No. 24-60035

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

M.K., A MINOR BY AND THROUGH HIS FATHER AND NEXT FRIEND, GREG KOEPP,
Plaintiff-Appellant
v.
PEARL RIVER COUNTY SCHOOL DISTRICT; P.B., A MINOR BY AND THROUGH HIS PARENTS; P.A., A MINOR BY AND THROUGH HIS PARENTS; I.L., A MINOR BY AND THROUGH HIS PARENTS; L.M., A MINOR BY AND THROUGH HIS PARENTS; W.L., A MINOR BY AND THROUGH HIS PARENTS; ALAN LUMPKIN, INDIVIDUALLY AND AS SUPERINTENDENT; CHRIS PENTON, INDIVIDUALLY AND AS EMPLOYEE; AUSTIN ALEXANDER, INDIVIDUALLY AND AS EMPLOYEE; STEPHANIE MORRIS, INDIVIDUALLY AND AS EMPLOYEE; TRACEY CRENSHAW, INDIVIDUALLY AND AS EMPLOYEE; BLAKE RUTHERFORD, INDIVIDUALLY AND AS EMPLOYEE; JOHN DOES 1-10,
Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Mississippi
No. 1:22-cv-00025-HSO-BWR

BRIEF OF THE STATES OF MISSISSIPPI, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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INTRODUCTION, INTEREST OF AMICI CURIAE, AND SUMMARY OF ARGUMENT

This case presents the question whether Title IX, in prohibiting discrimination "on the basis of sex," means what it says and what everyone understood it to mean when it became law over 50 years ago: no discriminating on the basis of biological sex. The answer is yes. But in recent years, some—including plaintiff and the United States here—have pressed a different view: that Title IX extends beyond biological sex, to sexual orientation and gender identity. This Court should reject that view and uphold the Title IX that Congress passed, that the President signed, and that has powered incredible progress in our country—to the benefit of us all, but particularly to the benefit of women and girls.

Title IX generally provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The law embodies years of effort to address "widespread and pervasive ... discriminatory practices against women" "in education." A Matter of Simple Justice, The Report of the President's Task Force on Women's Rights and Responsibilities iii, 6 (Apr. 1970). Title IX's nondiscrimination mandate applies to a wide range of educational programs that receive federal funds and (through the Affordable Care Act) to hospitals, clinics, doctors, and state-sponsored health programs

that receive federal funds. 20 U.S.C. § 1687; 42 U.S.C. § 18116(a). Title IX thus accounts for billions of dollars in funding to States and others.

Consistent with its text and its well-known aims, the universal view of Title IX—when it was enacted and for decades after that—was that it prohibits discrimination on the basis of *biological sex*: discrimination on the basis of the immutable characteristic of being male or female. Title IX aimed to provide "solid legal protection from the persistent, pernicious discrimination" that was "perpetuat[ing] second-class citizenship for American women." 118 Cong. Rec. 5730, 5804 (1972). It has performed as promised. Before it was enacted, women received 43% of bachelor's degrees, 39% of master's degrees, and 10% of doctorates, and relatively few women and girls participated in school sports. By 2022, women received 59% of bachelor's degrees, 63% of master's degrees, and 57% of doctorates; more than 3.4 million girls were playing high-school sports; and nearly 44% of college athletes were women.

As Title IX was about to celebrate its 50th year, however, some sought to undo the original meaning that propelled the statute's success. In one of his first official acts, President Biden declared that "laws that prohibit sex discrimination"—including Title IX—also "prohibit discrimination on the basis of gender identity or sexual orientation." Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021). The claimed justification for this view was the

Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that an employer who fires an employee merely for being gay or transgender violates Title VII of the Civil Rights Act—a different federal law that prohibits discrimination in employment "because of ... sex." 42 U.S.C. § 2000e-2(a)(1). Since that announcement, the Administration has fought against the original meaning and settled understanding of Title IX. It continues that fight here, arguing that Title IX extends to "discrimination on the basis of gender identity and sexual orientation." U.S. Br. 2. While this case involves only a claim of sexual-orientation discrimination, the Administration's brief makes clear the broad implications of extending Title IX beyond its terms.

