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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF CHRISTIAN EMPLOYERS ALLIANCE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(b), Christian Employers Alliance (CEA) respectfully moves this Court for leave to file the accompanying *amicus curiae* brief supporting Petitioners. Christian Employers Alliance's counsel requested the consent of the parties to the filing of its proposed amicus curiae brief with the required 10-day notice on November 21, 2022, and again on December 8, 2022. Counsel for Petitioners consented to the brief's filing. Counsel for Respondents failed to provide a response at all, even though counsel for Respondents consented to the filing of briefs by some other amici.

CEA is an alliance of Christian-owned businesses in the United States. CEA's mission as a ministry 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 a deep commitment to living out their Christian faith in everyday life.

CEA provides advocacy on legal policy issues on behalf of its members. These issues include the principles of religious freedom, 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 frequently disrespect these fundamental principles, and agency officials are far too willing to impose their personal political agendas despite the lack of clear statutory authority from

Congress. In just the past few years, CEA has had to go to court, and has won injunctions, against federal agencies.

CEA knows firsthand that federal agencies do not deserve the trust or deference of federal courts when they impose rules based on unclear statutory language, especially when it affects the most important issues. For all these reasons, it is important to the interests of CEA and its members, and to facilitate the Court's consideration of this matter, that leave be granted for CEA to file this amicus brief.

Therefore, CEA respectfully requests that the motion be granted.

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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 as a ministry 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 provides advocacy on legal policy issues on behalf of its members. These issues include the principles of religious freedom, 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 frequently disrespect these fundamental principles, and agency officials are far too willing to impose their personal political agendas despite the lack of clear statutory 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. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and the petitioners consented. Counsel for the government had not responded at the time this brief was printed, so a motion for leave to file accompanies this brief.

- to pay for early abortion-causing drugs in employer health plans[2];
- to coerce unvaccinated employees to receive a COVID-19 vaccine, despite employees' conscientious objections[3]; 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.[4]

CEA thus knows firsthand that federal agencies do not deserve the trust or deference of federal courts when they impose rules based on unclear statutory language, especially when it affects the most important issues. CEA urges the Court to grant the petition and rein in unaccountable bureaucrats in the executive branch.

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[2] *Christian Emps. All.* v. *Azar*, No. 3:16-CV-309, 2019 WL 2130142, at *2 (D.N.D. May 15, 2019).

[3] *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. *Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (per curiam), *and application dismissed sub nom. The S. Baptist Theological Seminary* v. *Dep't of Lab.*, 142 S. Ct. 890 (2022).

[4] *Christian Emps. All.* v. *U.S. Equal Opportunity Comm'n*, No. 1:21-CV-195, 2022 WL 1573689, at *9 (D.N.D. May 16, 2022).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Chevron deference threatens fundamental rights and deeply important political concerns, in addition to its threat to economic vibrancy.

The general 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 inflicting abuses against the freedom and fundamental values of American citizens and businesses. As recounted in this brief, federal agencies routinely use unclear or inapposite statutory language to impose mandates and spend tax dollars that 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 apparent statutory authority or concern for its absence. When left to their own devices—or to the political calculations of the White House—agencies stretch and strain their authority to impose on the everyday lives of American citizens in ways Congress never 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*, No. 21-972, 2022 WL 16726027, at *6 (U.S. Nov. 7, 2022) (Gorusch, J., dissenting from the denial of certiorari).

Chevron deference is a bad idea for many reasons. But it is especially dangerous to fundamental freedoms. The idea that bureaucrats know better

than judges how to interpret the law cedes to agencies the authority this Court has reserved to Congress: the ability to resolve the most highly contentious social and cultural "decisions of vast economic and political significance." See *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2605 (2022). The petition should thus be granted to overrule *Chevron* deference.

ARGUMENT

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

Federal agencies have recently shown they can be used to drive a nationwide, politicized agenda in explicit rejection of this Court's decisions, and of the authority of States, by imposing mandates and programs that lack clear statutory authority.

