NO. 22-451

IN THE
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, INC., ET AL.,
Petitioners,

v.

GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHRISTIAN EMPLOYERS ALLIANCE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Christian Employers Alliance (CEA) is an alliance of Christian-owned businesses in the United States. CEA's mission is to unite, equip, and represent Christian-owned businesses to protect religious freedom and provide the opportunity for employees, businesses, and communities to flourish. CEA members are for-profit and nonprofit, hail from different states, represent different industries, and vary in size. They share in common a deep commitment to living out their Christian faith in everyday life.

CEA advocates concerning legal policy issues on behalf of its members. These issues include the principles that religious freedom should be safeguarded, that human life is sacred from the moment of conception to natural death, and that male and female are immutable realities defined by biological sex.

Federal agencies often disrespect these fundamental principles, and agency officials are far too willing to impose their personal political agendas despite no authority from Congress. In just the past few years, CEA has had to go to court—and has won injunctions—against federal agencies that illegally sought to force Christian employers:

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

- to pay for early abortion-causing drugs in employer health plans, *Christian Emps. All.* v. *Azar*, No. 3:16-CV-309, 2019 WL 2130142, at *2 (D.N.D. May 15, 2019);
- to coerce unvaccinated employees to receive a COVID-19 vaccine, despite employees' conscientious objections, *In re MCP No. 165*, 21 F.4th 357, 384 (6th Cir. 2021), *application granted sub nom. Nat'l Fed'n of Indep. Bus.* v. *OSHA* 142 S. Ct. 661 (2022) (per curiam), *and application dismissed sub nom. S. Baptist Theological Seminary* v. *OSHA*, 142 S. Ct. 890 (2022); and
- to provide health insurance coverage for, and, in healthcare settings, to perform, life-altering medical procedures that remove or impair the healthy organs of persons who identify as the opposite sex, *Christian Emps. All.* v. *EEOC*, No. 1:21-CV-195, 2022 WL 1573689, at *9 (D.N.D. May 16, 2022).

CEA thus knows firsthand that federal agencies often abuse deference doctrines and take advantage of unclear statutory language by imposing administrative rules that Congress itself would never enact. Accordingly, CEA urges the Court to end *Chevron* deference and restore separation of powers principles that preserve fundamental rights.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Chevron deference threatens more than economic vibrancy and separation of powers principles. It also threatens fundamental rights.

The absence of accountability for federal agency officials—combined with immense pressure on the executive branch to placate its political base—has made the federal administrative state increasingly susceptible to agendas that abuse the fundamental freedoms and values of the American people. As recounted in this brief, federal agencies routinely use unclear statutory language to impose mandates and spend tax dollars that Congress would never enact to injure the right to life, devalue religious freedom, and contradict important biological distinctions based on sex.

Many of this Court's highest profile disputes have stemmed from administrative agencies advancing their own agendas without the requisite statutory authority. When left to their own devices—or to the political calculations of the White House—agencies stretch and strain their authority to burden the everyday lives of American citizens in ways Congress never imagined, much less prescribed. As one Justice of this Court recently put it, federal agencies now regularly "write ever more ambitious rules on the strength of ever thinner statutory terms." *Buffington* v. *McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

Agencies see *Chevron* deference as a handy tool to evade judicial review of their efforts to promote abortion and to ignore the biological differences between the sexes. Under the Biden administration,

the U.S. Department of Health and Human Services (HHS) has successfully invoked *Chevron* to prevent judicial review of its decision to redirect hundreds of millions of dollars of Title X family planning funds to abortion clinics. But for *Chevron*, HHS never would have tried to change the requirements of Title X, and there would be no litigation. The Biden administration has likewise claimed *Chevron* deference for its new rule providing free, on-demand abortions through all three trimesters in every veterans' hospital nationwide, regardless of state laws. Courts have even had to consider whether they must grant *Chevron* deference to the Biden administration's attempt to force all emergency room doctors nationwide to perform and complete elective abortions. And HHS has claimed *Chevron* deference for its rules requiring doctors to act against their religious beliefs, their consciences, and their sound medical judgment and perform controversial, medically dangerous "gender transition" interventions on all patients—including on children.

Chevron deference is a bad policy for many reasons. But it is especially dangerous to fundamental freedoms. To require federal courts to defer to agency interpretations of the law, even when an interpretation is not the best one, cedes to agencies an authority the Constitution has reserved to Congress alone: the power to resolve the most highly contentious social and cultural "decisions of vast economic and political significance." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2605 (2022).

This Court's recent cases have rightfully narrowed the scope of *Chevron* deference. They have insisted that every tool of statutory construction must be employed before a court may defer to agency action.

E.g., *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354, 2361–62, 2368 (2022); *Am. Hosp. Ass'n* v. *Becerra*, 142 S. Ct. 1896, 1906 (2022). But *any* extra-constitutional deference is too much. The Court should end *Chevron* deference once and for all.

ARGUMENT

I. Agencies are weaponizing federal health-care laws to violate the right to life.

Federal agencies have driven a nationwide agenda promoting abortion—often in explicit rejection of this Court's decisions and of state authority—all while imposing mandates and programs that lack statutory authority.

