roe* "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." *Id.* at 268-269.

This Court was clear as to its real constitutional mandate: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives" at the state level. *Id.* at 232. Accordingly, this Court announced, "[o]ur decision returns the issue of abortion to those [state] legislative bodies." *Id.* at 289.

B. The Biden Administration Dedicated Itself to Undermine *Dobbs*.

President Biden roundly criticized this Court's decision to return the issue of abortion to the States, expressing anger and defiance. Biden called the Court's decision "the culmination of a deliberate effort over decades to upset the balance of our law" and "an extreme ideology and a tragic error by the Supreme Court."[10] He accused the Court of "jeopardizing the health of millions of women." *Id.* He stated: "it just stuns me," and "[i]t's cruel." *Id.* He accused the Court of "literally taking America back 150 years." *Id.* He asserted that this Court's *Dobbs* majority "shows how extreme it is.... They have made the United States an outlier among developed nations in the world." *Id.*

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[10] The White House, "Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade" (June 24, 2022) (hereinafter "Remarks").

Biden promised to strike back, declaring that "this decision must not be the final word." He threatened: "I will do all in my power to protect a woman's right in states where they will face the consequences of today's decision." *Id.* "My administration will use all of its appropriate lawful powers." *Id.*

To circumvent this Court's decision in *Dobbs*, President Biden stated, "I'm directing the Department of Health and Human Services to take steps to ensure that ... politicians cannot interfere in the decisions that should be made between a woman and her doctor."[11] He followed up his threat with an Executive Order with a directive:

> The President has directed the Secretary of Health and Human Services (HHS) to ... take steps to ensure all patients — including pregnant women and those experiencing pregnancy loss — have access to the full rights and protections for emergency medical care afforded under the law, including by considering updates to current guidance that clarify physician responsibilities and protections under the Emergency Medical Treatment and Labor Act (EMTALA).[12]

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[11] White House, Remarks, *supra*.

[12] The White House, "FACT SHEET: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services" (July 8, 2022). *See* Executive Order No. 14076 (July 8, 2022), App.24-30.

President Biden certainly did not need to twist Secretary Becerra's arm to order hospitals to perform abortions made illegal by State law. As California's attorney general: "Becerra tried to force pro-life pregnancy centers to advertise abortion services and force churches and religious orders to pay for abortions and contraceptives under their health care plans."[13] After the *Dobbs* decision, "President Biden condemned the decision. And today his Health and Human Services secretary vowed to take steps to protect women's reproductive health. He called last week's ruling, quote, 'despicable.'"[14] More recently, Secretary Becerra responded to other pro-life rulings by promising: "'Everything is on the table. The president said that way back when the Dobbs decision came out. Every option is on the table....'"[15]

The *Dobbs* Court recognized that abortion was not a matter for the federal government, but rather a matter for state legislatures as the: "weighing of the relative importance of the fetus and mother represent[s] a departure from the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Id.* at 289 (internal quotations

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[13] L. Rose, "Biden's Radical Shift on Abortion is Out of Step with Most Americans," *Newsweek* (Feb. 8, 2021).

[14] J. Summers, M. Lim, & K. Fox, "HHS Secretary Becerra on federal abortion rights," *NPR* (June 28, 2022) (video).

[15] J. Wright, "HHS secretary says 'everything is on the table' in response to medication abortion ruling," *CNN Politics* (Apr. 9, 2023).

omitted). The Biden Administration view is quite different — it has boldly announced its commitment to the undermining of the *Dobbs* decision. The Biden Administration does not trust the States and the People to decide whether and how abortion should be regulated. It has only one objective — unlimited abortion on demand up to the moment of birth in every state.

Neither the district court nor the Ninth Circuit have done their job to respect and follow this Court's decision in *Dobbs*. In sanctioning the Executive Branch usurpation of state legislative power, these courts have acted in defiance of this Court's ruling. Until recently, such defiance has been rare, but when engaged in by the lower federal courts, it has drawn swift correction from this Court. In *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (*per curiam*), this Court rebuked the circuit court, saying: "the Court of Appeals could be viewed as having ignored … the hierarchy of the federal court system.... [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[16] This case again requires this Court to prevent anarchy from spreading by reasserting the basic hierarchal nature of our judicial system. In *Dobbs*, this Court modeled respect for the constitutional limitations on its own

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[16] *See also Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983) ("[T]he Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.").

power as part of the national government. This Court should require the Biden Administration to afford the Constitution the same respect.

