No. 24-437

In the Supreme Court of the United States

STATE OF OKLAHOMA, PETITIONER

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR THE STATES OF TEXAS AND TWENTY ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Two and a half years ago, this Court returned the question of abortion regulations "to the people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 259 (2022). Before the ink was even dry on the opinion, President Biden announced his intent to undermine the Court's decision and the right of States like amici to protect unborn life.[1] And for more than two years, his administration has done precisely that.[2] This case is just one more example: Notwithstanding that this Court has expressly held that Congress must speak unambiguously if it wishes to impose a condition on federal grant funding, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), and its recognition that Congress has never unambiguously "address[ed] the issues of abortion counseling, referral, or advocacy," *Rust v. Sullivan*, 500 U.S. 173, 185 (1991), the Department of Health and Human Services has revoked millions of dollars of grant funding from Oklahoma solely on the ground that it declined to provide referrals for abortions.

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[1] *See Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade*, The White House (June 24, 2022), https://perma.cc/7HAK-7U8M.

[2] CMS, U.S. Dep't of Health and Hum. Servs., *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss* (Sept. 17, 2021), https://perma.cc/65CQ-YLUQ; Off. for Civ. Rights, U.S. Dep't of Health and Hum. Servs., *Guidance to Nation's Retail Pharmacies: Obligations Under Fed. Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services*, https://perma.cc/L42Z-PB6E; Exec. Order No. 14076, *Protecting Access to Reproductive Healthcare Services*, 87 Fed. Reg. 42053 (July 8, 2022).

Amici curiae are the States of Texas, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. As this Court has recognized, such States have "special solicitude" to challenge unlawful federal Executive branch actions, *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), and thereby to guard "the public interest in protecting separation of powers by curtailing unlawful executive action," *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by equally divided Court*, 579 U.S. 547 (2016) (per curiam).[3]

SUMMARY OF ARGUMENT

For decades, Title X has provided vital funding for women's healthcare, and specifically for family-planning services. 42 U.S.C. §§ 300(a). And for decades, it has specifically barred those funds from "be[ing] used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6; Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, tit. II, § 508(d), 118 Stat. 2809, 3163 (2004). Nevertheless, the lower courts upheld HHS's decision to entirely deny funding to Oklahoma based on a regulation that purports to require Title X recipients to offer pregnant women "information and counseling regarding . . . [p]regnancy termination" and "referral upon request." 42 C.F.R. § 59.5(a)(5)(i)-(ii).

This Court recognized over thirty years ago that Congress has never unambiguously required States to provide abortion referrals to receive Title X funding. *Rust*, 500 U.S. at 185. By nonetheless allowing an *agency* to impose such a requirement, *see* Pet.App.12a, the

[3] Pursuant to Rule 37.2(a), Amici States provided notice to the parties of their intention to file this brief on November 6.

Tenth Circuit has blessed HHS's violation of at least three different clear-statement rules that this Court recognizes. Namely, HHS has (1) imposed a condition on spending, *Pennhurst*, 451 U.S. at 17, and (2) purported to "significantly alter the balance between federal and state power," *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam), (3) on a significant question of public policy "with its own unique political history," *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120, 159 (2000). This Court should grant review to preserve the carefully designed "structural constraints on all three branches" of government in an area of great national concern. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2275 (2024) (Thomas, J., concurring) (citation omitted).

There can be little dispute that this case presents a question worthy of this Court's time. This regulation impacts States both as direct recipients of Title X funds and as sovereigns with authority to enforce their own abortion laws and policies. There are few questions that have provoked more "earnest and profound debate across the country" than abortion. *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (internal quotation marks omitted). And this case involves a question upon which "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." Sup. Ct. R. 10(a). The Court should thus grant review, reverse the decision below, and restore healthcare funding to residents of Oklahoma in need.

