No. 24-437

IN THE

Supreme Court of the United States

OKLAHOMA,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM; ALLIANCE FOR LAW AND LIBERTY; AMAC ACTION; AMERICAN VALUES; ANGLICANS FOR LIFE; ASSOCIATION OF MATURE AMERICAN CITIZENS; CENTER FOR URBAN RENEWAL AND EDUCATION (CURE); COALITION FOR JEWISH VALUES; CONCERNED WOMEN FOR AMERICA; DEMOCRATS FOR LIFE;
(For continuation of Midline, see Inside Cover)

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Charlie Gerow; Heartbeat International; Idaho Freedom Foundation; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri House of Representatives, Chairman, Missouri Center-Right Coalition; Lutheran Center for Religious Liberty; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; Men for Life; National Center for Public Policy Research; North Carolina Values Coalition; Orthodox Jewish Chamber Of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Palmetto Promise Institute; Project 21 Black Leadership Network; Setting Things Right; 60 Plus Association; Paul Stam, Former Speaker Pro Tem, North Carolina House of Representatives; Stand for Georgia Values Action; Students for Life of America; The American Association of Senior Citizens; Tea Party Patriots Action; The Family Foundation of Virginia; Tradition, Family, Property, Inc.; Wisconsin Family Action, Inc.; Women for Democracy in America, Inc.; and Young America's Foundation in Support of Petitioner

QUESTIONS PRESENTED

1. Whether a federal agency, through regulations, can impose upon states a funding condition that satisfies the Spending Clause when the underlying statute does not contain or is ambiguous as to that condition.

2. Whether the Weldon Amendment prohibits the federal government from requiring a state's health department to provide abortion referrals.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that America's system of constitutional government, unique in the world, must be preserved and restored for the sake of American freedom. As the Founders understood, liberty depends on the proper balance of power among the people, their local and state governments, and the federal government. AAF files this brief on behalf of its 1,942 members in Oklahoma and its 8,400 members in the Tenth Circuit.

Amici Alliance for Law and Liberty; AMAC Action; American Values; Anglicans for Life; Saulius "Saul" Anuzis, President, The American Association of Senior Citizens; Association of Mature American Citizens; Center for Urban Renewal and Education (CURE); Coalition for Jewish Values; Concerned Women for America; Democrats for Life; Charlie Gerow; Heartbeat International; Idaho Freedom Foundation; International Conference

1. All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

2. Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House of Representatives, Chairman, Missouri Center—Right Coalition; Lutheran Center for Religious Liberty; James L. Martin, Founder/Chairman, 60 Plus Association; Jenny Beth Martin—Honorary Chairman, Tea Party Patriots Action; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; Men for Life; National Center for Public Policy Research; North Carolina Values Coalition; Orthodox Jewish Chamber Of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Palmetto Promise Institute; Project 21 Black Leadership Network; Setting Things Right; Paul Stam, Former Speaker Pro Tem, North Carolina House of Representatives; Stand for Georgia Values Action; Students for Life of America; The Family Foundation of Virginia; Tradition, Family, Property, Inc.; Wisconsin Family Action, Inc.; Women for Democracy in America, Inc.; and Young America's Foundation believe that the Constitution's limits on federal power are essential to the preservation of American liberty and prosperity.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress and the administrative state, sometimes at congressional direction and other times not, use the Federal Government's power of the purse as an "unconstitutional pathway for control."[3] The Federal Government's use of spending as a means of control "without concern for the [balance between state and

3. Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 5 (Harvard University Press 2021).

federal power], has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting).

That is exactly what happened here. The United States Department of Health and Human Services (HHS) sought to use federal funding as a club to force Oklahoma's state-run health service to refer pregnant women to a hotline that would provide information about abortion, among other things. The Weldon Amendment is an appropriations rider that, in effect, prohibits HHS from discriminating against recipients based on their refusal to provide or refer to abortion services. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004) The HHS policy is the current iteration of a decades-long back and forth action on HHS's part (requiring and then not requiring and then requiring again) Title X recipients to provide information related to abortion. Cert. Pet. at 5-6. However, the rule's preamble, consistent with the Weldon Amendment, clarifies that "objecting providers or Title X grantees are not required to counsel or refer for abortions." 86 Fed. Reg. 56,144 at 56,153 (Oct. 7, 2021).