This Court should reject the Administration's view and instead hold that Title IX prohibits only discrimination on the basis of biological sex. Title IX's text, structure, and manifest aims compel that result. The amici curiae here—the States of Mississippi, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia—submit this brief to emphasize two more reasons, of special concern to the States, why this Court should honor Title IX's text and well-known aims.*

* The States may file this brief without the parties' consent or leave of the Court. Fed. R. App. P. 29(a)(2).

First, bedrock constitutional limitations powerfully reinforce the view that Title IX prohibits only discrimination on the basis of biological sex. To start, Title IX nowhere gives clear notice that it extends to sexual-orientation or gender-identity discrimination—which means that it does not extend to those matters. Title IX exercises Congress's spending power, that power requires Congress to make clear to States what it is doing, and Congress in 1972 certainly did not make clear that a law widely understood to address discrimination against women and girls addressed discrimination based on sexual orientation and gender identity. Next, nothing in Title IX shows a congressional intention to grant federal agencies—which play a vital role in enforcing Title IX—the power the Administration claims here: to make national policy on sexual orientation and gender identity. That means that Title IX grants no such power. Last, Title IX nowhere shows that Congress decided to effectuate an extraordinary shift in the federal-state balance of power over education policy and school discipline. Whatever incursion on state and local authority Congress envisioned for addressing discrimination based on biological sex, nothing suggests that it considered—let alone embraced—the broad federal takeover of education policy that would result if Title IX applied to sexual orientation and gender identity.

Second, extending Title IX beyond biological sex would have profound, unjustifiable negative ramifications. It would damage privacy and dignity on a wide scale by prohibiting (or drastically limiting)

traditional sex-separate facilities like bathrooms, locker rooms, and hospital rooms. It would largely destroy women's and girls' opportunities in school athletics by making it difficult if not impossible to account for basic differences between the sexes. And it would upend the practice of medicine by dictating that medical decisions disregard medical reality and instead embrace novel social policy. The Administration has pressed for all of these results—in litigation and rulemaking—based on the same arguments it makes here.

Although this case carries significant consequences nationwide, it also carries significant consequences locally. This case arises from claims of bullying and harassment among children in middle school. "No one questions that a student suffers" when he or she is bullied or harassed, which is an "all too common aspect of the educational experience." *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998). But solutions to that problem should—and do—come from local officials with the knowledge, experience, and commitment to address it in a way that is best for all involved. Beyond prohibiting bullying and harassment, many amici require localities to adopt policies and take action to address any bullying and harassment. *E.g.*, Miss. Code Ann. § 37-11-69; Tenn. Code Ann. § 49-6-4503. Solutions will not come from agency officials in Washington who see a local claim of bullying as an opportunity to advance a political agenda.

This Court should enforce the Constitution's limits and ward off damaging consequences by affirming the decision below.

ARGUMENT

I. Background Principles Show That, In Barring Discrimination "On The Basis Of Sex," Title IX Prohibits Only Discrimination Based On Biological Sex.

The district court held that, in prohibiting discrimination "on the basis of sex," Title IX prohibits discrimination based on biological sex—not discrimination based on other grounds. The district court was right.

Start with statutory text. Title IX generally prohibits "discrimination under any education program or activity receiving Federal financial assistance" "on the basis of sex." 20 U.S.C. § 1681(a). That text prohibits—and prohibits only—discrimination based on *biological sex*. When Title IX was enacted in 1972, *sex* meant "[t]he condition or character of being male or female." The American Heritage Dictionary of the English Language 1187 (1969). *Sex* was then, and remains now, a binary concept. Webster's Third New International Dictionary 2081 (1966) (defining *sex* as "one of the two divisions of organic esp. human beings respectively designated male or female"). And *sex* was then and remains today a matter of objective biology. "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). *Sex* did not then—and does not now—embrace sexual orientation or gender identity.

The statute's structure reinforces this understanding of Title IX's nondiscrimination provision. Title IX consistently embraces the traditional, binary definition of *sex* as male or female. It permits "separate living facilities for the different sexes." 20 U.S.C. § 1686. It exempts certain schools that in 1972 were in "the process of changing from ... admit[ting] only students of *one sex* to ... admit[ting] students of *both sexes*." *Id.* § 1681(a)(2) (emphases added); *cf. id.* § 1681(a)(5). And it permits "father-son or mother-daughter activities" that are offered "for students of *one sex*" as long as they also are offered "for students of the *other sex*." *Id.* § 1681(a)(8) (emphases added). If "sex" in Title IX "were ambiguous enough to include" other concepts—like "gender identity"—then these "various carveouts" would be "meaningless." *Adams v. School Board of St. Johns County*, 57 F.4th 791, 813 (11th Cir. 2022) (en banc).