ARGUMENT

I. The Decision Below Was Wrong.

HHS allocated $512 million in Title X funds for fiscal year 2024.[4] Its decision to make abortion referrals a condition of that funding—a decision based on, at best, ambiguous statutory authorization—implicates at least three different legal doctrines, each of which require clear congressional authorization. Yet Congress has neither required abortion referrals as a condition of receiving Title X funding nor clearly permitted an agency to do so. Instead, no Title X funds may be used "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Given that prohibition (or, at minimum, ambiguity), the Tenth Circuit erred when it found that States must make *referrals* to abortion services, even when doing so would violate state law or policy. *Oklahoma v. U.S. Dep't of Health & Hum. Servs.*, 107 F.4th 1209, 1219 (10th Cir. 2024).

A. "One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before [it]." *West Virginia v. EPA*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring). In service of that duty, this Court has recognized a number of clear-statement rules, which assume that "Congress means for its laws to operate in congruence with the Constitution rather than test its bounds," while still ensuring that courts "'act as faithful agents of the Constitution.'" *Id.* (quoting Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010)). The rule at issue here, as well

[4] U.S. Dept. of Health & Human Servs., Fiscal Year 2024 Budget in Brief at 4, 31, https://www.hhs.gov/about/budget/fy2024/index.html.

as the statutes it purports to interpret, implicate three such canons.

First, and most important here, though "Congress may fix the terms on which it shall disburse federal money to the States," because "legislation enacted pursuant to the spending power is much in the nature of a contract," this Court has explained, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17; *see also, e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 216 (2022). Thus, "[i]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. This constitutional requirement "enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*

Second, this Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 622 (2020). This rule reflects the bedrock understanding that the "promise of liberty" around which our system is built depends on the "double security" offered by a "proper balance between the States and the Federal Government," which act as "mutual restraints" but "only if both are credible." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). Because the "[t]he Federal Government holds a decided advantage in this delicate balance," even in "areas traditionally regulated by the States," this Court "assume[s] Congress does not exercise [its powers] lightly." *Id.* at 460. As this Court recognized in *Dobbs*, one such area of traditional state control is regulating the practice of medicine. 597 U.S. at

301; *see also, e.g.*, *State v. Zurawski*, 690 S.W.3d 644, 670 (Tex. 2024).

Third, the question of requiring States to facilitate referrals for abortions over their objection is rife with political and moral significance. "Extraordinary grants of regulatory authority" over such issues "are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *West Virginia*, 597 U.S. at 723 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). This Court "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *Id.* (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

"Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent" have left this Court "'reluctant to read into ambiguous statutory text' [a] delegation claimed to be lurking there." *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In these cases, the Court has required "something more than a merely plausible textual basis for the agency action," instead asking whether the agency can "point to 'clear congressional authorization' for the power it claims." *Id.*; *see also, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 595 U.S. 109, 117 (2022) (per curiam).

B. The Tenth Circuit should have applied these principles to find that the agency had claimed for itself an extraordinary grant of regulatory authority far beyond its statutory authorization. As the Senate Judiciary Committee heard earlier this year, abortion regulations are complex and challenge policymakers to consider how "the important values of equality or bodily autonomy of women … stand in relation to the life of the unborn

child—a whole, living, distinct member of the human species." *The Continued Assault on Reproductive Freedoms in a Post-Dobbs America Before the S. Comm. On the Judiciary*, 118th Cong. 1 (2024) (statement of O. Carter Snead, Charles E. Rice Professor of Law, University of Notre Dame). There is perhaps no more hotly debated issue in the modern American political sphere than abortion.

A total of 41 States have enacted some form of legislative prohibition on elective abortions.[5] The Texas Legislature, for its part, has chosen to prohibit all elective abortions, making an exception only when there is "a greater risk" of the mother's death or a "serious risk of substantial impairment" of one of her "major bodily function[s]." Tex. Health & Safety Code § 170A.002; *id.* § 170A.002(3). Accordingly, it is also against Texas law to "aid or abet" the procurement of an abortion. *Id.* § 171.208. Twelve additional States have enacted similar bans on elective abortion: Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, and West Virginia.[6] Twenty more have chosen to prohibit abortion at some point after 18 weeks,[7] and 8 States have passed laws prohibiting abortion at or before 18 weeks' gestation.[8]

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[5] Guttmacher Institute, *State Bans on Abortion Throughout Pregnancy*, https://perma.cc/RGU2-U9H9 (last visited Nov. 6, 2024).

