No. 22-451

In the Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *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

BRIEF *AMICUS CURIAE* OF THE LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the executive power must be checked to protect the free exercise of religion.

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INTEREST OF THE *AMICUS*[1]

The Little Sisters of the Poor (*Petites Sœurs des Pauvres*) were founded in 1839 in Brittany, France, by St. Jeanne Jugan. They are now a Roman Catholic religious congregation of more than 1,500 women who care for 10,000 elderly poor in 30 countries. From the very beginning, the Little Sisters have served needy elderly people of any race, sex, or religion. *Amicus* Little Sisters of the Poor Saints Peter and Paul Home is a Pennsylvania religious non-profit corporation that is part of the congregation.

Based on their Catholic beliefs, the Little Sisters oppose sterilization, contraception, and abortion, and believe it wrong to include those procedures in their employee health benefits. As a result of these beliefs, the Little Sisters have spent a decade resisting the regulator-created "contraceptive mandate" promulgated under the 2010 Patient Protection and Affordable Care Act, 42 U.S.C. 18001 *et seq*. The resulting litigation has resulted in multiple appeals that have reached this Court. See *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 571 U.S. 1171 (2014); *Zubik* v. *Burwell*, 578 U.S. 403 (2016); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Little Sisters of the Poor Jeanne Jugan Residence* v. *California*, 141 S. Ct. 192 (2020). That litigation remains pending in district courts in California and Pennsylvania, with no prospect of resolution in sight. See Status Report, *Pennsylvania* v. *Biden*,

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

No. 2:17-cv-04540 (E.D. Pa. Apr. 24, 2023), ECF 299; Joint Status Report, *California* v. *Becerra*, No. 4:17-cv-5783 (N.D. Cal. May 1, 2023), ECF 493.

The Little Sisters submit this brief for two reasons.

First, they urge the Court to adopt a rule of decision that will ensure that regulators can no longer use their powers to run roughshod over religious believers. The Little Sisters' experience with the contraceptive mandate shows that where regulators have the power to expand the reach of a statute beyond its text in ways that infringe on free exercise rights, sometimes they will. The Little Sisters request that this Court adopt a rule to check that executive overreach in a way that all federal courts—not just this Court—will enforce.

Second, they urge the Court to resolve this case in a way that would allow them to bring their own odyssey through the federal courts to an end. A decade (and counting) is too long.

INTRODUCTION

If they could visit us today, the Founders would not be surprised that at times government officials would attempt to wield the executive power in ways that go beyond what is authorized by statute, or that during a cycle of executive overreach they might use that power to target religious believers they do not like. After all, the entire frame of American government was built on the premise that unlike the British constitution, power had to be divided among different bodies that would check each other. That structure was designed to stop a concentration of power that inevitably led to abuses. And the Founders were well aware, after the bloody history of the English religious wars, that those

abuses would likely include use of the executive power to suppress religious exercise.

What would surprise the Founders is that a cycle of executive overreach has gone so long unchecked. For more than a decade (and arguably longer) federal regulators have used their power under *Chevron* to target religious believers. Yet the other branches have not yet brought this overreach to an end. Religious liberty disputes like the contraceptive mandate become frozen conflicts that Executive Branch regulators can continue indefinitely.

This case offers an opportunity for the Court to exercise the checking role the Constitution entrusts to it. Abjuring a rule of judicial deference that tends to fuel executive overreach is a good in itself. But eliminating undue deference will also reduce future church-state conflicts, since most recent religious liberty conflicts have originated not with Congress but with regulators.

Eliminating *Chevron* deference will not fix everything; this Court cannot make Congress do its job. But this Court can prevent the Executive Branch from rushing in where Congress fears to tread, and that alone would be an important rebalancing of power.

Moreover, as we explain below, eliminating *Chevron* deference would complement this Court's existing major questions and nondelegation doctrines. That offers the prospect of ending the current cycle of executive overreach, thus putting responsibility for government action back in the hands of the Constitution's ultimate guarantor of liberty: the People.

ARGUMENT

I. The Constitution is designed to limit overbroad executive power, which historically led to suppression of religious dissenters.