For example, the Biden administration reacted to *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022), by issuing a raft of abortion mandates—even though no federal statute contains any mandate to perform abortions.[2] Rather than wait on Congress to respond to his call to codify *Roe* v. *Wade*, President Biden committed federal agencies "to doing everything in his power" to "protect access" to abortion.[3] Agencies immediately launched initiatives forcing states and private citizens to perform

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[2] *E.g.*, Exec. Order No. 14076, Protecting Access to Reproductive Healthcare Services, 87 Fed. Reg. 42,053 (July 8, 2022); Exec. Order No. 14079, Securing Access to Reproductive and Other Healthcare Services, 87 Fed. Reg. 49,505 (Aug. 3, 2022); Presidential Memorandum, Further Efforts To Protect Access to Reproductive Healthcare Services, 88 Fed. Reg. 4895 (Jan. 26, 2023).

[3] White House, FACT SHEET: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services (July 8, 2022), https://perma.cc/NHE6-D5J9.

abortions and spend taxpayer money to perform and pay for abortions.[4]

In each case, agency officials used their power to brush aside their lack of statutory authority and to claim primacy over state laws. Just as with other major initiatives undertaken due to executive frustration with legislative gridlock, Congress has repeatedly decided *against* empowering agencies to undertake these abortion initiatives, either in whole[5] or in part.[6]

These agency actions thus epitomize the kind of transformative, "nationwide"[7] effort that this Court flagged as contrary to the principle that Congress ordinarily makes important policy decisions itself. Cf. *West Virginia* v. *EPA*, 142 S. Ct. at 2604 (White House described Clean Power Plan as "aggressive

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[4] See White House, FACT SHEET: Biden-Harris Administration Highlights Commitment to Defending Reproductive Rights and Actions to Protect Access to Reproductive Health Care One Year After Overturning of *Roe* v. *Wade* (June 23, 2023), https://perma.cc/66WV-EVAM (collecting actions).

[5] *E.g.*, Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023); Women's Health Protection Act of 2023, H.R. 12, 118th Cong. (2023); Women's Health Protection Act of 2022, S. 4132, 117th Cong. (2022); Women's Health Protection Act of 2022, H.R. 3755, 117th Cong. (2022); Women's Health Protection Act of 2021, S. 1975, 117th Cong. (2021); Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021).

[6] *E.g.*, Let Doctors Provide Reproductive Health Care Act, S. 1297, 118th Cong. (2023); Let Doctors Provide Reproductive Health Care Act, H.R. 2907 118th Cong. (2023); Right to Contraception Act, S. 1999, 118th Cong. (2023); Freedom to Travel for Health Care Act, S. 2053, 118th Cong. (2023); UPHOLD Privacy Act of 2023, S. 63, 118th Cong. (2023).

[7] White House, FACTSHEET: The Biden-Harris Administration's Record on Protecting Access to Medication Abortion (April 12, 2023), https://perma.cc/RBG2-SRTR.

transformation in the domestic energy industry"); *NFIB*, 142 S. Ct. at 663 (White House stated multi-agency goal to impose vaccine requirements on 100 million Americans).

Because agencies recently imposed these abortion efforts, their lack of statutory authority has not been fully litigated. But so long as *Chevron* deference remains good law, it provides a powerful tool to justify this sort of executive-branch lawlessness.

A. Funding abortions with taxpayer dollars.

Federal agencies have claimed newfound authority to redirect enormous sums of taxpayer money into the hands of abortion clinics—dollars appropriated to provide healthcare for the poor and support for our military.

Even though Congress stated that no funds in the Title X Family Planning Program can "be used in programs where abortion is a method of family planning," Public Health Services Act, 42 U.S.C. 300a-6, the U.S. Department of Health and Human Services (HHS) is giving up to $286.5 million in taxpayer funds[8] to clinics that provide abortions, counsel in favor of abortions, and fail to physically or financially segregate abortion funds from federally funded family planning.[9]

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[8] HHS, OASH, Office of Population Affairs, Title X Family Planning Program, https://perma.cc/K9CD-MAAW.

[9] HHS, Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144, 56,145 (Oct. 7, 2021) (repealing requirement of physical and financial separation of abortion and funded family planning); Press Release, HHS, HHS Awards $256.6 Million to

And thanks to the mischief of *Chevron*, HHS is *already* receiving deference for its view of Title X. Previously, this Court upheld Title X program integrity requirements under *Chevron*, including a prohibition on abortion counseling. *Rust* v. *Sullivan*, 500 U.S. 173, 177–179, 187–188 (1991). This Court found that "a ban on counseling, referral, and advocacy within the Title X project" was permissible and "[t]he broad language of Title X plainly allows" this "construction of the statute." *Id.* at 184. But when HHS changed its rules in 2021 to provide precisely the opposite, removing separation requirements and requiring abortion counseling, a lower court gave HHS "a high degree of deference" under *Chevron*. *Ohio* v. *Becerra*, 577 F. Supp. 3d 678, 688–690 (S.D. Ohio 2021). Shockingly, the district court held that this new interpretation is "obviously *and properly* a response to shifting political winds." *Ibid.* (emphasis added).