The Biden administration reacted to this Court's decision in *Dobbs* v. *Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022), by issuing a raft of abortion mandates—even though the statutes that the agencies cite contain no such authorizations.[5] Agencies launched huge new programs forcing states and private citizens to perform abortions and spend taxpayer money to perform and pay for abortions. In each case, agency officials used their positions to brush aside the absence of federal authority and to claim primacy over

[5] See, *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).

state laws to which this Court deferred in *Dobbs* as a matter of federalism.

These agency actions epitomize the kind of "whole-of-government"[6] and "nationwide"[7] effort that this Court warned is an inadequate substitute for clear statutory authority. Cf. *West Virginia*, 142 S. Ct. at 2604 (White House described Clean Power Plan as "aggressive transformation in the domestic energy industry"); *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 663 (2022) (per curiam) (White House stated multi-agency goal to impose vaccine requirements on about 100 million Americans).

Because these abortion mandates are new, their statutory authority has not been fully litigated. But whether agencies cite *Chevron* deference in their defense, the policies show agencies are not good candidates for judicial deference in interpreting their own authorities.

A. Transforming Hospitals into Abortion Clinics.

The U.S. Department of Health and Human Services (HHS) has sought to turn practically all hospitals into on-demand abortion clinics. As part of its anti-*Dobbs* campaign, HHS told all hospitals receiving Medicare funds that have emergency rooms, that regardless of state laws protecting the unborn

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[6] White House, Statement by President Joe Biden on Supreme Court Ruling on Texas Law SB8 (Sept. 2, 2022), https://perma.cc/VX9M-YWYH.

[7] 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.

they must perform abortions under HHS's novel interpretation of the 1986 Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd.[8]

This was a brazen bureaucratic imposition on several levels. As a federal district court held when it preliminary enjoined the mandate in Texas, and for members of certain pro-life medical organizations represented by undersigned counsel, the mandate lacked statutory authority for several reasons: (1) EMTALA says nothing about abortions or mandating them; (2) four times, EMTALA explicitly requires stabilizing the "unborn child"; (3) EMTALA and the Social Security Act 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, but instead is a statute designed to stop the dumping of patients unable to pay. See *Texas* v. *Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525, at *19–26 (N.D. Tex. Aug. 23, 2022).

President Reagan signed EMTALA in 1986, and not once until HHS's post-*Dobbs* memorandum did a federal agency declare that EMTALA mandates abortions. Yet the agency officials not only concluded that the statute authorized them to impose that mandate, they imposed it without giving notice or an opportunity to the public to comment, in violation of the Medicare Act and the APA. *Id*. at *27–28.

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[8] 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.

Notably, the district court considered whether *Chevron* deference applies because HHS claimed that EMTALA had given it authority to force doctors and hospitals to provide abortions. *Id.* at *19. The court rejected HHS's interpretation. But this Court should clarify the legal standard so lower courts do not have to defer to federal agencies that engage in this kind of politicized "statutory interpretation."

B. 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 first-trimester chemical abortion drugs.[9] Like the EMTALA abortion mandate, the agency officials did not subject that mandate to the notice-and-comment process, and they claimed that they were merely informing regulated entities of obligations that already existed under statutory law. In this instance, HHS officials asserted their mandate exists, *sotto voce,* under Section 1557 of the Affordable Care Act, 42 U.S.C. 18116, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which merely prohibit sex and disability discrimination and do not mention abortion. *Id.*

HHS's Pharmacy Mandate has the same lack of clear statutory authority, and the same dubious merit, as its EMTALA memorandum. Both are increasingly common attempts to "discover in a long-

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[9] 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.

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) (citation omitted). Both show why this Court should reject *Chevron* deference to agency interpretations in furtherance of their mandates.