[6] *Id.*

[7] *Id.* (listing California, Connecticut, Delaware, Hawaii, Illinois, Kansas, Maine, Massachusetts, Montana, Nevada, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin, and Wyoming).

[8] *Id.* (listing Arizona, Florida, Georgia, Iowa, Nebraska, North Carolina, South Carolina, and Utah).

HHS threatens to impede the function of, if not entirely override, many of these laws and state policies by claiming it has the power to revoke a State's Title X funding if a State will not refer patients for abortions. Through Title X, Congress decided "to subsidize family planning services which will lead to conception and childbirth," not to "promote or encourage abortion." *Rust*, 500 U.S. at 193. Far from conferring on HHS the power to override state abortion laws, Title X specifically establishes that "[n]one of the funds appropriated" to HHS under the statute may be used "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

A clear statement from Congress requiring abortion referrals (or allowing an agency to require them) is also nowhere to be found in Title X. To the contrary, this Court held almost 30 years ago that the statutory text is ambiguous regarding abortion referrals. *Rust,* 500 U.S. at 184. Far from clarifying its intent to require referrals following *Rust*, Congress has consistently included the Weldon Amendment as a rider on every HHS appropriations bill since 2004. *See, e.g.*, Consolidated Appropriations Act, 2005, § 508(d), 118 Stat. at 3163. That rider prohibits HHS funds from being used by an agency or program—including Title X grants—"if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, *or refe*r for abortions." *Id.* (emphasis added); *see also* Pet. 5-6.

Even without the flat ban that the Weldon Amendment represents, the ambiguity the Court recognized in *Rust* should have been fatal under any of the three clear-statement rules discussed above. The Tenth Circuit erred when it held otherwise, allowing unelected

bureaucrats to arrogate to themselves the power to resolve the "profound moral issue" of abortion—a power that this Court expressly found belonged in the hands of the elected representatives of individual States. *Dobbs*, 597 U.S. at 223.

II. This Court Should Grant Review and Reverse the Court Below.

The Tenth Circuit's decision cries out for this Court's review. As the Court has consistently held, *Congress* is the entity with the constitutional authority "to set the terms on which it disburses federal funds." *Cummings*, 596 U.S. at 216. Amici States are aware of no case from this Court addressing whether that authority can be delegated to an agency—particularly in a circumstance where this Court has imposed clear-statement rules to preserve important constitutional values. Lower courts have, however, split on that question.

A. Whether to condition the receipt of federal funding on anything having to do with abortion is an important question of federal law.

The decision below blessed an extraordinary assertion of agency power on an issue that could not be of "great[er] social significance and moral substance," *Dobbs*, 597 U.S. at 300: whether elective abortions should be allowed and who should fund them. Less than three years ago, this Court unequivocally held that "States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute [its] social and economic beliefs for the judgment of legislative bodies.'" *Id.* (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963)).

In the intervening years, States and their citizens have vigorously debated this question and continue to do so. Indeed, in the election held just days ago, abortion was on the ballot in one of every five States.[9] Even where the question has not been put directly to voters, it has been the subject of significant legislative debate or litigation in state courts. For example, the Supreme Court of Texas recently upheld Texas's laws against state constitutional challenges and affirmed the State's interests in protecting the lives of unborn children, both as a facial matter, *Zurawski*, 690 S.W.3d at 670. (Tex. 2024); and in the face of a particularly fraught set of circumstances gaining national attention, *see In re State*, 682 S.W.3d 890 (Tex. 2023) (orig. proceeding) (per curiam).

Nevertheless, HHS is effectively attempting to pay Title X recipients in many States to violate state law and policy by referring beneficiaries for abortions that are illegal. *See, e.g.*, Tex. Health & Safety Code § 171.208(a) (proscribing "knowingly engag[ing] in conduct that aids or abets the performance or inducement of an abortion"); Idaho St. § 54-1814 (proscribing "aiding or abetting the performing or procuring of an unlawful abortion"). This is an extraordinary assertion of administrative power.