Since then, HHS has pushed the limits of deference for its view of Title X: HHS began using Title X funds to *force* clinics to refer and counsel women for abortions, even when state law protects unborn life.[10] HHS cut off funding for clinics in Oklahoma and Tennessee because these clinics do not counsel women in favor of abortions that violate state law.[11] HHS pays no heed to Title X's limits or to the

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Expand and Restore Access to Equitable and Affordable Title X Family Planning Services Nationwide (Mar. 30, 2022), https://perma.cc/LM9A-NFPU.

[10] 42 C.F.R. 59.5(a)(5)(i) & (ii) (entities must provide "referral upon request" for "[p]regnancy termination").

[11] Letter from HHS Office of the Assistant Sec'y for Health to Tenn. Dept. of Health, Re: Decision not to fund continuation award (March 20, 2023), https://perma.cc/UV9A-E39K; *Federal*

Weldon Amendment, which prohibits discriminating against funding recipients "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[12]

What's more, HHS went on to announce that it would begin spending Medicaid funds to pay for patients to travel to obtain abortions,[13] despite over 40 years of explicit Congressional language in the Hyde Amendment declaring that no HHS funds "shall be expended for any abortion" or "for health benefits coverage that includes coverage of abortion."[14] Once again, the Department of Justice's Office of Legal Counsel issued a post-*Dobbs* memo supporting this novel statutory interpretation.[15]

Other agencies have likewise begun ignoring their statutory limits on abortion funding. The Department of Defense (DOD) announced that it would transport service members to obtain abortions and expend funds so its doctors could get licensed to perform abortions[16]—despite congressional restrictions on spending military money for abortion,

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Government Deems Oklahoma's Title X Program Non-Compliant: OSDH Responds, News on 6 (May 25, 2023), https://perma.cc/DMB4-XAQT.

[12] Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009).

[13] Press Release, HHS, HHS Takes Action to Strengthen Access to Reproductive Health Care, Including Abortion Care (Aug. 26, 2022), https://perma.cc/JH79-NBEB.

[14] Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. H, §§ 506–507, 136 Stat. 49 (2022).

[15] Application of the Hyde Amend. to the Provision of Transp. for Women Seeking Abortions, 46 Op. O.L.C. ___ (Sept. 27, 2022), https://perma.cc/QTQ3-TBT6.

[16] Memorandum from Sec'y of Def. on Ensuring Access to Reprod. Healthcare (Oct. 20, 2022), https://perma.cc/R4PY-R2AS.

10 U.S.C. 1093. DOD also appears to be using its vast budget to retaliate against states that protect the unborn and to relocate military installations to states that allow abortion on demand.[17] And the Department of Justice (DOJ) supports and defends the administration's many new abortion mandates and programs—despite DOJ's own appropriations statute's prohibition on using any funds to "require any person to perform, or facilitate in any way the performance of, any abortion."[18]

B. Converting veterans' hospitals into abortion clinics.

The U.S. Department of Veterans' Affairs (VA) likewise found after *Dobbs* a novel abortion power previously denied to it by Congress —a power it had "never before adopted" or even noticed. Cf. *NFIB*, 142 S. Ct. at 666. The VA began performing abortions in veterans' hospitals—on demand through all nine months of pregnancy in all 50 states.[19]

Section 106 of the Veterans Healthcare Act of 1992, Pub. L. No. 102-585, 106 Stat. 4943 (1992), directly bans the performance of abortions in the VA system. But the VA skipped advance notice or comment to begin exercising that denied authority, and it seized "a wafer-thin reed on which to rest such sweeping power." *Ala. Ass'n of Realtors* v. *HHS*,

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[17] Courtney Kube & Carol E. Lee, *Biden administration may halt plans to move Space Command to Alabama over state's abortion law, officials say*, NBC News (May 15, 2023), https://perma.cc/DG2B-TY3Z.

[18] Consolidated Appropriations Act of 2022, Pub. L. 117-103, Div. B., Tit. II, § 203, 136 Stat. 49, 131 (2022).

[19] VA, Reproductive Health Services, 87 Fed. Reg. 55,287 (Sept. 9, 2022).

141 S. Ct. 2485, 2489 (2021). In the summer of 2022, for the first time, the VA (alongside DOJ's Office of Legal Counsel) claimed that Congress had silently negated the effect of Section 106 by implication in its 1996 amendments to the Act, 38 U.S.C. 1710.[20] That 1996 amendment nowhere states that it repealed Section 106; indeed, it says nothing about abortion. Instead, 38 U.S.C. 1710 merely states that the VA can give eligible veterans "medical services which the Secretary determines to be needed"—a general power to provide healthcare that the Biden administration decided was good enough to empower it to perform abortion.

The new VA rule also runs afoul of the Assimilative Crimes Act, which provides that, in a federal government building, such as a VA hospital, state criminal law applies. This includes state laws prohibiting elective abortion and regulating the practice of medicine. 18 U.S.C. 13(a). In another post-*Dobbs* memorandum, DOJ brushed aside those concerns as well.[21]

This new abortion-on-demand VA regime was challenged by a VA nurse practitioner whose request for religious accommodation fell on deaf ears. To no one's surprise, the VA claimed that courts must defer to the agency under *Chevron*.[22] The VA cited

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[20] *Ibid.*; Intergovernmental Immunity for the VA and Its Emps. When Providing Certain Abortion Servs., 46 Op. O.L.C. ___, 7–8 (Sept. 21, 2022), https://perma.cc/7TA2-HBES.