After this Court's decision in *Dobbs v. Jackson Women's Org.*, 597 U.S. 215 (2022), a 1907 Oklahoma law that prohibits advising women to obtain an abortion became enforceable again. Cert. Pet. at 7. This law advances the State's legitimate interest in the life and health of both mothers and their unborn children. The

Oklahoma State Department of Health (OSDH) notified HHS that it could no longer provide the demanded abortion referrals and information because of this State law. *Id*. at 8. In response, HHS withdrew millions of dollars in Title X funding. *Id*. at 8-9. This case concerns whether federal funds will continue to be withheld.

The Federal Government possesses only limited and enumerated powers. The Constitution grants Congress no independent spending power. Rather, Congress's power to spend is derivative of its enumerated powers. Thus, when the Federal Government attempts to use conditions on its spending as a means of accomplishing what it otherwise could not, it exceeds its constitutional authority. Such "unconstitutional pathway[s] of control"[4] are widespread. Here the harm to constitutional interests including federalism and conscience rights demonstrate the harm that can be caused when the Federal Government acts outside of the carefully crafted boundaries the Constitution imposes on it. The Court should grant certiorari and rule for Petitioner to protect the Constitution and the liberty of the people it exists to secure.

ARGUMENT

The government of the United States, created by the Constitution, is "one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). An "enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824). That fact was made explicit by the ratification of the Tenth Amendment:

4. Hamburger, *supra* note 3 at 5

"The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const. amend X. Thus, all federal action must grow directly out of one of its specified powers. Because HHS's condition on Title X spending at issue in this case is not an exercise of one of the Federal Government's limited powers, it is an instance of unconstitutional overreach that justifies granting Oklahoma's petition for certiorari.

I. The Spending Condition at Issue in This Case is Beyond the Enumerated Powers of Congress.

Congress has no independent spending power unmoored from its enumerated powers. *But see*, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 577 (2012). Article I grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States." U.S. Const. art. I § 8 cl. 1. As Professor Phillip Hamburger has explained, during the constitutional convention, Gouverneur Morris "wanted a general spending power," but "knew he could not accomplish this openly."[5] He thus replaced the comma after "Excises" with a semicolon while on the Committee of Style. The convention noticed the change and reverted the punction to a comma, making it "abundantly clear that the phrase about 'providing for . . . general welfare' was merely a limitation on the taxing power, not a spending power."[6]

5. Hamburger, *supra* note 3 at 77.

6. *Id.*

Because Congress lacks an independent spending power, its myriad uses of federal funds to accomplish things not within its delegated powers comprise an "unconstitutional pathway of control."[7] This often comes in the form of conditions imposed on recipients of federal funds. Conditions are reasonable and necessary when they "define what government is lawfully buying or supporting with a grant."[8] However, "regulatory conditions are those that substitute for statutes in regulating Americans."[9] Professor Hamburger suggests several examples of factors that may demonstrate that a condition is regulatory, including that they are "disproportionately large, nongermane, or otherwise 'off.'"[10] Fundamentally, when Congress or the administrative state[11] uses conditions to accomplish what they could not accomplish directly, they illegitimately circumvent the Constitution and its carefully defined limits on federal power, threatening the liberty of the people with death by a thousand cuts.

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7. *Id*. at 5.

8. *Id*. at 61.

9. *Id*. at 63.

10. *Id*.

11. Here, the condition was not imposed by Congress but by HHS which claims that Congress delegated power to it to impose that condition. As Oklahoma rightly argues, that claim is inconsistent with clear statutory law and with this Court's precedent regarding conditions on federal spending. As this brief argues, even if HHS was right about Congress's intent, the delegation would have been illegitimate in part because it would constitute a delegation of power Congress itself does not have.

Neither Congress nor the administrative state could impose the Title X abortion referral condition at issue in this case as an exercise of one of Congress's enumerated powers. Because the condition is also neither a necessary nor a proper exercise of one of its enumerated powers, it is unconstitutional.

II. The Spending Condition at Issue in This Case is not Necessary or Proper for the Exercise of any of the Federal Government's Enumerated Powers.