The history of executive power in the Anglo-American tradition is one of cyclical attempts at executive dominance that were eventually checked, sometimes by revolution or war. During periods of executive overreach, religious dissenters were typically the first to suffer from abuses of executive power. Mindful of these abuses, the Founders sought to break the cycle of overreach by limiting overbroad executive power.

A. English monarchs frequently used prerogative powers to punish religious dissenters.

During the early modern period, English monarchs frequently used the royal prerogative power to oppress religious dissenters. Royal prerogatives were (and are) "the fully discretionary powers of the executive that exist independently of statute, and are not subject to legislative regulation or abridgement." Michael W. McConnell, *The President Who Would Not Be King* ("*President*") 26 (2020). Blackstone held that when the King exercises a prerogative, "there is no legal authority that can either delay or resist him." *Ibid.*

One prerogative was the power of proclamations, which were issued by the monarch alone, without Parliament's involvement. The Stuart kings in particular attempted to extend the reach of proclamations by "adding legal obligations, beyond those required by statutes." Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 272 (2009); see also

Philip Hamburger, *Is Administrative Law Unlawful?* ("*Unlawful?*") 33-40 (2014). Indeed, from 1629 to 1640, Charles I attempted to rule entirely by proclamation, avoiding going to Parliament to raise funds. Reinstein 272. Other prerogatives invoked by the monarchs were powers to suspend a law or to dispense from a law in individual cases. See *President* 115-117.

Monarchs enforced their prerogative powers by means of "prerogative courts." *Unlawful?* 133-141. These courts, most notable among them the Star Chamber and the Court of High Commission, were instituted by legislation, but quickly arrogated to themselves additional powers based on royal prerogative. *Id.* at 135. Similarly, in Ireland, the English government instituted a prerogative court known as the Court of Castle Chamber. See Herbert Wood, *The Court of Castle Chamber or Star Chamber of Ireland*, 32 Proc. of the Royal Irish Acad. 152, 152 (1914).

In 1604, shortly after the accession of James I, "the jurisdictional conflict of the prerogative and the common law began in earnest." P.B. Waite, *The Struggle of Prerogative and Common Law in the Reign of James I*, Canadian J. Econ. & Pol. Sci. 144, 147 (1959). The struggle pitted the inquisitorial/civil-law style of the prerogative courts promoted by James against the common-law courts, whose champion was Sir Edward Coke. *Unlawful?* 40-41. James had come from Scotland, where the law was based to a much greater degree on Roman law and the related *ius commune*. And he had written extensively on the divine right of kings. See, *e.g.*, James I, *Basilikon Doron* (1599).

Several cases illuminated the conflicts between royal prerogative and the common law. In the *Case of Prohibitions*, the court had ruled that the King had no

power to adjudicate cases because he was not trained in the law. See *Prohibitions del Roy*, 12 Coke's Reports 64 (1607). James summoned the judges to explain themselves, but Coke stood firm that the King could not decide a common law land dispute. James did not react well: "With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege*." *Id.* at 65.[2]

In another prerogative case, the *Case of Proclamations*, the King's Bench, again with Coke involved, concluded that all royal prerogatives were subject to law and that the King could not use prerogative to make new law: "the King hath no prerogative, but that which the law of the land allows him." *Case of Proclamations*, 12 Coke's Reports 74, 75 (1611).[3] This principle was later adopted by Parliament—at the instigation of Sir Coke, who had since been fired by the King—in the 1628 Petition of Right, which significantly limited royal prerogatives. See Petition of Right, 3 Car. 1, c.1 (1628).

During the struggle between the Stuarts and Parliament, prerogative powers were frequently used to

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[2] A version of this quote from Bracton (and Coke) is inscribed on the pediment of the Harvard Law School library.