Title IX's manifest and well-known aims confirm that it bars only discrimination based on biological sex. The statute "was enacted in response to evidence of pervasive discrimination against women" in "educational opportunities." *McCormick ex rel. McCormick v. School District of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004). Congress passed the law after "extensive hearings" documenting the second-class treatment of women and girls on school campuses. *Cohen v. Brown University*, 101 F.3d 155, 165 (1st Cir. 1996); *see Cannon v. University of Chicago*, 441 U.S. 677, 696 n.16 (1979) ("The genesis of Title IX" was a "set of [congressional] hearings on 'Discrimination Against Women.'"). In

those hearings, Title IX's sponsor explained that "one of the great failings of the American educational system" was "the continuation of corrosive and unjustified discrimination against women" in "all facets of education." 118 Cong. Rec. 5730, 5803 (1972) (Statement of Senator Bayh). Title IX was to be the "antidote" to that discrimination: "a strong and comprehensive measure ... to provide women with solid legal protection from ... persistent, pernicious discrimination" in schools. *Id.* at 5803, 5804. It sought to "provide for the women of America" "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance." *Id.* at 5808. There is no evidence that in passing Title IX Congress sought to address sexual orientation or gender identity.

Title IX's text, structure, and manifest aims are grounds enough to hold that the statute prohibits only discrimination on the basis of biological sex. But there is more. Governing background principles powerfully reinforce this straightforward understanding of Title IX. These principles keep the national government within constitutional bounds, preserve state power, and safeguard individual liberty.

First, Title IX nowhere gives clear notice that it extends to sexual orientation or gender identity—which, given the limits on Congress's power, means that Title IX does not apply to those matters.

Title IX exercises Congress's power under the Constitution's Spending Clause. Under that Clause, Congress may "pay the Debts and

provide for the ... general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Using that power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). But a spending-power law functions "much in the nature of a contract" and "operates based on consent: in return for federal funds, the recipients agree to comply with federally imposed conditions." *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568, 1570 (2022) (cleaned up). So "the legitimacy of Congress' power to enact Spending Clause legislation rests ... on whether the recipient voluntarily and knowingly accepts the terms of that contract." *Id.* at 1570 (cleaned up). A spending-power law thus must "furnish[ ] clear notice" of what it requires. *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006). After all, recipients "cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." *Ibid.* (internal quotation marks omitted). So "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). This clear-statement rule is especially important because Congress may use its spending power to "condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take" using its direct legislative authority (under, for example, the Commerce Clause). *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686 (1999). The spending power

thus poses significant federalism concerns, especially when "traditional state power" is at stake. *Kentucky v. Yellen*, 54 F.4th 325, 354 (6th Cir. 2022). Given these principles, this clear-statement rule "is a binding constitutional command" for spending-power laws, not just a "rule[ ] of statutory construction." *Texas v. Yellen*, 105 F.4th 755, 770, 771 (5th Cir. 2024).

Title IX does not remotely provide "clear notice" (*Arlington Central*, 548 U.S. at 296) that it extends to sexual-orientation or gender-identity discrimination. As explained, the statute's text, structure, and aims show that it bars discrimination on the basis of biological sex. *Supra* pp. 6-8. That view prevailed—unbroken—for decades. Nearly 30 years after Title IX's enactment, the Department of Education declared: "Title IX does not prohibit discrimination on the basis of sexual orientation." U.S. Dep't of Education, Title IX, Revised Sexual Harassment Guidance 3 (Jan. 2001). Just a few years ago, the Department reaffirmed that "Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity." Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637, 32637 (June 22, 2021) (noting Department's view under prior Administration). "It can't be that sexual orientation and gender identity have always been protected" under Title IX, "given the clear evidence of prior contrary agency positions."