[21] Application of the Assimilative Crimes Act to Conduct of Fed. Emps. Authorized by Fed. L., 46 Op. O.L.C. ___ (Aug. 12, 2022), https://perma.cc/HR9Q-T5CF.

[22] *Carter* v. *McDonough*, No. 6:22-cv-01275, ECF No. 31 at 34–35 (citing *Astrue* v. *Capato ex rel. B.N.C.*, 566 U.S. 541, 558 (2012)).

precedent bowing to the agency's "considerable expertise" in "interpreting and applying the various veterans' benefits statutes."[23]

C. Transforming emergency rooms into abortion clinics.

HHS has also sought to turn all hospital emergency rooms into on-demand abortion clinics. Just over a fortnight after *Dobbs* was decided, HHS told all hospitals receiving Medicare funds that, regardless of state laws protecting the unborn, emergency room doctors must perform or complete abortions under HHS's novel interpretation of the 1986 Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd.[24]

This EMTALA abortion mandate was a brazen bureaucratic imposition on several levels. As a federal district court held when it enjoined the mandate, the mandate lacked statutory authority for at least four reasons: (1) EMTALA says nothing about abortions, much less mandating them; (2) four times, EMTALA explicitly requires stabilizing the "unborn child"; (3) EMTALA and the Social Security Act *twice* disavow any preemption of state laws unless there is a direct conflict with the language of EMTALA; and (4) lower courts have widely held that EMTALA imposes no medical standard of care, because it seeks instead to stop the dumping of patients unable to pay.

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[23] *Id*. (quoting *Kirkhuff* v. *Nimmo*, 683 F.2d 544, 549 (D.C. Cir. 1982)).

[24] Memorandum from Ctrs. for Medicare & Medicaid Servs. on Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss (July 11, 2022) (revised Aug. 25, 2022), https://perma.cc/ND68-86SK.

Texas v. *Becerra*, 623 F. Supp. 3d 696, 724–733 (N.D. Tex. 2022).

President Reagan signed EMTALA in 1986, and not once until HHS's July 2022 memorandum did a federal agency declare that EMTALA mandates abortions. Yet agency officials concluded that the statute authorized them to impose that mandate, and they imposed it without giving notice or an opportunity to the public to comment, in violation of the Medicare Act and the Administrative Procedure Act (APA). *Texa*s v. *Becerra*, 623 F. Supp. 3d at 733–735.

Even though the agency failed to promulgate a final rule, the district court considered whether it had to defer to HHS's interpretation of EMTALA under *Chevron*. *Texas* v. *Becerra*, 623 F. Supp. 3d at 724–725. The court rejected HHS's interpretation, but that case is on appeal, with *Chevron* still front and center.

D. Allowing the postal service to deliver chemical abortion drugs.

Making emergency room doctors perform and complete abortions was just the beginning. The current administration's main response to *Dobbs* has been to skirt federal and state protections for unborn life by creating a 50-state online mail-order abortion economy.

Since the day *Dobbs* was decided, President Biden has directed his cabinet to ensure that women have "access" to chemical abortion drugs "no matter where

they live"[25] and to make these drugs "as widely accessible as possible"—"including when prescribed through telehealth and sent by mail."[26] HHS Secretary Xavier Becerra has "directed every part of my Department to do any and everything" to "double down and use every lever we have."[27]

The Comstock Act of 1873 explicitly prohibits the use of "any express company or other common carrier or interactive computer service" for carriage in interstate commerce of "any drug, medicine, article, or thing designed, adapted or intended for producing abortion." 18 U.S.C. 1462. The Act similarly prohibits the mailing of any "article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion." 18 U.S.C. 1461. This Act has no ambiguity: it "indicates a national policy of discountenancing abortion as inimical to the national life." *Bours* v. *United States*, 229 F. 960, 964 (7th Cir. 1915).

Yet, "in the wake of *Dobbs*," DOJ advised the U.S. Postal Service that these criminal statutes do not restrict shipping chemical abortion drugs through the mail or by common carrier and obtaining them online—even though these drugs are "used to perform

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[25] White House, FACT SHEET: President Biden to Sign Memorandum on Ensuring Safe Access to Medication Abortion (Jan. 22, 2023), https://perma.cc/U9Q8-S9QT.

[26] White House, FACT SHEET: President Biden Announces Actions In Light of Today's Supreme Court Decision on *Dobbs* v. *Jackson Women's Health Organization* (June 24, 2022), https://perma.cc/53SQ-VM42.

[27] HHS, HHS Secretary Becerra's Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), https://perma.cc/89AZ-RFL4.

abortions"—so long as "the sender lacks the intent that the recipient of the drugs will use them unlawfully."[28] Soon after, the U.S. Food & Drug Administration (FDA) adopted this interpretation[29] to allow chemical abortion drugs to be ordered via telehealth and shipped to women and girls nationwide via mail or common carrier—no in-person medical examination required.[30]

The federal government's willful defiance of crystal-clear federal and state abortion statutes deserves no deference from any court. See *All. for Hippocratic Med.* v. *FDA*, No. 23-10362, 2023 WL 2913725, at *20–21 (5th Cir. Apr. 12, 2023) (observing that HHS and FDA "argue that the Comstock Act does not mean what it says it means").

