No. 24-12444

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA, ET AL.,

Plaintiffs-Appellants

v.

U.S. SECRETARY OF EDUCATION, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Alabama
No. 7:24-cv-00533 (Axon, J.)

MOTION OF THE STATES OF MISSISSIPPI, ALASKA, ARKANSAS, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel certifies that the following listed persons and parties, in addition to those listed in plaintiffs-appellants' motion for injunction pending appeal, may have an interest in the outcome of this case:

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The proposed amici curiae—the States of Mississippi, Alaska, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming—respectfully move this Court for leave under Federal Rule of Appellate Procedure 27 to file the attached amicus brief in support of the plaintiffs-appellants' motion for injunction pending appeal and state:

1. This lawsuit challenges a final rule, adopted by the U.S. Department of Education, which was scheduled to take effect August 1, 2024. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024). That rule purports to implement the nondiscrimination provision of Title IX, which generally provides that "[n]o person in the United States shall ... 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" "on the basis of sex." 20 U.S.C. § 1681(a). The rule would extend that provision beyond discrimination based on biological sex, to sexual-orientation and gender-identity discrimination.

2. Several States and private parties (including several proposed amici here) have challenged the rule in federal courts around the country. At least seven courts have enjoined the rule's operation to various

degrees. *Oklahoma v. Cardona*, No. 5:24-cv-00461-JD, Dkt. 48 (W.D. Okla. July 31, 2024); *Arkansas v. U.S. Dep't of Education*, No. 4:24 CV 636 RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024); *Carroll Independent School District v. U.S. Dep't of Education*, No. 4:24-CV-00461-O, 2024 WL 3381901 (N.D. Tex. July 11, 2024); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342 (N.D. Tex. July 11, 2024); *Kansas v. U.S. Dep't of Education*, No. 24-4041-JWB, 2024 WL 3273285 (D. Kan. July 2, 2024); *Tennessee v. Cardona*, No. CV 2:24-072-DCR, 2024 WL 3019146 (E.D. Ky. June 17, 2024); *Louisiana v. U.S. Dep't of Education*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024). And at least two courts have enjoined enforcement of a related rule adopted by the U.S. Department of Health and Human Services, which similarly purports to extend Title IX's nondiscrimination provision—incorporated in the healthcare context by the Affordable Care Act—to sexual orientation and gender identity. *Tennessee v. Becerra*, No. 1:24CV161-LG-BWR, 2024 WL 3283887 (S.D. Miss. July 3, 2024); *Texas v. Becerra*, No. 6:24-CV-211-JDK, 2024 WL 3297147 (E.D. Tex. July 3, 2024).

3. The district court in this case, however, rejected plaintiffs-appellants' request to preliminarily enjoin the Department of Education's Title IX rule.

4. Title IX's nondiscrimination provision 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, including the proposed amici States.

5. Consistent with its text and its well-known aims, the universal view of Title IX—when it was enacted and as it has been 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. Under this view, the statute for decades has advanced Congress's manifest aim 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).

6. Under the Constitution, States exercise primary "control" over education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29, 49 (1973). Proposed amici thus have a powerful interest in upholding the correct understanding of Title IX that has ushered in incredible progress in our country, particularly for women and girls. The States therefore submit the proposed amicus brief to emphasize two reasons, of special concern to the States, why this Court should honor Title IX's text and aims by granting an injunction pending appeal.

7. *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. Such clear notice is required for legislation that (like Title IX) exercises Congress's spending power. Next, nothing in Title IX shows a congressional intention to grant federal agencies—which play a vital role in enforcing Title IX—the power that the Department 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. 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.

8. *Second*, extending Title IX beyond biological sex would have profound 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.

REQUEST FOR RELIEF

The proposed amici States respectfully request that the Court grant them leave to file the attached amicus brief in support of plaintiffs-appellants' motion for injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because, excluding the exempted parts of the document, it contains 953 words. This motion 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.

Dated: August 2, 2024

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing motion 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.

Dated: August 2, 2024

s/ Justin L. Matheny
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STATEMENT OF THE ISSUES, INTEREST OF AMICI CURIAE, AND SUMMARY OF ARGUMENT

This Court should enjoin the Department of Education's extraordinary rule extending Title IX's prohibition of discrimination "on the basis of sex" to sexual orientation and gender identity. This Court will likely reject the Department's view of Title IX and instead hold that the statute prohibits only discrimination based on biological sex. As plaintiffs-appellants' motion explains, Title IX's text, structure, and aims compel that result. The amici curiae here—the States of Mississippi, Alaska, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming—submit this brief to emphasize two more reasons, of special concern to States, why this Court should honor Title IX's text and aims. First, background principles powerfully reinforce that Title IX applies only to discrimination based on biological sex. And second, adopting the contrary view—as the district court did—would have profound, unjustifiable negative ramifications.

ARGUMENT

I. Background Principles Show That Title IX Prohibits Only Discrimination Based On Biological Sex.

Bedrock constitutional limitations reinforce that Title IX prohibits only discrimination on the basis of biological sex.

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, 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 like "a contract" and "operates based on consent." *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568, 1570 (2022) (cleaned up). Congress's authority "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, because recipients "cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006) (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).

Title IX does not provide "clear notice" that it extends to sexual-orientation or gender-identity discrimination. The statute's text, structure, and aims show that it bars discrimination based on biological sex. Mot. 7-10. That view prevailed—unbroken—for decades. The view

that Title IX covers "sexual orientation and gender identity discrimination" is "new" and would "substantially change[ ] the experience" of regulated parties. *Tennessee v. Dep't of Education*, 104 F.4th 577, 600, 613 (6th Cir. 2024). Recipients of Title IX funds did not "voluntarily and knowingly accept[ ]" (*Cummings*, 142 S. Ct. at 1570) that Title IX extends beyond biological sex.