[3] Today, the *Case of Proclamations* is one of the leading cases on the nature of royal prerogative in British constitutional law. See *R (on the application of Miller)* v. *The Prime Minister* [2019] UKSC 41 at [32], [41] (citing the *Case of Proclamations* for principle that "an attempt to alter the law of the land by the use of the Crown's prerogative powers was unlawful").

attack religious dissenters. Catholics were brought before the Star Chamber, including Sir John Yorke, who was heavily fined for staging an anti-Protestant play at his home during the reign of James I. See Cora L. Scofield, *A Study of the Court of Star Chamber* 47 n.4 (1900). During the reign of Charles I, Archbishop of Canterbury William Laud "brought six show cases in the Star Chamber in the 1630s," all against Puritans, including William Prynne, who had published religious critiques of Anglican church officials. Wendell Bird, *The Revolution in Freedoms of Press and Speech* 83-87 (2020). The Star Chamber sentenced them to hefty fines, imprisonment, cropping of the ears, branding, and the pillory. See Edward P. Cheyney, *The Court of Star Chamber*, 18 Am. Hist. Rev. 727, 747-748 (1913).

Likewise, "[r]eligious dissenters repeatedly resisted the orders and warrants of the High Commission[.]" *Unlawful?* 137. For example, "Martin Marprelate" was a fictional opponent of the Anglican prelates. "His audacious creators" were subjected to subpoenas from the High Commission but managed to evade capture. *Id.* at 177. In Ireland, the Court of Castle Chamber "devoted much of its time to prosecuting those who refused to take the oath of supremacy, and jurors who refused to present against the recusants." Wood 159.

Ultimately it was a struggle over religion that precipitated the Glorious Revolution of 1688. The *Trial of the Seven Bishops* involved seven Anglican bishops who refused to read out a royal proclamation from the pulpit as commanded by James II. See *The Trial of the Seven Bishops for Publishing a Libel* [1688] 12 How. St. Tr. 183, 415. When the bishops published their objections to the proclamation in a petition, James II had

them tried for libel. *Ibid.* The bishops were acquitted at trial, unleashing a wave of public displeasure with James, leading to his replacement by William and Mary later that year. *President* 116.

The Glorious Revolution, which ended the Stuart dynasty, significantly limited royal prerogative and established Parliamentary supremacy. The English Bill of Rights, enacted in 1689, empowered Parliament to limit and regulate existing royal prerogatives. See Bill of Rights, 1 W. & M., Sess. 2, c. 2 (1689). And in its very first provision, the Bill of Rights curtailed executive power: "the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal." *Id.* § 1. A cycle of executive overreach had ended.[4]

B. The Founders sought to avoid the historic abuses of the prerogative power, including suppression of religious dissenters.

The Founders learned the lessons of the Glorious Revolution—including distrust of royal prerogatives—as part of their Whig "political heritage." Michael W. McConnell, *Establishment and Toleration in Edmund Burke's 'Constitution of Freedom,'* 1995 Sup. Ct. Rev. 393, 446 (1995). Moreover, the Founders' experience with colonial governors "solidified discontent with broad prerogative powers." *President* 20.

In framing the Constitution, the Founders faced a conundrum—what to do with the royal prerogatives now that there was no King? On the one hand, their

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[4] Parliament has continued to reduce royal prerogatives, and most (but not all) of those that remain are exercised by the monarch on the advice of the Government.

Whiggish instincts and the colonial experience did not incline them to trust executive use of prerogatives. On the other, the dual experience of weak state governors and an almost-nonexistent executive under the Articles of Confederation made the problems posed by the lack of a strong executive apparent to all. *President* 19-21.

The Founders' solution was to distribute the royal prerogatives between Congress and the President, and subject them to checks by the other branches. Thus Article II, Section 2 of the Constitution vests the President with some "clarif[ied] or limit[ed]" prerogative powers and some "*qualified* prerogative powers, subject to a senatorial check on a case-by-case basis." *President* 264-265. Other royal prerogatives were recast as "powers" in Article I, Section 8 and "allocate[d] to the legislative branch." *Id.* at 274. "By one scholarly count, thirteen of the twenty-nine enumerated powers of Congress were prerogatives of the king." *Id.* at 275. But those powers were also limited because "Congress cannot administer these powers itself, or through its own agents." *Id.* at 276. The upshot is that the Founders sought to prevent abuses of power by allocating prerogative powers away from the Executive and ensuring that reallocated royal prerogatives were limited or in some way subjected to checks by the other branches.