The Pharmacy Mandate suffers from familiar flaws. No federal regulation states that Sections 504 or 1557 require pharmacies to stock and dispense first-trimester abortion drugs, nor could it. That is because the Affordable Care Act explicitly states that nothing in it negates federal laws regarding "refusal to provide abortion" or state laws prohibiting abortion. 42 U.S.C. 18023(c). And where Section 1557 only bans sex discrimination by incorporation of that ban under Title IX of the Education Amendments of 1972, the Pharmacy Mandate contradicts Congress' explicit statement in Title IX that it does not require any entity to provide any service related to an abortion. 20 U.S.C. 1688.

C. Turning Veterans' Hospitals into Abortion Clinics.

The U.S. Department of Veterans' Affairs (VA) likewise found a new power to promote abortion—a power it had "never before adopted" or even noticed. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

In response to *Dobbs*, the VA began performing abortions in veterans' hospitals—on demand through all nine months of pregnancy—no matter what pro-life state laws say.[10] Just as with HHS, the VA seized

[10] Dep't of Veterans Affairs (VA), Interim Final Rule, Reproductive Health Services, 87 Fed. Reg. 55,287 (Sept. 9, 2022).

on the flimsiest of statutory reeds to support its new assertion of power.

In the VA's underlying statute, Congress explicitly banned the performance of abortions in the VA system. See Section 106 of the Veterans Health Care Act of 1992, Pub. L. No. 102-585, 106 Stat. 4943. But in the summer of 2022, for the first time, the VA (in conjunction with the Department of Justice's Office of Legal Counsel) claimed that Congress had silently negated the effect of Section 106 by implication of its 1996 amendments to the Act.[11] That 1996 amendment did not actually repeal Section 106, and it said nothing about abortion. 38 U.S.C. 1710 merely states that the VA can give eligible veterans "medical services which the Secretary determines to be needed."

And in the Assimilative Crimes Act, Congress declared that in a federal government building, such as a VA hospital, state criminal law will apply—meaning, pro-life state laws banning elective abortion will apply, along with other state laws regulating the practice of medicine. But in another post-*Dobbs* memorandum, DOJ brushed aside those concerns as well.[12]

When an agency, including DOJ, is determined to implement and justify a White House priority, the lack of clear statutory authority is ultimately no

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[11] *Ibid*.; Dep't of Justice, Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services, 46 Op. O.L.C. ___, 7–8 (Sept. 21, 2022).

[12] Dep't of Justice, Application of the Assimilative Crimes Act to Conduct of Federal Employees Authorized by Federal Law, 46 Op. O.L.C. ___ (Aug. 12, 2022).

obstacle. This is so even in the presence of contrary language in other laws. Deferring to government officials in such circumstances makes no sense.

D. Funding Abortions with Taxpayer Dollars.

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

HHS announced 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, Pub. L. No. 117-103, Div. H, §§ 506–507, 136 Stat. 49, insisting that no HHS funds "shall be expended for any abortion" or "for health benefits coverage that includes coverage of abortion." Once again, DOJ's Office of Legal Counsel issued a post-*Dobbs* memo supporting this novel statutory interpretation.[14]

The Department of Defense announced it would transport service members to obtain abortions and expend funds so its doctors could get licensed in jurisdictions to perform abortions—despite congres-

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[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] Dep't of Justice, Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions, 46 Op. O.L.C. ___ (Sept. 27, 2022).

sional restrictions on spending military money for abortion. See 10 U.S.C. 1093.[15]

And even though Congress explicitly stated that no funds in the Title X family planning program can "be used in programs where abortion is a method of family planning," HHS is giving those funds to abortion clinics that engage in no physical or financial separation of their abortions and their federally funded family planning.[16] HHS is even using the funds to require entities to refer women for abortions.[17]

E. Bringing Back the Contraceptive and Abortifacient Mandate on Businesses and Non-Profits.

Despite over a decade of litigation about the Affordable Care Act's contraceptive and early abortifacient mandate, including multiple trips to this Court, HHS is pursuing rulemaking yet again to re-impose that mandate and repeal religious and

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

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

[17] 42 C.F.R. 59.5(a)(5)(i) & (ii) (entities must provide "referral upon request" for "[p]regnancy termination").

moral objections put in place by the last administration.[18]

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

But in keeping with a campaign promise to reimpose the mandate, President Biden's HHS has sent a rule to the White House for final review.[19] As with so many cases of government overreach against life, no provision of the ACA requires coverage of contraception, much less mandates it over conscientious objections. 42 U.S.C. 300gg-13.