Tennessee v. Dep't of Education, 104 F.4th 577, 600, 612 (6th Cir. 2024). Rather, the view that Title IX covers "sexual orientation and gender identity discrimination" is "new" and would "substantially change[ ] the experience" of regulated parties. *Id.* at 600, 613. Recipients of Title IX funds thus did not "voluntarily and knowingly accept[ ]" (*Cummings*, 142 S. Ct. at 1570) that Title IX extends to sexual orientation or gender identity. *See Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998) (declining to extend Title IX liability "[u]ntil Congress speaks directly on the subject"); *NFIB v. Sebelius*, 567 U.S. 519, 584 (2012) ("Congress' power to legislate under the spending power is broad," but "it does not include surprising participating States with post-acceptance ... conditions.").

The absence of any contrary evidence is striking. Plaintiff and the United States point to nothing to suggest that anyone in 1972 or long thereafter would have understood a prohibition on sex discrimination to include sexual-orientation or gender-identity discrimination. They cite no contemporaneous dictionary or other source saying that *sex* embraces those concepts. *Cf. Adams*, 57 F.4th at 812 ("Reputable dictionary definitions of 'sex' from the time of Title IX's enactment show that ... 'sex' ... meant biological sex."). They identify nothing in Title IX's implementing regulations applying the statute as they suggest. *Cf. Jackson v. Birmingham Board of Education*, 544 U.S. 167, 183 (2005) (recipients on notice of liability for discriminatory retaliation where,

among other things, Title IX's regulations "clearly prohibit[ed] retaliation and have been on the books for nearly 30 years"). They identify no legislative history supporting their view, despite the "extensive hearings" (*Cohen*, 101 F.3d at 165) documenting Congress's aims. *Cf. Pennhurst*, 451 U.S. at 18 (pointing to lack of "legislative history ... suggest[ing] that Congress intended" States to incur certain liability). And they cite no caselaw from the time of the statute's enactment (or for decades after that) applying any similar theory of sex discrimination that may have put funding recipients on notice of possible liability. *Cf.* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47829 (Aug. 4. 2022) (proposed rule) (current Administration recognizing that "extend[ing]" Title IX's "prohibition on sex discrimination ... to gender identity discrimination" "reflect[s] recent developments in sex discrimination law") (capitalization omitted).

This absence of evidence is particularly stark in the United States' brief. The scope-of-Title-IX issue here may be the current Administration's most important legal-policy priority. Yet despite pressing its view on that issue in many cases and major rulemakings over a course of years, the best contemporaneous evidence the United States has come up with to support its view is—*nothing*.

No State or other funding recipient would have been "[ ]able to ascertain" that accepting Title IX funds subjected them to potential

liability for sexual-orientation or gender-identity discrimination. *Arlington Central*, 548 U.S. at 296. So Title IX imposes no such liability.

Second, nothing in Title IX shows a congressional intention to give federal agencies—which play a vital role in enforcing Title IX—the politically significant power the Administration claims here: to make sweeping national policy on sexual orientation and gender identity.

When Congress wants to "authoriz[e] an agency to exercise powers" on matters of "vast" "economic and political significance," it must "speak clearly." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). When it does not do so, "important subjects" remain "entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Courts cannot rely on "ambigu[ous] or doubtful expression[s]" of Congress's intent to "resolve important policy questions." *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring). This "background interpretive principle"—"rooted in the Constitution's separation of powers"—has at least as much force as the contract-law analogy that applies to spending-power laws. *Cummings*, 142 S. Ct. at 1576 (Kavanaugh, J., concurring). And the principle has particular force on important matters involving "earnest and profound debate." *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006). Otherwise, unelected bureaucrats—rather than elected representatives—would regularly decide major issues.

Extending Title IX beyond biological sex would hand to federal agencies—and strip from the people—power over significant questions on sexual orientation and gender identity. It would empower the Department of Education and Department of Health and Human Services to require schools and hospitals to force boys and girls to share bathrooms, locker rooms, and other intimate spaces with those of the opposite sex. It would allow Washington-based functionaries to end the longstanding practice—necessary for equal opportunity, competitive integrity, and physical safety—of separating school athletics based on sex. And it would allow agency officials with no medical training to dictate to medical doctors when and how they can rely on sex-based distinctions when caring for patients. Not one of those prospects is speculation. The Administration is pressing all those positions in rulemakings right now, based on the view of Title IX that it advocates here. *See infra* Part II.