Questions regarding abortion policy belong, in the first instance, to legislatures—a fact that this Court made crystal clear in *Dobbs*. 597 U.S. at 302. And Congress has been far from silent, specifically providing that "[n]one of the funds appropriated" to HHS under Title X may be used "in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Through this regulation, however, HHS has allocated to itself the authority

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[9] *See* Kaiser Family Foundation, *Ballot Tracker: Outcome of Abortion-Related State Constitutional Amendments*, KFF.org (Nov. 6, 2024), https://perma.cc/9BSG-6T4H

to force Title X recipients to refer patients for abortions without regard to federal or state law. 42 C.F.R. § 59.5(a)(ii). Given that "Americans continue to hold passionate and widely divergent views [about] abortion," *Dobbs*, 597 U.S. at 230, this case presents an "important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c).

B. The Tenth Circuit split from sister circuits regarding whether an agency can impose conditions on Spending Clause legislation.

Although amici States are aware of no other decision addressing the issue in an abortion context, the decision below created a split regarding whether *any* agency can impose conditions on Spending Clause legislation that Congress did not expressly provide. The Court should grant certiorari to resolve this "important matter" upon which the Circuits disagree. *Id.* R. 10(a).

1. The Fourth Circuit first confronted the question of whether an agency can impose a condition that Congress has not required in *Commonwealth of Virginia, Department of Education v. Riley,* 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam). There, the court addressed the question whether the United States Department of Education could withhold $60 million in grant funds from Virginia based on the Commonwealth's expulsion of disabled students for reasons unrelated to any disability. *Id.* at 560. The Fourth Circuit agreed with Virginia that the federal statute at issue "included no such clear statement" conditioning a State's receipt of federal funds on the requirement that these students receive a state-funded education even if state disciplinary policies would have triggered their suspension or expulsion. *Id.*

In reaching its conclusion, the Fourth Circuit pointed to the "plain language" of the statute, reasoning that

despite the statute's requirement that "states assure all disabled children 'the right to a free appropriate education,'" there was no language that "even implicitly condition[ed] the receipt of . . . funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities." *Id.* at 560-61. The federal agency was unable to impose a condition on federal funding that did not appear in the plain text of the statute. *Id.* at 561.

2. The Ninth Circuit similarly recognized the importance of separation-of-powers concerns between the Executive and Legislative branches regarding the Spending Clause in *City and County of San Francisco v. Trump,* 897 F.3d 1225 (9th Cir. 2018). There, the court examined whether the President could remove funding via executive order from cities who adopted "sanctuary" immigration policies. *Id.* at 1232. Like the Fourth Circuit before it, the Ninth Circuit concluded that he could not because Congress had not specifically granted authority for the President to take such an action. *Id.* at 1234. But "the Administration ha[d] not even attempted to show that Congress authorized it to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration's immigration strategies." *Id.* As the Ninth Circuit put it, "if 'the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.'" *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring)).

3. The Fifth Circuit followed a similar approach in *Texas Education Agency v. United States Department of Education*, 992 F.3d 350 (5th Cir. 2021). In that case, the court examined whether the National Defense

Authorization Act clearly and unambiguously required a waiver of sovereign immunity as a condition of accepting federal funds. *Id.* at 358-59. After observing that the standard for the "knowing" and "voluntary" waiver of sovereign immunity "align[ed]" with the requirement for the conditions of acceptance on federal money, the court considered "whether the clarity required for a waiver of sovereign immunity to be 'knowing' can be met by regulations clarifying an ambiguous statute." *Id.* at 359, 361.

The answer to that question was *no*, for two reasons. *First*, "[r]elying on regulations to present the clear condition . . . is an acknowledgement that Congress's condition was not unambiguous" and therefore could not satisfy the clarity standard that *Pennhurst* and its progeny required. *Id.* at 361. *Second*, allowing agency regulations to provide the clear condition would "grant the Executive a power of the purse" reserved for Congress under the Spending Clause "and thus would be inconsistent with the Constitution's meticulous separation of powers." *Id.* at 362.