It was not lost on the Founders that one effect of the Constitution's trammeling of executive power was to protect religious liberty. For example, when introducing the Bill of Rights, Madison argued that it might be "less necessary to guard against the abuse" by the Executive of fundamental liberties including "liberty

of conscience" because under the Constitution the Executive was obviously the "weaker" branch. 1 Annals of Cong. 453-454 (Joseph Gales ed., 1789). Madison's statement likely reflected Congress's belief "that including the Executive was unnecessary in light of the congressional restriction. If there were no religious-based laws to execute, there would be little opportunity for the President to exercise power over the subject of religion." Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L.J. 1069, 1097 n.105 (1998).

Moreover, even under the new Constitution with its "weaker" Executive, Madison was scrupulous about using executive power in ways that mimicked the old royal prerogatives. Thus, Madison later said that when he issued official Thanksgiving Day proclamations he "was always careful to make the Proclamations absolutely indiscriminate" and that such proclamations ought to be "merely recommendatory; without any penal sanction enforcing the worship." James Madison, Letter to Edward Livingston (July 10, 1822), quoted in Lash 1124-1125. Unlike the Stuarts, Madison actively sought to limit the effect of executive proclamations, not expand them. Founding-era history thus discloses a vision of a "weaker" Executive wary of its own powers and actively checked by the other branches—particularly when it came to fundamental rights like religious liberty.

II. Contrary to the Constitution's design, recent broad uses of executive power have burdened the religious exercise of disfavored groups.

Today religious liberty is once again endangered by officials wielding executive power against religious dissenters like the Little Sisters in direct contradiction

of the Constitution's design. We describe two examples below.

A. The contraceptive mandate.

The contraceptive mandate is one of the most prominent examples of executive overreach targeting religious people, and one that has directly affected the Little Sisters for a decade.

The history of the mandate is reminiscent of the Stuarts' efforts to unilaterally rule beyond the text of any statute, and to stymie any judicial review of their actions. Congress passed the ACA in March 2010. One provision required many employers to offer health coverage that included "preventive care and screenings" for women. 42 U.S.C. 300gg-13(a)(4). But Congress did not define "preventive care." Instead, Congress delegated the definition—and the power to administer the statute—to various administrative agencies. See *ibid.* ("provided for in comprehensive guidelines supported by the Health Resources and Services Administration"); see also 42 U.S.C. 300gg-92 (HHS); 29 U.S.C. 1191c (Labor); 26 U.S.C. 9833 (Treasury).

During the bill's passage, proponents consistently denied that Congress was delegating this obviously sensitive issue to the agencies. Senator Barbara Mikulski said, "There are no abortion services included in the Mikulski amendment. It is screening for diseases that are the biggest killers for women—the silent killers of women. It also provides family planning—but family planning as recognized by other acts." 155 Cong. Rec. S12028 (Dec. 1, 2009).[5] In the

[5] Federal statutes at the time mandated contraceptive coverage only for federal employees and their dependents.

House, a group of pro-life Democrats secured an Executive Order from President Obama averring that the ACA contained no mandate for abortion services. See, *e.g.*, Lori Montgomery and Shailagh Murray, *In Deal with Stupak, White House announces executive order on abortion*, Washington Post (March 21, 2010); Executive Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

Despite these protestations and assurances, once the legislation passed, the regulators sought to expand its scope. Four months after the ACA was enacted, HHS issued interim final rules requiring employers to cover preventive services, which it said its subagency the Health Resources and Services Administration (HRSA) would define in guidelines. See 75 Fed. Reg. 41,726 (July 19, 2010). After receiving voluminous comments, including on the potential threat to religious believers, HHS, acting through HRSA, issued guidelines defining the preventive-care mandate to require coverage for all FDA-approved female contraceptives, including some widely viewed as abortifacients. HHS also adopted interim final rules requiring employers to follow HRSA guidance. See 76 Fed. Reg. 46,621 (Aug. 3, 2011). At the same time, the agencies crafted an exemption for "certain religious employers." 76 Fed. Reg. at 46,623.