But Title IX does not empower any federal agency to make the ultimate decisions for the Nation on these "political[ly] significan[t]" matters. *Alabama Ass'n*, 141 S. Ct. at 2489. There is no evidence that Congress even considered whether to give agencies power over issues of sexual orientation or gender identity in this context, let alone that it made the momentous decision to address those controversial matters as it addressed a widely shared aim to "protect[ ] ... women" from discrimination. 118 Cong. Rec. 5730, 5804 (1972); *see West Virginia v.*

EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring) ("an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem" may be "a warning sign that it is acting without clear congressional authority"). Yet adopting the Administration's position would require concluding that Congress considered and embraced all of the breathtaking consequences laid out above—when it passed a statute that simply prohibited discrimination "on the basis of sex." It defies belief that Congress would set national policy on such fraught issues—or delegate that authority to federal agencies—"in so cryptic a fashion." *West Virginia*, 142 S. Ct. at 2608 (majority opinion). So courts must conclude that Congress did no such thing.

Third, Title IX nowhere shows that Congress decided to effectuate an extraordinary shift in the federal-state balance of power over education policy and school discipline. Whatever incursion on state and local authority Congress envisioned for discrimination based on biological sex, nothing suggests that Congress considered—let alone embraced—the broad federal takeover of education policy that would result if Title IX applied to sexual orientation and gender identity.

The Constitution embraces a system of "dual sovereignty," in which "States possess sovereignty concurrent with that of the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *see* U.S. Const. amend. X. This division of authority "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v.*

United States, 505 U.S. 144, 181 (1992). By leaving power with the States, the Constitution makes those who most affect everyday life accountable to the people as a distant national government can never be. *See Gregory*, 501 U.S. at 458. Under this federal structure, States exercise primary "control" over education, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29, 49 (1973), and "primar[y]" authority over their citizens' health and safety, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). If Congress wants "to alter" this "balance," it must "make its intention to do so" "unmistakably clear." *Gregory*, 501 U.S. at 460. This "plain statement rule" (*id.* at 461) guards against "intru[sions]" into the "domain of state law." *Alabama Ass'n*, 141 S. Ct. at 2489. And it "assures that [Congress] has in fact faced, and intended to bring into issue, the critical matters involved" when legislating in ways that affect core state power. *Gregory*, 501 U.S. at 461.

Title IX does not reflect Congress's clear intent to effectuate the broad takeover of education policy and school discipline that would result if Title IX applied to sexual orientation and gender identity. Title IX shows Congress's aim to address "unjustified discrimination against women" and provide "an equal chance" to women and girls to succeed in education. 118 Cong. Rec. at 5303, 5808. And it does so while preserving "state and local" "control" over "education" generally. *Tennessee v. Dep't of Education*, 104 F.4th 577, 593 (6th Cir. 2024); *see Milliken v. Bradley*,

418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *Rodriguez*, 411 U.S. at 29 ("education is perhaps the most important function of state and local governments"). That control extends to student "discipline"—a function traditionally entrusted to state and local authorities. *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976), *aff'd,* 430 U.S. 651 (1977). Expanding Title IX to reach sexual-orientation and gender-identity discrimination would impose federal control over school policy. Yet nothing in Title IX's text, context, or history suggests that Congress "in fact faced" or "intended to bring into issue" (*Gregory*, 501 U.S. at 461) the intrusion on state authority that the Administration's view entails. So courts must conclude that Title IX does no such thing.

Plaintiff and the United States rely on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), for their contrary view of Title IX. Pl. Br. 21-27; U.S. Br. 8-16. But the background principles discussed above reinforce the error in relying on *Bostock* to extend Title IX beyond discrimination based on biological sex.

First, the statute in *Bostock*—Title VII—is not subject to the clear-notice rule that governs Title IX. Title IX is "an exercise of" Congress's "Spending Clause power," but Title VII is not. *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir. July 17, 2024). The "contractual framework" for spending-power legislation "distinguishes Title IX from Title VII": unlike Title IX, Title VII "is framed in terms not

of a condition but of an outright prohibition" of discrimination. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286 (1998). And "Title IX's contractual nature has implications" for the statute's "construction." *Id.* at 287.