III. THE GUIDANCE DOCUMENTS CONSTITUTE AN UNCONSTITUTIONAL EXERCISE OF A FEDERAL POLICE POWER.

A. Idaho Correctly Views the Guidance Documents as a Usurpation of the State Police Power.

The problem presented by the Guidance Documents is more fundamental than the case of an executive department simply exceeding such authority it was granted by Congress on a federal matter. It is a deliberate intrusion into the powers of the state. As Petitioners argue, "[t]his is no ordinary case of statutory misconstruction. The Government's wayward reading of EMTALA is an intolerable federal power grab." Pet. Br. at 19. It is at bottom an attempt by the Biden HHS to assume federal police powers which the Tenth Amendment reserves to the States. As Petitioners also point out:

> Allowing the United States to treat EMTALA's duty of stabilizing treatment as a blank page to fill with the Executive Branch's preferred medical policy would empower the government to impose federal mandates compelling hospitals to provide any sort of medical procedures.... Such an approach would displace Congress's role as the Nation's

> lawmaker and the States' historic police power to regulate medical care. [Pet. App. at 26.]

B. The Founders Intended Dual Sovereignties to Preserve Liberty.

This Court has repeatedly explained the reason for the Founders' division of governmental power between the federal and state sovereigns: "Perhaps the principal benefit of the federalist system is a check on abuses of government power.... [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front...." *Gregory* at 458-459.

From the founding days until the mid-20th century, police powers were understood to be the domain of the States. In 1824, this Court recognized that the powers reserved to States included:

> [an] immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, **health laws of every description**, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass. [*Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (emphasis added).]

Later, this Court unequivocally explained that police powers are vested in the States:

> The authority of the State [which] is commonly called the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description…." [*Jacobson v. Mass.*, 197 U.S. 11, 24-25 (1905).]

In modern times, this Court has again reiterated that "[t]he Constitution ... withhold[s] from Congress a plenary police power." *United States v. Lopez*, 514 U.S. 549, 566 (1995). Accordingly, this Court has declined to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. "To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated ... and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-568. Indeed, as Justice Thomas noted in his concurrence, "[t]he Federal Government has nothing approaching a police power." *Id.* at 584-585 (Thomas, J., concurring).

Clearly, the Biden Administration rejects this Court's return of abortion law to the States. Just as clearly, the Administration violently disagrees with the choice made by the people of Idaho through their

state legislature. In asserting that HHS' Guidance Documents can preempt state policy powers, it makes a mockery of this basic constitutional balance of powers. It is an action utterly without constitutional authority. Whether HHS' position on abortion or Idaho's position is a better public policy position is immaterial. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, A Friend of the Constitution No. V, *Alexandria Gazette*, July 5, 1819, in John Marshall's Defense of *McCulloch v. Maryland* at 190-191 (G. Gunther ed. 1969).

C. The Spending Power.

To be sure, Congress has the right, under the Constitution's spending power, to influence state policy with financial incentives. *See S.D. v. Dole*, 483 U.S. 203 (1987). Where Congress offers "relatively mild encouragement to the States" through the inducement of federal funds, this Court has found no constitutional infirmity. *Id.* at 211. But "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* As this Court has expressly held in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), where Congress threatened to make all Medicaid funding conditioned on adherence to a specific requirement, it was "much more than 'relatively mild encouragement' — it is a gun to the head." *Id.* at 581. Petitioners' brief explains in detail the severity of the threat which HHS levels at the State:

> [U]nless Idaho hospitals perform abortions when HHS says so ... a hospital risks "termination of its Medicare provider agreement...." Between 2018 and 2020, Idaho hospitals received $74 million for emergency departments and $3.4 billion in overall Medicare funding.... Terminating Medicare funding and excluding hospitals from Medicare would create a financial and public-health crisis in Idaho, and Idaho would be left holding the bag. [Pet. Br. at 52.]

By any standard, the HHS demand backed up by this sanction presents Idaho with an impermissible "gun to the head." It essentially threatens a death sentence to the Medicare program in Idaho unless the State capitulates and subjects its State law to the illicit "police power," not even of Congress, but of a naked HHS edict.

The Biden Administration's Guidance Documents are not just a misuse of EMTALA, but they are also an attempt to transfer the historic police powers of the states to a member of the President's Cabinet. It usurps the role of Idaho legislature of its authority to exercise its police powers in line with the will of its voters.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be reversed.

Respectfully submitted,

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