E. Turning pharmacies into abortion drug dispensaries.

HHS also told the nation's pharmacies—all 60,000 of them—that because they serve patients covered by a federally funded plan, they must stock and dispense chemical abortion drugs and contraceptives.[31] This pharmacy mandate was

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[28] Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. __ (Dec. 23, 2022), https://perma.cc/AY4S-8UL4.

[29] Memorandum from FDA on Review of Supplemental Drug Applications Proposing Modifications to the Mifepristone REMS Program at 144 (Dec. 23, 2022), https://perma.cc/YKA4-DGUV.

[30] FDA, REMS Single Shared System for Mifepristone 200 mg (Jan. 2023), https://perma.cc/MJT5-35LF.

[31] HHS, Off. for Civ. Rts., *Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services* (July 13, 2022), https://perma.cc/KTQ5-M7FP.

another White House ploy "to protect access to medication abortion."[32]

Like the EMTALA abortion mandate, agency officials did not subject the pharmacy abortion mandate to a notice-and-comment process. Instead, HHS claimed it was merely informing regulated entities of pre-existing statutory obligations. According to HHS officials, the mandate implicitly exists under Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. 18116, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibit sex and disability discrimination but do not mention abortion.[33]

HHS's pharmacy mandate has the same lack of statutory authority, and the same dubious merit, as its other abortion efforts. All of them are increasingly common attempts to "discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (cleaned up). No federal regulation states that Sections 1557 or 504 require pharmacies to stock and dispense first-trimester abortion drugs, nor could it. That is because the ACA *preserves* federal laws protecting conscience rights and makes no attempt to preempt state law, including those prohibiting abortion. 42 U.S.C. 18023(c). Moreover, Section 1557 incorporates Title IX of the Education Amendments of 1972, and so the pharmacy mandate contradicts Congress' statement that Title IX does not require any entity to provide any service related to abortion. 20 U.S.C. 1688. The pharmacy mandate also conflicts with the Hyde Amendment,

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[32] White House, FACTSHEET, *supra* note 7.
[33] HHS, Off. for Civ. Rts., *supra* note 31.

which prohibits any federal funding of abortions, with limited exceptions.[34]

But when HHS's pharmacy mandate was challenged under the Administrative Procedure Act by a state and a Catholic pharmacy, HHS again claimed that its interpretation of federal civil rights statutes was within the "heartland" of its agency expertise, so courts must give way to HHS enforcement.[35] And, if HHS includes this mandate in a future Section 1557 rule,[36] HHS will almost certainly claim *Chevron* deference. Yet the agency should not have that tool to aid its efforts to create new abortion demands.

F. Blocking enforcement of federal or state abortion statutes.

After *Dobbs*, the Biden administration not only seeks to mandate and enable abortion—it seeks to block any enforcement of federal or state laws protecting innocent human life or conscience rights.

HHS discovered a never-before-found authority in the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[37] to privilege abortion-related evidence from any use in court or in law enforcement

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[34] Hyde Amendment, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, Div. H., Tit. V, §§ 506–07.

[35] Defs.' Mot. Dismiss, *Texas* v. *HHS*, No. 7:23-cv-00022-DC, ECF No. 31 at 22–23 (W.D. Tex. May 8, 2023), *motion denied*, *Texas* v. *HHS*, No. 7:23-cv-00022-DC, 2023 WL 4629168 (July 12, 2023).

[36] See, *e.g.*, HHS, Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022).

[37] Pub. L. No. 104-191, 110 Stat. 1936 (1996).

investigation. Motivated by "concerns" about *Dobbs*,[38] HHS is finalizing a rule (with preemptive effect on state laws) to (1) block the use of "reproductive healthcare information" in federal or state civil or criminal investigations or legal proceedings, even when a court would ordinarily approve the release or use of the information, and (2) consider unborn life "non-persons" under HIPAA.[39] Secretary Becerra explained that after *Dobbs*, President Biden had "call[ed] on HHS to take action to meet this moment and we have wasted no time in doing so."[40]

By taking this step, HHS is hijacking HIPAA's broad delegation of authority so that HHS may privilege from disclosure evidence necessary to enforce laws protecting unborn life—creating a practical right to do what federal and state laws expressly forbid.[41]

HHS has "never previously claimed powers of this magnitude." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2358 (2023). Prior HIPAA exemptions to disclosure to law enforcement were "extremely modest and narrow in scope." *Ibid.* And it would be "odd indeed" if Congress had tucked authority to negate the enforcement of any abortion law in such "a relatively obscure

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[38] HHS, HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 88 Fed. Reg. 23,506, 23,507 (Apr. 17, 2023).

[39] 88 Fed. Reg. at 23,506, 23,527, 23,532, 23,552–53.

[40] Press Release, HHS, HHS Proposes Measures to Bolster Patient-Provider Confidentiality Around Reproductive Health Care (Apr. 12, 2023), https://perma.cc/EUY5-LY86.