Second, although federal agencies play a vital role in enforcing both Title VII and Title IX, only Title VII could be said to give agencies a clear mandate to reach beyond discrimination based on biological sex. Title VII puts all sex-based employment actions off limits. By prohibiting discrimination "because of ... sex," 42 U.S.C. § 2000e-2(a)(1), it declares that sex is "not relevant to the selection, evaluation, or compensation of employees," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion). *Bostock* thus explained that an employer violates Title VII by "intentionally fir[ing]" an employee "based *in part* on sex"—even when "other factors besides ... sex contributed to the decision." 140 S. Ct. at 1741. That is because "discriminat[ing] against [an] employee[ ] for being homosexual or transgender" requires an employer to consider the employee's biological sex, which Title VII puts off limits. *Id.* at 1743. An agency can thus deploy Title VII to reach sexual-orientation and gender-identity discrimination in some cases. But the same is not true for Title IX. It does not put sex-based distinctions off limits. To the contrary, it recognizes that sex *is* sometimes relevant to providing equal educational opportunities. Title IX thus *allows* and at times *requires* recognizing and acting on inherent differences between the sexes. *See*

Adams v. School Board of St. Johns County, 57 F.4th 791, 811 (11th Cir. 2022) (en banc) ("Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes."). That nuanced approach distinguishes Title IX from Title VII. Agencies enforcing Title IX must ensure that schools combat discrimination based on sex. But they cannot go far beyond that by prohibiting any and all differential treatment that might involve sex.

Last, Title IX applies in a context—education—with a "deeply rooted" "tradition" of state and local "control." *Milliken*, 418 U.S. at 741. And Title IX nowhere reflects Congress's intention to shift the federal-state balance of power over education policy and school discipline beyond what was needed to stop discrimination against women and girls in education. Relying on Title VII precedents to effect a broad federal takeover of education is especially problematic because the statutes "serve different goals" and apply in vastly different contexts. *Tennessee v. Cardona*, 2024 WL 3453880, at *3 ("we have been skeptical of attempts to export Title VII's expansive meaning of sex discrimination to other settings"). "[S]chools are unlike the adult workplace" and "children may regularly interact in a manner that would be unacceptable among adults." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). State and local officials—who have the on-the-ground experience and knowledge—thus retain their authority unless Congress expresses clearly its desire "to effect a radical shift of authority from the States to

the Federal Government." *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006). Title IX expresses no such desire.

II. Extending Title IX Beyond Biological Sex Would Have Profound Negative Ramifications.

The legal reasons for enforcing Title IX's plain text are powerfully reinforced by the practical ramifications of not doing so. The United States' own actions over the past few years show how damaging it would be to hold that Title IX extends beyond biological sex.

First, extending Title IX beyond discrimination based on biological sex would gravely undermine the privacy that is critical in the intimate spaces that are ubiquitous in everyday life—restrooms, locker rooms, dorm rooms, and more.

Nearly everyone appreciates that privacy is critical to personal dignity and wellbeing. As Justice Ginsburg put it 50 years ago: "Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." Ruth Bader Ginsburg, The Fear of the Equal Rights Amendment, Wash. Post (Apr. 7, 1975). Title IX embraces that commonsense understanding—that "differential treatment by sex" may be necessary to "preserve[ ]" "personal privacy." 118 Cong. Rec. at 5807. The statute and longstanding regulations thus permit "separate living facilities for the different sexes" (20 U.S.C. § 1686) and "separate toilet, locker room, and shower facilities on the basis of sex" (34 C.F.R. § 106.33). These

provisions reflect that the ability to "shield[ ] one's bod[y] from the opposite sex" in intimate settings is essential to human dignity and "has been widely recognized throughout American history and jurisprudence." *Adams*, 57 F.4th at 805.

Yet in pressing the position it presses here—that Title IX extends beyond biological sex—the Administration has taken the view that Title IX dramatically restricts (and may prohibit) separating facilities based on biological sex. In a sweeping rule that reimagines Title IX itself, the Administration has taken the view that "students experience sex-based harm that violates Title IX" if they cannot access "sex-separate facilities ... consistent with their gender identity." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33818 (Apr. 29, 2024). That view would "require schools to subordinate the fears, concerns, and privacy interests of biological women to the desires of transgender biological men to shower, dress, and share restroom facilities with their female peers." *Kansas v. U.S. Dep't of Education*, No. 24-4041-JWB, 2024 WL 3273285, at *11 (D. Kan. July 2, 2024). The Administration has acted similarly in a rule purporting to implement Section 1557 of the Affordable Care Act, which incorporates Title IX's nondiscrimination prohibition in federally funded healthcare programs. 42 U.S.C. § 18116(a). In that rule the Administration claims that nonbinary and transgender persons must be given access to "intimate space[s]" (like shared hospital rooms)

"consistent with their gender identity." Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522, 37593 (May 6, 2024); *see Texas v. Becerra*, No. 6:24-CV-211-JDK, 2024 WL 3297147, at *3 (E.D. Tex. July 3, 2024) (Administration's position means that "provider[s] must allow biological males who 'identify' as female into female-exclusive facilities, including shared hospital rooms").