But this exemption was exceedingly narrow: it exempted only nonprofit organizations under Section 6033(a)(3)(A)(i) and (iii) of the Internal Revenue Code—that is, "churches," "their integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." 76 Fed. Reg. at 46,623. And it applied only if the employer's purpose was to "inculcat[e] * * * religious

values" and the employer "primarily" employed and served "persons who share its religious tenets." *Ibid.*

As later-disclosed correspondence showed, the narrowness was a feature, not a bug. The agencies intentionally gerrymandered the mandate's exemption to limit its reach, knowing that many religious organizations, like the Little Sisters, would not qualify.[6] High-ranking regulators tried to determine how altering the section 6033 tax-filing exemption standard would affect the number of women provided contraceptives under their employers' health plans.[7] In their public explanation, the agencies asserted that Section 6033 organizations that object to contraceptive coverage were more likely to employ people of the same faith who share that objection and thus would be less likely to use contraceptive services even if covered under their plan. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). But HHS later testified that it had "no evidence" supporting this justification.[8] Regulators were targeting as many religious dissenters as they thought they could get away with.

The regulatory legerdemain did not end there. After non-exempt religious objectors filed multiple lawsuits, the agencies began a new rulemaking that revisited the religious exemption. 77 Fed. Reg. 16,501 (Mar.

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[6] This approach was motivated at least in part by political concerns. See, *e.g.*, Ryan Grim, *Joe Biden Worked to Undermine the Affordable Care Act's Coverage of Contraception*, The Intercept (June 5, 2019), https://perma.cc/UL83-ZUKK.

[7] See Joint Appendix at 1099-1106, *Zubik* v. *Burwell,* No. 14-1418 (Jan. 4, 2016).

[8] Gary M. Cohen Tr. at 34:22-24, *Catholic Diocese of Beaumont* v. *Sebelius,* No. 1:13-cv-709 (E.D. Tex.), ECF 28-2.

21, 2012). At the same time, the agencies announced a one-year "safe harbor" delay in enforcing the mandate against certain nonprofit religious employers. *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012). That caused most of the nonprofit employers' lawsuits to be stayed or dismissed as unripe. See*, e.g.*, *id.* at 553 (holding appeals "in abeyance pending the new rule that the government has promised"). Yet there was no safe harbor for objecting for-profit religious employers. Thus the agencies ensured that a for-profit employer case (*Hobby Lobby*) would reach this Court at least a Term before the non-profit employer cases.

The agencies were not done. In July 2013, they issued a final rule fully exempting churches and some religious orders while offering a self-styled "accommodation" to certain non-profit religious employers. See 78 Fed. Reg. at 39,873-39,875. The "accommodation" was a mechanism by which a nonexempt religious nonprofit would certify its objection to its insurer or third-party plan administrator, who would then provide contraceptive coverage to its employees anyway. See 78 Fed. Reg. at 39,874, 39,879, 39,892-39,893. The agencies spread the accommodation mechanism across multiple different regulations issued by different agencies.[9]

In June 2014, this Court held that RFRA prohibited application of the mandate to closely held, for-profit corporations. See *Burwell* v. *Hobby Lobby*

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[9] Dividing a single policy across multiple agency actions has been called "agency smurfing." *State of Texas* v. *United States Dep't of Health & Human Servs.*, No. 7:23-cv-22, 2023 WL 4629168, at *1 (W.D. Tex. July 12, 2023).

Stores, Inc., 573 U.S. 682 (2014). The agencies responded to this setback by issuing yet another rule, allowing some closely-held for-profit businesses to use the "accommodation" mechanism. 79 Fed. Reg. 51,092 (Aug. 27, 2014); 80 Fed. Reg. 41,318 (July 14, 2015). But the accommodation for non-profit employers was unaffected, so the lawsuits of the non-profit employers, including the Little Sisters, continued.