[41] *E.g.*, 10 U.S.C. 919a; 18 U.S.C 1841, 1461, 1462, 1531; 19 U.S.C 1305; see also 18 U.S.C. 1961(1)(b), as added by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2143; 18 U.S.C. 1852, 1956, 1957.

provision" of HIPAA. *Sackett* v. *EPA*, 143 S. Ct. 1322, 1340 (2023). Of course, Congress did no such thing.

HHS lacks *any* authority to wield HIPAA in this way. And the agency has no expertise in law enforcement or in criminal law and procedure. Congress said that HIPAA privacy rules may set forth basic healthcare privacy standards, but HHS could not limit public health investigations. 42 U.S.C. 1320d-7. And the only statute that HHS cites to support defining unborn life as non-persons reads, "Nothing in this section shall be construed to affirm, *deny*, expand, or *contract* any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive.'" 1 U.S.C. 8 (emphasis added). In fact, the Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. 110–233, 122 Stat. 881, which amended the HIPAA privacy rule, 42 U.S.C.1320d–9, repeatedly states in other provisions that privacy protections for information of an "individual or family member" extend to information of "any fetus carried by such pregnant woman" and "any embryo," 26 U.S.C.A. 9802(g); 29 U.S.C. 1182(f); 42 U.S.C. 300gg–4(f), 300gg–53(f), 42 U.S.C. 1395ss(x)(4); 42 U.S.C.A. 2000ff-8(b).

Once again, HHS seeks to employ "[a]n overly broad interpretation" of a longstanding statute to decide for itself a major question of vast political significance. *Sackett*, 143 S. Ct. at 1341. And unless this Court sets aside *Chevron* deference, it remains a shield for HHS to invoke when that interpretation is challenged in court.

G. Bringing back the contraceptive and abortifacient mandate.

Despite a decade of litigation over the ACA's contraceptive mandate, including multiple trips to this Court, HHS is pursuing rulemaking to re-impose that mandate, at least in part.[42]

The federal courts were embroiled in litigation on this issue between 2011 and 2020. *E.g.*, *Zubik* v. *Burwell*, 578 U.S. 403, 405 (2016) (per curiam); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688 (2014). The controversy subsided only when the prior administration issued religious and moral exemptions that this Court upheld in *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2372 (2020).

But the President is bringing this issue back: he says that *Dobbs* made expanding access to contraception "more critical"[43] and gives HHS cause to rescind past exemptions.[44] HHS is thus finalizing a rule to repeal moral exemptions outright;[45] to possibly eliminate religious exemptions by a proposal akin to the previous "accommodation" regime;[46] and to create an elaborate and illegal scheme to fund contraception using inapplicable marketplace user fees (much like

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[42] IRS, Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7,236 (February 2, 2023).
[43] Exec. Order 14101, Strengthening Access to Affordable, High-Quality Contraception and Family Planning Services, 88 Fed. Reg. 41,815 (June 28, 2023).
[44] 88 Fed. Reg. at 7,240, 7,243, 7,250, 7,252.
[45] 88 Fed. Reg. at 7,249.
[46] 88 Fed. Reg. at 7,248.

the appropriations clause run-around at issue in this case).[47]

No provision of the ACA requires coverage of contraception or abortifacients, much less mandates it over conscientious objections. 42 U.S.C. 300gg-13. And the underlying coverage guidelines mandating contraceptives in health insurance plans have never satisfied the APA. See *Little Sisters of the Poor*, 140 S. Ct. at 2382 n. 8 (HHS "has altered its Guidelines multiple times since 2011, always proceeding without notice and comment."). One federal court has already held that HHS's promulgation of its contraceptive mandate updates violated APA requirements. *Tice-Harouff* v. *Johnson*, No. 6:22-CV-201-JDK, 2022 WL 3350375 (E.D. Tex. Aug. 12, 2022). But it is inevitable that other courts will defer to HHS and rule the opposite way, requiring this Court to review the issue yet again.

II. Agencies are weaponizing federal civil-rights laws to impose radical gender ideology.

Federal officials are also undeserving of *Chevron* deference because they are trying to arrogate to themselves decisions of great "magnitude and consequence on a matter of earnest and profound debate across the country," *Biden* v. *Nebraska*, 143 S. Ct. at 2374 (cleaned up). Agencies are weaponizing federal civil rights laws to contradict important biological distinctions based on sex, threatening religious liberty, free speech, parental rights, and the equal opportunities of women and girls.

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[47] 88 Fed. Reg. 7,252–53.

Since day one of President Biden's term, federal agencies have been implementing a whole-of-government agenda to redefine "sex" discrimination by expanding *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1753 (2020), beyond all recognition.[48] *Bostock* made clear that this Court's decision did *not* extend beyond situations of hiring and firing under Title VII, and did *not* consider women's sports, intimate spaces, religious liberty, or other civil rights questions. Yet agencies have seized on *Bostock* to "conveniently enable[]" the President "'to enact a program' that Congress has chosen not to enact itself"—indeed, a program Congress has *refused* to enact.[49] *Biden* v. *Nebraska*, 143 S. Ct. at 2373 (quoting *West Virginia* v. *EPA*, 142 S. Ct. at 2614).