The Administration's position here thus threatens to do away with sex-separate facilities—despite Title IX's explicit authorization of sex-separate spaces to protect privacy. *See* 20 U.S.C. § 1686. Beyond harming personal dignity, the Administration's view would require schools, hospitals, and other facilities to spend "millions of dollars" to redesign intimate spaces to protect privacy while complying with this reimagining of Title IX. *Louisiana v. U.S. Dep't of Education*, No. 3:24-CV-00563, 2024 WL 2978786, at *13 (W.D. La. June 13, 2024); *see* 89 Fed. Reg. at 33820 (Administration's acknowledgment that "provid[ing] gender-neutral or single-occupancy facilities" to maintain "privacy" likely has "significant cost implications"). Enforcement of the Administration's Title IX and Section 1557 rules has been enjoined. *E.g.*, *Tennessee v. Becerra*, No. 1:24CV161-LG-BWR, 2024 WL 3283887, at *14 (S.D. Miss. July 3, 2024) (Section 1557); *Louisiana*, 2024 WL 2978786, at *21 (Title IX). Yet the Administration continues—in cases like this one—to press a view of Title IX that would achieve the same result that those rulemakings seek.

Second, discarding the settled understanding of Title IX would largely destroy women's and girls' opportunities in school athletics.

Title IX's most visible impact has perhaps been the progress it has ushered in for women's and girls' sports. This success owes to Title IX's recognition that, due to "inherent differences" and "physiological advantages" between males and females, *Adams*, 57 F.4th at 819 (Lagoa, J., concurring), structuring sports based on biological sex is essential for equal opportunity, competitive integrity, and physical safety. *E.g.*, Bernice Resnick Sandler, Title IX: How We Got It and What a Difference It Made, 55 Clev. St. L. Rev. 473, 482 (2007) ("some sex segregation is necessary" for athletics because otherwise "few women would have access to sports"); Doriane Coleman, Martina Navratilova, & Sanya Richards-Ross, Pass the Equality Act, But Don't Abandon Title IX, Wash. Post (Apr. 29, 2019), bit.ly/3L3CT4c (having separate teams for males and females "is the only way to achieve equality for girls and women").

Title IX's longstanding athletics regulation—which took effect with Congress's approval—thus provides that schools may operate "separate teams for members of each sex" in "contact sport[s]" and sports "based upon competitive skill." 34 C.F.R. § 106.41(b). This has led to incredible successes. When Title IX was enacted, about 294,000 girls participated in high-school sports and less than 15% of college athletes were women. Now, over 3.4 million girls play high-school sports and nearly 44% of college athletes are women. Women's Sports Foundation, 50 Years of

Title IX (2022), bit.ly/3V66cHW; NCAA Sports Sponsorship and Participation Rates Report 88, 227 (Jan. 2022), bit.ly/3s0WXid. "The impact of Title IX on student athletes is significant and extends long beyond high school and college; in fact, numerous studies have shown that the benefits of participating in team sports can have life-long positive effects on women," while "discriminating against female athletes and creating feelings of inferiority with their male counterparts can have long-lasting negative effects." *Parker v. Franklin County Community School Corp.*, 667 F.3d 910, 916 (7th Cir. 2012).

The Administration's position here would at best drastically limit—and, at worst, end—the separation of sports based on biological sex. The Administration has, in fact, proposed replacing Title IX's longstanding athletics regulation with a rule requiring that students be allowed to participate in sports "consistent with their gender identity." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860, 22891 (Apr. 13, 2023). Under that proposed rule, schools could apply eligibility criteria for athletics based on biological sex—as many have done for the 50 years of Title IX's existence—only by meeting an extreme form of intermediate scrutiny. *Ibid.* The Administration paused this rulemaking after intense public pushback that pointed up the consequences of issuing such a rule in an election year. *E.g.*, Laura

Meckler, Biden Title IX Rules on Trans Athletes Set for Election-year Delay, Wash. Post (Mar. 28, 2024), wapo.st/4bO8UZf. But, as it does in this case, the Administration continues to press a view of Title IX that would command the same result and thus presents the same risks to women's and girls' sports. *See* U.S. Amicus Br. 29, *B.P.J. by Jackson v. West Virginia State Board of Education*, Nos. 23-1078, 23-1130 (4th Cir. Apr. 3, 2023) (Administration's view that "categorically exclud[ing] transgender students from participating" on teams "consistent with their gender identity" violates Title IX's "antidiscrimination mandate").