The Fifth Circuit recently reaffirmed this view in *Texas v. Yellen,* 105 F.4th 755 (5th Cir. 2024), which addressed a provision of the American Rescue Plan Act that required States to certify that they would not use the federal funds to offset reduction in the States' net tax revenue. As relevant here, the court observed that "[i]n arguing that *statutory* ambiguity can be vitiated by *regulatory* enactments in the context of the Spending Clause, the federal defendants claim a remarkably broad power for federal administrative agencies." *Id.* at 773. That claim, the court emphasized, "is remarkably wrong." *Id.* Indeed, "[t]he promulgated regulations . . . suffer from an inescapable dilemma" because "[t]hey are legally relevant if and only if the statute is ambiguous. . . .

But if the statute is ambiguous, then it violates the Spending Clause." *Id.* at 774.

The Fifth Circuit further dismissed the administration's attempt to argue that *Pennhurst* merely required Congress to establish the *existence* of a funding condition in a statute, not the specifics. *Id.* at 770. If that view were correct, "any number of mandatory but contentless conditions could be imposed on the [S]tates." *Id.* Without a clear statement in the statute, "[a]ny future administration could fill in its expansive contours with whatever requirements that the administration sees fit, and which the states could have never anticipated," opening the floodgates to litigation and undermining the continuity of programs that federal and state governments jointly administer. *Id.* at 1147.

4. The Eleventh Circuit joined its sister circuits in *West Virginia ex rel. Morrisey v. United States Department of Treasury*, 59 F.4th 1124 (11th Cir. 2023), in which thirteen States sued the Treasury Department, complaining of the same provision at issue in *Yellen*. *Id.* at 1131-32. 2023). Following the Fifth Circuit's earlier decision in *Texas Education Agency*, the Eleventh Circuit rejected the Department's argument that agency regulations could provide clarity that the statute lacked. *Id.* at 1147.

Instead, as here, the agency was subject to multiple clear-statement rules. Specifically, the provision required a clear statement not just because it represented a condition tied to Spending Clause legislation but also because it affected the States' sovereign authority to tax, "intrud[ing] into an area that is the particular domain of state law." *Id.* (citations omitted). The Court emphasized that, under such circumstances, "[a]llowing an executive agency to impose a condition that is not otherwise

ascertainable in the law Congress enacted 'would be inconsistent with the Constitution's meticulous separation of powers.'" *Id.* (quoting *Tex. Educ. Agency*, 992 F.3d at 362). Although the court acknowledged that agencies may "fill in gaps that may exist in a spending condition," that did not save the regulation when the issue was "not whether Congress left a gap that an agency may fill" but "the lack of an ascertainable condition in the statute." *Id.* at 1148.

5. The Tenth Circuit—later joined by the Sixth, *Tennessee v. Becerra*, 117 F.4th 348, 358-59 (6th Cir. 2024)—departed from these precedents by requiring States to make abortion referrals where even this Court has recognized that Congress imposed no such condition. *Rust*, 500 U.S. at 185. True, none of the cases from which the Tenth and Sixth Circuits departed had directly involved abortion. But like the funding condition at issue in *Morrisey* and *Yellen*, HHS's termination of Oklahoma's Title X funds due to the State's refusal to permit abortion referrals "intrud[es] into an area that is the particular domain of state law" in the name of a requirement that is not ascertainable on the face of the statute. *Morrisey,* 59 F.4th at 1147. Moreover, HHS's reliance on its own interpretation of Title X instead of the plain text of the statute "is an acknowledgement that Congress's condition was not unambiguous" and therefore that the funding condition is invalid. *Tex. Educ. Agency*, 992 F.3d at 361.

Moreover, whether an agency can impose a spending condition on a State is a significant question implicating both the horizontal and vertical separation of powers. *Supra* pp.4-6. That the Tenth Circuit allowed HHS to assume undelegated power in the abortion context—mere months after this Court returned that very power to the

States—only highlights the need for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2024

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