Because *Chevron* deference allows unaccountable agencies to decide questions Congress should decide, *Chevron* deference is a dangerous doctrine in the hands of these officials.

A. Coercing doctors to harm their patients.

HHS reinterpreted the ACA to require healthcare providers to harm their patients—and it has claimed *Chevron* deference for this view.

The practice of medicine is biologically based, and doctors cannot safely ignore the biological differences between men and women. But HHS has reinterpreted "sex" in Section 1557 of the ACA to mean "gender identity." Under this interpretation, HHS seeks to

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[48] Exec. Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

[49] *E.g.*, Equality Act, S. 5, 118th Cong. (2023); Equality Act, H.R. 15, 118th Cong. (2023).

force doctors to administer puberty blockers and cross-sex hormones to patients who identify as the opposite sex—and it even coerces doctors to remove healthy organs when those patients request it.[50] Mandates like these inhibit full and frank conversations between doctors and patients, and they can drive conscientious healthcare professionals and counselors out of the healing professions entirely. *E.g.*, *Tingley* v. *Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022), pet. for cert. filed, No. 22-942 (U.S. Mar. 27, 2023).

No one thought Congress required doctors to medically assist patients to present as the opposite sex when it passed the ACA in 2010. Section 1557 incorporates Title IX, which codified sex as a male-female binary. And, like Title IX, the ACA itself repeatedly refers to men and women in biologically binary terms. See, *e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 261, 334, 343, 551, 577, 626, 650, 670, 785, 809, 873, 890, 966, 1003 (2010).

HHS's gender identity mandate harms children and adults who struggle with gender dysphoria. As one court said, this mandate "frustrate[s] the proper care of gender dysphoria, where . . . a diagnosis occurs following the considered involvement of medical professionals." *Christian Emps. All.* v. *EEOC*, No. 1:21-CV-195, 2022 WL 1573689, at *6 n.1 (D.N.D.

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[50] HHS, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. pt. 92); Notice of Interpretation and Enforcement of Section 1557, 86 Fed. Reg. 27,984, 27,985 (May 25, 2021); see also HHS, Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022) (proposed rule reinstating 2016 provisions).

May 16, 2022). Worse yet, by branding some treatments "as 'discrimination,' the HHS prohibits the medical profession from evaluating what is best for the patient in what is certainly a complex mental health question." *Ibid*.

Unsurprisingly, HHS has invoked *Chevron* deference in defense of this mandate. *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 677, 687 (N.D. Tex. 2016). This interpretation was rejected by some courts as contrary to the statute, *ibid*.; *Neese* v. *Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425, at *1 (N.D. Tex. Nov. 11, 2022), or as lacking reasoned explanation of how it follows from the statute, *Texas* v. *EEOC*, No. 2:21-CV-194-Z, 2022 WL 4835346, at *9 (N.D. Tex. Oct. 1, 2022). But no court should be forced to accept HHS's "implausible interpretation," *Sackett*, 143 S. Ct. at 1340—let alone sidestep the question of agency authority—by deferring to an agency pursuing such mischief.

B. Forcing employers to pay for puberty blockers, cross-sex hormones, and amputating healthy organs.

The Equal Employment Opportunity Commission (EEOC) likewise seeks to rewrite Title VII to force employers to provide insurance coverage for puberty blockers, cross-sex hormones, and surgeries.[51]

CEA, among others, has already needed to obtain judicial relief under RFRA to protect Christian employers from this mandate. *Christian Emps. All.*, 2022 WL 1573689, at *3, 6; *Religious Sisters of Mercy*

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[51] *E.g.*, EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021), https://perma.cc/XUQ3-KG26.

v. *Azar*, 513 F. Supp. 3d 1113, 1131 (D.N.D. 2021). This mandate has also been enjoined in some states for creating a new rule without following notice-and-comment procedures. *Tennessee* v. *U.S. Dep't of Educ.*, 615 F.Supp.3d 807, 838–840 (E.D. Tenn. 2022), *appeal docketed*, No. 22-5807 (6th Cir. Sept. 13, 2022). And the EEOC guidance establishing this mandate was vacated by a district court for exceeding the agency's statutory authority. *Texas* v. *EEOC*, 2022 WL 4835346.

Still, EEOC's enthusiastic attempt and the ongoing litigation show the danger posed to fundamental freedoms if courts defer to agencies that interpret longstanding statutes to impose new and controversial mandates on the American people.

C. Ending women's sports.

The U.S. Department of Education (ED) is transforming Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), and threatening to erode the advancements women have long fought to achieve. Fifty years ago, Congress acted to protect equal opportunity for women by passing Title IX. But the Department has issued "guidance" that interprets "sex" in Title IX to mean "gender identity," compelling schools to allow males who identify as girls to compete in female sports.[52] The Department issued this

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[52] Exec. Order No. 14021, Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. 13,803 (Mar. 8, 2021); Memorandum from Pamela Karlan on Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://perma.cc/CWW8-7DM9.

mandate without notice and comment,[53] and so it has been enjoined in some states, *Tennessee* v. *U.S. Dep't of Educ.*, 615 F.Supp.3d 807 (E.D. Tenn. 2022), *appeal docketed*, No. 22-5807 (6th Cir. Sept. 13, 2022), while the Department is finalizing the same mandate through rulemaking.[54]

When the Department's final rule issues, the agency will likely inevitably *Chevron* deference. In fact, when it sought to impose the same mandate during the Obama administration,[55] the Department claimed *Auer* deference for the same view of its own binding Title IX regulations. *Texas* v. *United States*, 201 F. Supp. 3d 810, 827–28 (N.D. Tex. 2016); *G.G. ex rel. Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

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[53] ED, 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. 32,637 (June 22, 2021).