The absence of contrary evidence is striking. No contemporaneous dictionary shows that *sex* embraces sexual orientation or gender identity. Nor does anything in Title IX's implementing regulations or legislative history. No caselaw from near the statute's enactment (or for decades after that) applies any similar theory of sex discrimination. Indeed, despite the importance of the scope-of-Title-IX issue to this Administration and the many times it has briefed the issue, the best contemporaneous evidence the Administration has come up with to support its view is—*nothing*.

Second, nothing in Title IX shows Congress's intention to give federal agencies—which play a vital role in enforcing Title IX—the power 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). 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 principle has particular force on important matters involving "earnest and profound debate." *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

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 to require schools 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, because Title IX's nondiscrimination prohibition now applies in federally funded healthcare programs, it would allow agency officials with no medical training to dictate to doctors when and how they can rely on sex-based distinctions when caring for patients. *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 sexual orientation or gender identity in this context. Yet adopting the Administration's position would require concluding that Congress

considered and embraced the breathtaking consequences set out above when it passed a statute to "protect[ ] ... women" from discrimination (118 Cong. Rec. 5730, 5804 (1972)) that simply prohibits discrimination "on the basis of sex." It defies belief that Congress would set national policy—or delegate that authority to agencies—"in so cryptic a fashion." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

Third, Title IX nowhere shows that Congress decided to effectuate an extraordinary shift in the federal-state balance of power over education policy.

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). By leaving much power with the States, the Constitution makes those who most affect everyday life more accountable to the people. *Id.* 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). 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." *Gregory*, 501 U.S. at 461.

Title IX does not reflect Congress's clear intent to effectuate the broad takeover of education policy that would result if Title IX applied to sexual orientation and gender identity. Title IX combats "unjustified discrimination against women" in education, while respecting inherent differences between the sexes. 118 Cong. Rec. at 5303, 5808. And it does so while preserving "state and local" "control" of "education." *Tennessee v. Dep't of Education*, 104 F.4th at 593. Expanding Title IX would impose federal control over school policy far beyond the statute's clear aims. 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) that intrusion on state authority.

These background principles reinforce the error in relying, as the rule does, on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), 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." *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286 (1998).

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. *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." *Bostock*, 140 S. Ct. at 1741. Title IX is different. It does not put sex-based distinctions off limits. Rather, 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. That nuanced approach distinguishes Title IX from Title VII.

Last, Title IX applies in a context—education—with a "deeply rooted" "tradition" of state and local "control." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Title VII "serve[s] different goals" and applies in a vastly different context. *Tennessee v. Cardona*, 2024 WL 3453880, at *3; *see Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999) ("[S]chools are unlike the adult workplace"). And Title IX nowhere reflects Congress's intention "to effect a radical shift of authority from the States to the Federal Government" (*Gonzales*, 546 U.S. at 275) beyond what was needed to stop discrimination against women and girls in education. State and local officials thus retain their authority until Congress says otherwise.

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

The legal reasons for enforcing Title IX's text are powerfully reinforced by the profound practical ramifications of extending the statute beyond biological sex.

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

"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 dignity. *Adams v. School Board of St. Johns County*, 57 F.4th 791, 805 (11th Cir. 2022) (en banc).

Yet the rule here takes the view that Title IX dramatically restricts (and may prohibit) separating facilities based on biological sex. The rule says that "students experience sex-based harm that violates Title IX" if

they cannot access "sex-separate facilities ... consistent with their gender identity." 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." 89 Fed. Reg. 37522, 37593 (May 6, 2024). 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. 20 U.S.C. § 1686.

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. Title IX's longstanding athletics regulation 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). The Administration's position here would drastically limit—or end—that practice. The Administration has proposed a rule requiring that students be allowed to participate in sports "consistent with their gender identity." 88 Fed. Reg. 22860, 22891 (Apr. 13, 2023). Although the Administration paused this rulemaking after intense public pushback spotlighting the problems of issuing the rule in an election year, it continues to press a view of Title IX that would command the same result. 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) ("categorically exclud[ing] transgender students from participating" on teams "consistent with their gender identity" violates Title IX).

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

By applying Title IX's nondiscrimination mandate in healthcare, Section 1557 of the Affordable Care Act embraces the recognition that sex-based distinctions have objective consequences for medical treatment. Thus, under Section 1557, federally funded providers may generally ask about and use sex-based distinctions to provide sound care. 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 would end that. Besides undercutting individual privacy as the rule here does, the rule purporting to implement Section 1557 would remake standards of care and undermine the doctor-patient relationship. That rule acknowledges that doctors often must ask about a patient's "sex-related medical history" and "health status" when "providing 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, they are not "relevant" or are "unwelcome." *Ibid.* Doctors thus may prematurely cut off efforts to assess their patients and inform them about the risks of certain medical procedures. The rule also says that doctors may not "use sex-based distinctions to administer individualized care" if doing so causes "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 "discrimination based on anatomical or physiological sex characteristics is inherently sex-based" and prohibited. *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 patients suffering from gender dysphoria.

No one in 1972 believed that Title IX was enacted to dramatically undercut privacy and dignity, to make widespread athletic success for women and girls impossible, and to undermine the practice of medicine. The rule here demands that courts pretend that things were otherwise. This Court should reject that view and enjoin the rule's enforcement.

CONCLUSION

This Court should grant an injunction pending appeal.

Respectfully submitted,

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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 Eleventh Circuit Rule 29, 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 2591 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.

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CERTIFICATE OF SERVICE

I, Justin L. Matheny, 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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