Third, applying Title IX beyond discrimination based on biological sex would upend the practice of medicine.

Section 1557 of the Affordable Care Act applies Title IX's nondiscrimination mandate to the healthcare context. As discussed above, Title IX recognizes that sex-based distinctions between men and women are real and have objective consequences. Title IX thus embraces the traditional, binary definition of *sex* and it prohibits not all differential treatment but only "discrimination"—"treating [an] individual worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. By incorporating Title IX's nondiscrimination provision, Section 1557 embraces the recognition that sex-based distinctions also have objective consequences for medical treatment, health outcomes, and patient privacy. Thus, under Section 1557, federally funded providers may generally ask about sex-related traits and use sex-based distinctions to

provide sound medical care. *See* 42 U.S.C. § 18114 (prohibiting any regulation that would "interfere[ ] with communications" on "treatment options" or "restrict[ ] the ability of health care providers to" disclose "relevant information to patients").

The Administration's view of Title IX would end that. In its rule purporting to implement Section 1557, the Administration has claimed that the nondiscrimination provision largely prohibits maintaining sex-separate "intimate space[s]," like shared hospital rooms. 89 Fed. Reg. at 37593. The rule thus undercuts individual privacy and dignity just as the Administration's Title IX rule does. More: the Section 1557 rule assaults the dignity of those who need medical care and are at their most vulnerable.

And the rule goes far beyond that. It would remake standards of care and undermine the doctor-patient relationship. The rule acknowledges that "[p]roviders often need to make inquiries about a patient's sex-related medical history, health status, or physical traits" to "provid[e] care." 89 Fed. Reg. at 37595. But it says that such "inquiries may rise to the level of *harassment on the basis of sex*" if, in the Administration's policy-driven view, those inquiries are not "relevant" or are "unwelcome"—no matter whether those questions aim to uncover the truth needed to provide sound treatment. *Ibid.* (emphasis added). Doctors thus may prematurely cut off efforts to assess their patients and inform them about the risks of certain medical procedures. Even while

recognizing that sex-based characteristics matter to medical care, the rule also claims that doctors may not "use sex-based distinctions to administer individualized care" if doing so causes a patient "distress." *Id.* at 37593, 37594. So if a doctor refuses to provide gynecological services to males, that provider could face liability for sex discrimination if a male patient claims to have suffered "distress." The rule also claims that "[d]iscrimination based on sex characteristics is a prohibited form of sex discrimination because discrimination based on anatomical or physiological sex characteristics is inherently sex-based." *Id.* at 37576. So a doctor who would perform surgery to remove cancerous breast tissue could face liability for refusing to surgically remove the healthy breast tissue of a patient suffering from gender dysphoria.

This regime would chill the doctor-patient relationship, undermine medical care, and harm patients. Not surprisingly, courts have blocked the Administration's rule. *E.g.*, *Tennessee v. Becerra*, 2024 WL 3283887, at *14. But the Administration continues to press a position here that would allow it to impose that same regime.

* * *

No one in 1972 believed that Title IX was enacted to dramatically undercut the privacy and dignity of men and women (and boys and girls) across the country, to make widespread athletic success for women and girls an impossibility, and to remake the practice of medicine to the detriment of patients in need. The Administration's position here

demands that this Court pretend that things were otherwise. This Court should reject the Administration's view.

CONCLUSION

This Court should affirm the district court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott G. Stewart, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

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CERTIFICATE OF COMPLIANCE

This brief complies with the content and form requirements of Fed. R. App. P. 29(a)(4)-(5) and 32(a) and Fifth Circuit Rule 29.2, and comports with the word-limitation requirements of those rules because the brief, excluding the parts of the document exempted by Fed. R. App. P. 32, contains 6,468 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which appear in Century Schoolbook 12-point font.

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