Article I grants Congress the power to enact laws that are "necessary and proper for carrying into execution" its other enumerated powers. U.S. Const. art. I, § 8, cl. 18. The Necessary and Proper Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Sebelius*, 567 U.S. at 559 (quoting *McCulloch*, 17 U.S. at 411). "Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with the basic constitutional principles." *Gonzales v. Raich*, 545 U.S. 1, 52 (2005) (O'Connor, J. dissenting) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting)). That clause is not "a pretext . . . for the accomplishment of objects not entrusted to the government." *Raich*, 545 U.S. at 66 (Thomas, J., dissenting) (quoting *McCulloch*, 17 U.S. at 423) (internal quotation marks omitted).

Rather, "the Necessary and Proper Clause is exceeded . . . when [congressional action] violates the background principle of enumerated (and hence limited) federal power." *Sebelius*, 567 U.S. at 653 (Scalia, J., dissenting). The Necessary and Proper Clause merely "ensure[s]

that the Congress shall have all means at its disposal to reach the heads of power that admittedly fall within its grasp . . . Congress shall not fail because it lacks the means of implementation."[12] Necessary and proper means necessary *and* proper. The scope of the powers vested by the clause is limited by "the word 'proper' [which] in this context requires executory laws to be distinctively and peculiarly within the jurisdictional competence of the national government—*that is, consistent with background principles of separation of powers, federalism, and individual rights.*"[13]

Even Chief Justice John Marshall, in his famous explication of the clause, generally taken to be an expansive reading, demanded that the "means . . . consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. 17 U.S. 316, 421 (1819). As Justice Thomas has explained, *McCulloch* created a two-part test for compliance with the Necessary and Proper Clause:

> First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution . . . Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to

12. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1397-98 (1987).

13. Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234-35 (1994) (emphasis added).

> serve . . . The means Congress selects will be deemed "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[in]consistent" with its "letter and spirit."

United States v. Comstock, 560 U.S. 126, 160-61 (2010) (Thomas, J., dissenting) (alteration in original) (quoting *McCulloch*, 17 U.S. at 421). Both the letter and the spirit of the Constitution require congressional exercises of power under the clause to be consistent with basic constitutional principles.

Congress's necessary and proper power is limited by the word "proper," "*that is, consistent with background principles of separation of powers, federalism, and individual rights.*"[14] The condition at issue in this case is not consistent with the principle of federalism that is so fundamental to American constitutional structure.

The regulation of healthcare is an area of traditional state power. The states have an interest in the well-being of both mothers and their unborn children. As this Court has explicitly recognized for at least three decades, States have a legitimate interest in protecting the life of the unborn. *See Planned Parenthood of Southeastern Pa. v. Casey*, 501 U.S. 833, 871 (1992); *Dobbs*, 597 U.S. at 262-63. The representatives of the State of Oklahoma voted to protect that interest and the State's officials here sought to respect that decision. Yet HHS, by requiring States that accept this Title X funding to refer pregnant women to

14. *Id.*

sources that would inform women about abortion, sought to impose a one-size-fits-all approach with regard to the value of the life of the unborn on the entire nation. In doing so it is attempting to undermine the federal structure that is central to American constitutional government. Because HHS's conditioning of Title X funding in this case violates the several basic principles of American constitutional government, it is not necessary and proper.

The HHS condition similarly would undermine conscience protections that are necessary to ensure that State employees' First Amendment rights are protected. Many healthcare workers have religious objections to being forced to support abortions. Oklahoma's policy would protect its employees with such objections. HHS, on the other hand, seeks to force those employees to participate in facilitating abortion in a way that threatens their First Amendment speech and Free Exercise rights.

Because HHS's abortion referral condition would impose on Oklahoma and its employees conditions that the Federal Government could not directly impose under any of its enumerated powers, and because the condition is not a necessary or proper exercise of any of those powers, it is beyond the power of Congress—and thus of HHS—to enact. For all of these reasons, this Court should grant the petition for certiorari and rule for Petitioner.

CONCLUSION

For the forgoing reasons, the Court should grant certiorari and rule for Petitioner.

Respectfully submitted,

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