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[18] Off. of Mgmt. & Budget, Exec. Off. of the President, Unified Agenda, Coverage of Certain Preventive Services Under the Affordable Care Act (CMS-9903), RIN: 0938-AU94 (2022), https://perma.cc/NX7L-WZSA ("This rule would propose amendments to the final rules regarding religious and moral exemptions and accommodations regarding coverage of certain preventive services under title I of the Patient Protection and Affordable Care Act.").

[19] John McCormack, *Biden Says He Would Rescind Exemption for Little Sisters of the Poor*, National Review (July 9, 2020), https://perma.cc/RAK8-TKJX; Off. of Mgmt. & Budget, Exec. Off. of the President, Pending EO 12866 Regulatory Review: Coverage of Certain Preventive Services Under the Affordable Care Act (CMS-9903) (2022), https://perma.cc/H3K3-G2UM.

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

Federal agencies are also undeserving of *Chevron* deference because they are weaponizing federal civil rights laws to impose radical gender ideology, thereby threatening religious liberty, free speech, parental rights, and the basic recognition of biological differences between men and women.

Bostock v. *Clayton County*, 140 S. Ct. 1731, 1753 (2020), made clear that this Court's decision did *not* interpret Title VII beyond situations of hiring and firing to questions of intimate spaces. It did not interpret other civil rights statutes. And it did not resolve religious liberty questions. Nevertheless, since day one of President Biden's term, federal agencies have been implementing a whole-of-government agenda to redefine "sex" discrimination to impose mandates far outside the narrow bounds established in *Bostock*.

On taking office, President Biden ordered every federal agency to enforce every sex discrimination law as though it covers sexual orientation and gender identity—with no regard for religious freedom, free speech, the rights of women and girls, and parental rights.[20]

Every federal agency involved in civil rights enforcement has thus been weaponizing *Bostock* to impose far-reaching mandates. These agency actions have no clear authorization from their underlying

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

statutes—which simply prohibit sex discrimination—and in many cases explicitly rely on rather than reject the biological binary between men and women. *Chevron* deference would be a dangerous doctrine in the hands of these agency officials run amok.

A. Coercing Religious Colleges to Put Men in Women's Dorm Rooms by Expanding the Fair Housing Act.

The U.S. Department of Housing and Urban Development (HUD) issued a "directive" that requires private religious colleges to open female showers, restrooms, and dorm rooms to biological males who assert a female gender identity—without notice or comment and with no mention of the impact on religious liberty.[21] As with many other agency mandates discussed here, HUD issued the directive without public notice or an opportunity for comment.

HUD has 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). This reinterpretation of the Fair Housing Act triggers its crippling punishments for violations, including six-figure civil penalties, unlimited punitive damages, and even prison time. 42 U.S.C. 3611–3614, 3631; 24 C.F.R. 103.215, 180.671, 180.705. HUD's directive orders federal, state, and private officials to "fully enforce" this new standard

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[21] 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.

on virtually all housing nationwide—including college dorms.

This new mandate diminishes women's privacy and safety. Religious schools like the College of the Ozarks in Point Lookout, Missouri, which filed a lawsuit against the mandate, seek to keep their religiously motivated dorm policies and faith-based policies on sexuality and student conduct, and to speak about those policies to their students. Their policies separate student housing by sex regardless of gender identity, and require students to refrain from sex outside of marriage between one man and one woman. Parents and students want the freedom to select schools that have such rules about college housing and behavior. But HUD's new directive precludes colleges from maintaining these policies unless they wish to risk catastrophic penalties.