[54] ED, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020); ED, 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. 22,860 (April 13, 2023).

[55] ED & DOJ, Dear Colleague Letter on Transgender Students (May 13, 2016), https://perma.cc/GNS3-QXXH ("Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances. When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.").

No court should be forced by *Chevron* to defer to the Department's claim that Title IX means the opposite of what it says. The statute deals with discrimination on the basis of sex, not gender identity, and Title IX's direct reference to a male-female binary excludes any gender identity interpretation. 20 U.S.C. 1681. Moreover, Congress specifically asked for, and then ratified, Title IX regulations and guidance that *require* separate sports teams for women and girls.[56] Title IX has thus always been interpreted as an equal opportunity provision that requires women's sports opportunities, prohibits requiring women to compete against men in those situations, and reflects that women have the right to privacy and safety in intimate spaces like locker rooms. 34 C.F.R. 106.33, 106.34, 106.41.

When government officials ignore biological reality, people get hurt. In athletics, girls may be physically hurt; and across the country, women and girls are unjustly losing medals, podium spots, public recognition, and the opportunity to compete as males take their places. And in education, the Department's reinterpretation of sex harms students and teachers. It means that grade schools must treat students as whatever sex the child prefers, even without parents' knowledge or consent. It requires universities to censor and compel speech by forcing students and professors to use pronouns and titles inconsistent with a person's sex, on pain of Title IX discrimination and harassment proceedings that lack many standard due process protections. As things stand, *Chevron*

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[56] See, *e.g.*, Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003).

remains a shield for executive-branch officials seeking to impose these harms.

D. Forcing colleges to allow men in women's showers and bedrooms.

The U.S. Department of Housing and Urban Development (HUD) has likewise sought to expand the Fair Housing Act to diminish women's equal opportunities and privacy in housing. HUD issued a "directive" that requires colleges to open female showers, restrooms, and dorm rooms to biological males who assert a female gender identity—without notice or comment and without noting any exceptions.[57]

HUD directed that the 1974 Fair Housing Act's sex-discrimination provisions be understood to include sexual orientation and gender identity, even though those provisions say nothing about those subjects. 42 U.S.C. 3604 (a) & (b); 24 C.F.R. 100.50 (b)(1)–(3). Under this reading of the Act, colleges and universities may no longer keep dorm policies that separate student housing by sex regardless of gender identity, or that require students to refrain from sex outside of marriage between one man and one woman. In court, HUD has admitted that such policies are unlawful under the directive,[58] but stated that it has yet to enforce this mandate on religious colleges or

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[57] Memorandum from Acting Assistant Sec'y for Fair Housing & Equal Opportunity on Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), https://perma.cc/V7DV-E797.

[58] HUD Opp'n to Prelim. Inj., *Sch. of the Ozarks, Inc. v. Biden*, No. 6:21-cv-03089, ECF No. 19 at 20, 41–42, 44–45 (May 6, 2021); Tr., *Sch. of the Ozarks, Inc. v. Biden*, No. 6:21-cv-03089, ECF No. 23 at 42, 57–59 (May 19, 2023).

consider its application to them, *Sch. of the Ozarks, Inc.* v. *Biden*, 41 F.4th 992, 998–99, 1001 (8th Cir. 2022), *cert. denied,* No. 22-816, 2023 WL 4065624 (U.S. June 20, 2023).[59]

This transformation of housing and education, made with no clear congressional statement of authority, is another example of how agencies distort separation of powers principles and act in a way inconsistent with the democratic process. *Chevron* deference emboldens agencies to persist in this distortion.

* * *

When federal agencies are not actively restrained by courts, they threaten fundamental rights by re-interpreting statutes to expand their authority. This Court should hold that agencies do not possess blank checks to read their policy preferences into silent or ambiguous federal statutes or to impose broad mandates in service of nation-shaping political agendas.

The *Chevron* regime undoubtedly started with the best of intentions and respect for a co-equal branch. But time has shown that the doctrine encourages politicized agencies to reinterpret federal laws in ways that Congress could not have imagined, including reinterpretations that threaten life, religious liberty, and free speech, and that impose far-reaching gender ideology throughout the nation. Only this Court can put an end to judicial deference that empowers executive agencies and officials to reach far beyond their congressionally prescribed authority.

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[59] HUD Br., *Sch. of the Ozarks, Inc. v. Biden*, No. 21-2270 at 20, 23, 27–29 (Sept. 2, 2021).

CONCLUSION

For these reasons, and those explained by Petitioners, the Court should end *Chevron* deference and the decision below should be reversed.

Respectfully submitted,

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