In court, HUD has admitted its directive applies to religious colleges, but claims that federal courts have no power to examine whether HUD has the authority to issue this directive. *Sch. of the Ozarks, Inc.* v. *Biden*, 41 F.4th 992 (8th Cir. 2022), *pet. for rehearing denied*, No. 21-2270, 2022 WL 4589688, at *1 (8th Cir. Sept. 30, 2022).

A petition for certiorari by College of the Ozarks is forthcoming on this extraordinary assertion of federal agency power without giving regulated entities an opportunity to comment. *Chevron* deference should not extend to benefit agencies like those willing to issue directives so clearly at odds with statutory enabling language.

B. Ending Women's Sports by Hijacking Title IX.

The U.S. Department of Education (ED) likewise issued "guidance" that interpreted "sex" in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), to address new protected classes—compelling schools to enact many new policies, including to allow men to compete in women's sports.[22]

Once again, ED issued this mandate without notice and comment,[23] and so it has been enjoined in some states. *Tennessee* v. *U.S. Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), *appeal docketed*, No. 22-5807 (6th Cir. Sept. 13, 2022). But the agency is now also promulgating the mandate through rulemaking.[24]

When its final rule issues, *Chevron* deference should not exist as a defense to this redefinition of Title IX. Instead, federal courts—not politically motivated officials at ED—should determine whether Congress meant to end women's sports when it passed

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[22] 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.

[23] 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).

[24] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020).

Title IX. That may sound like a far-fetched position. But when the agency sought to impose the same mandate during the Obama administration, it claimed *Chevron* deference for its view of Title IX. *Texas* v. *United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016). It also claimed *Auer* deference for its view of its own binding regulations. *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).

Title IX provides no clear statutory authority for this mandate. The statute deals with discrimination on the basis of sex, not gender identity or sexual orientation. In fact, Title IX's direct statutory reference to a male-female binary excludes the gender identity interpretation being imposed by ED. 20 U.S.C. 1681, 1686. Congress enacted Title IX to ensure women had equal opportunity in academics and athletics. Thus, Title IX has always been interpreted as an equal opportunity provision that prohibits requiring women to compete against men and that 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.

Of course, rewriting Title IX does more than threaten to erode the advancements women have long fought to achieve. It threatens the rights of parents, students, and teachers. Under this new interpretation, the agency would require grade schools to treat students as whatever sex the child prefers, even without parents' knowledge or consent. This policy undermines parents' authority to make vital decisions about their child's emotional, mental, and physical health. What is more, public universities will be able—indeed, will be federally required—to censor and compel speech by forcing students and

professors, on pain of discrimination and harassment proceedings lacking due process protections—to use pronouns and titles that are inconsistent with a person's sex—even compelling religious students and teachers. No court should defer to such an interpretation of an otherwise clear statutory regime.

C. Coercing Doctors to Amputate Healthy Organs by Rewriting the Affordable Care Act.

HHS has also issued a mandate interpreting "sex" in Section 1557 of the Affordable Care Act to prohibit gender identity discrimination in virtually all healthcare settings. Under this mandate, HHS requires doctors to perform, refer for, and affirm many life-altering medical procedures, such as mastectomies, testosterone suppression, and hormone administration, to remove or impair the healthy organs of persons who identify as the opposite sex.[25]

No one thought Congress required this when it passed the ACA in 2010. Section 1557 derives from Title IX, where, as mentioned above, Congress codified sex as a male-female binary. The ACA itself likewise and repeatedly refers to men and women in biologically binary terms. See, *e.g.*, Pub. L. No. 111-148, 124 Stat. 119, 551 (referring to "pregnant women"); *id.* at 577 (providing reasonable break time

[25] 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 Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022) (proposed rule reinstating 2016 provisions).

for nursing mothers); *id*. at 261, 334, 343, 577, 626, 650, 670, 785, 809, 873, 890, 966, 1003. The very practice of medicine is biologically based, and it is impossible to practice if doctors are required to treat biological differences between men and women as if they are ideological constructs changeable by personal preference.

Again, HHS has asserted *Chevron* deference in its attempt to shield its reinterpretation of Section 1557 from direct review. *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 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). But other courts, rather than hold that HHS lacks statutory authority, issued injunctions against this mandate under the Religious Freedom Restoration Act—something that would be unnecessary if the statutory question was properly resolved in the absence of a looming *Chevron* analysis. *Religious Sisters of Mercy* v. *Azar*, 513 F. Supp. 3d 1113, 1139 (D.N.D. 2021); see also *Franciscan All., Inc.* v. *Becerra*, No. 7:16-cv-00108-O, 2021 WL 3492338 (N.D. Tex. Aug. 9, 2021), as amended (Aug. 16, 2021) (also entering RFRA injunction). CEA itself had to seek, and has so far obtained, preliminary injunctive relief against the mandate, which the court ordered under RFRA. *Christian Emps. All.* v. *U.S. Equal Opportunity Comm'n*, No. 1:21-CV-195, 2022 WL 1573689 (D.N.D. May 16, 2022). Meanwhile, HHS successfully persuaded another district court that it lacks the power to review this healthcare mandate. *Am. Coll. of Pediatricians* v. *Becerra*, No. 1:21-cv-195, 2022 WL 17084365, at *18 (E.D. Tenn. Nov. 18, 2022).

HHS's gender identity mandate harms children and adults who struggle with gender dysphoria. It coerces doctors to perform dangerous and life-altering medical procedures, even if doing so violates their medical judgment, their conscience, or their religious beliefs. It inhibits full and frank conversations between doctors and patients, driving Christian healthcare professionals and counselors out of the healing professions entirely. *Tingley* v. *Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022). And it precludes parents, children, and patients from seeking the medical treatment in their best interest.

As one court said, "Beyond the religious implications, the Biden HHS Notification and resulting HHS Guidance frustrate the proper care of gender dysphoria, where even among adults who experience the condition, a diagnosis occurs following the considered involvement of medical professionals." *Christian Emps. All.*, 2022 WL 1573689, at *6 n.1. "By branding the consideration 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*.

D. Forcing Employers to Pay for Amputating Healthy Organs by Reinterpreting Title VII.

Although *Bostock* did not reach any questions under Title VII other than hiring and firing, the Equal Employment Opportunity Commission (EEOC) has ignored the explicit parameters of *Bostock* to impose a broad sexual orientation and gender identity mandate covering all aspects of the employment relationship.[26] The mandate extends to intimate spaces and to such practices as health insurance coverage for the above-mentioned medical procedures. CEA, among others, has needed to obtain judicial relief under RFRA to protect its members from the health insurance coverage mandate. *Christian Emps. All.*, 2022 WL 1573689, at *3.

This mandate, too, has been enjoined under RFRA for Christian employers. *Id.* at *6; *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1131. It has also been enjoined in some states for creating a new rule without following notice-and-comment procedures. *Tennessee*, 2022 WL 2791450, at *22. And it was vacated by a district court in Texas for exceeding EEOC's statutory authority. *Texas* v. *EEOC*, No. 2:21-cv-00194, 2022 WL 4835346 (N.D. Tex. Oct. 1, 2022).

Nevertheless, EEOC's enthusiastic attempt and the ongoing litigation show yet again the danger posed to fundamental freedoms if this Court continues to require federal courts to defer to federal

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

agencies that interpret unclear statutes to impose mandates on the American people.

* * *

When they are not actively restrained by courts, agencies regularly threaten fundamental rights by re-interpreting statutes that do not say what agencies want them to say, to impose mandates in service of nation-shaping political agendas. This Court should hold once and for all that agencies are not entitled to blank checks to read their policy preferences into silent or even ambiguous federal statutes. The *Chevron* regime may have originated with the best of intentions and a proper respect for agency expertise. But time has shown that the doctrine has encouraged political bureaucrats to reinterpret federal laws in a way that threatens life, religious liberty, free speech, parental rights, and common sense about men and women. It is well past time for that judicial deference to end.

CONCLUSION

For the foregoing reasons, and those explained by Petitioners, the petition should be granted.

Respectfully submitted,

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