In November 2015, this Court granted certiorari in several cases challenging the accommodation mechanism, including the Little Sisters' case. In briefing and at argument, the government conceded, *inter alia*, that the regulations "could be modified" to better protect religious liberty. See *Zubik* v. *Burwell*, 578 U.S. 403, 408 (2016). See also Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *and the Perils of Judicial Faith in Government Claims*, 2015-2016 Cato Sup. Ct. Rev. 123, 132-142 (2016) (describing various concessions). Accordingly, a unanimous Court vacated the decisions below, instructed the parties to attempt to resolve the dispute, and ordered that no penalties be imposed on the religious objectors for noncompliance with the mandate in the interim. See *Zubik*, 578 U.S. 403.

The agencies negotiated halfheartedly until the November 2016 election. After the election, and just days before the change in presidential administrations, the agencies announced that they had been unable to identify a "feasible approach" to modify the regulatory mechanism.[10]

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[10] U.S. Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* 4 (Jan. 9, 2017), https://perma.cc/R3LN-CMSH.

The new administration disagreed, issuing a rule broadening the religious exemption to cover religious employers like the Little Sisters. See 82 Fed. Reg. 47,792 (Oct. 13, 2017); see also 83 Fed. Reg. 57,536 (Nov. 15, 2018). This Court upheld that rule against state challenge in *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020). But despite the hopes of some, the Little Sisters' "legal odyssey" continues in the lower courts. *Id.* at 2396 (Alito, J., concurring).

What should the Court make of this tangled skein? The common thread over more than a decade of regulation and litigation is that federal regulators, motivated by politics and ideology, disfavored unpopular religious groups at every turn. Each loss in this Court was met not with acquiescence but with yet more aggressive regulatory creativity. The saga of the contraceptive mandate thus epitomizes the kind of executive overreach the Constitution is designed to protect against when fundamental rights are on the line.

B. The transgender mandate.

A second prominent example of regulator overreach penalizing religious actors is the transgender mandate.

Through incorporation of Title IX, Section 1557 of the ACA prohibits federally funded or administered health programs from discriminating based on sex. 42 U.S.C. 18116(a). Congress gave HHS discretion to issue rules implementing that prohibition. 42 U.S.C. 18116(c).

HHS used its discretion to import Title IX's prohibition on sex discrimination while simultaneously *refusing* to import its religious accommodation. In a

2016 rule, HHS interpreted Section 1557's prohibition on sex discrimination to include discrimination based on "gender identity," or one's "internal sense of gender." 81 Fed. Reg. 31,375, 31,384, 31,387 (May 18, 2016). As a result, if a gynecologist performed a hysterectomy on a woman—for, say, uterine cancer—she would also have to remove a healthy uterus from a person seeking to transition genders. *Id.* at 31,435, 31,455. This regulatory mandate is enforced by denying funding (including Medicare and Medicaid), false-claims liability, lawsuits for damages and attorneys' fees, and other penalties. *Id.* at 31,439.

In comments on the proposed rule, religious organizations "strongly supported a religious exemption." 81 Fed. Reg. at 31,379. Not without reason: When Congress enacted Section 1557, it specifically indicated that the ACA's antidiscrimination regime incorporated all of Title IX, including its religious exemptions. See *Franciscan Alliance, Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016). But like so many notice-and-comment periods, this was little more than a "charade" for the agency. David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine,* 2001 Sup. Ct. Rev. 201, 231. HHS refused to incorporate Title IX's religious exemption. 81 Fed. Reg. at 31,380. The result was that conduct not considered sex discrimination under Title IX was sex discrimination under the ACA. "By not including [Title IX's religious] exemptions," HHS "nullifie[d] Congress's specific direction" and "expanded the ground prohibited under Title IX that Section 1557 explicitly incorporated." *Franciscan*, 227 F. Supp. 3d at 691 (cleaned up). If Congress wanted to assign HHS the authority to limit the scope of Title IX's antidiscrimination bar when incorporating it in

the ACA, "it surely would have done so expressly." *Id.* at 687.

Instead, HHS stated that the agency (not a court) would apply RFRA on a case-by-case basis. 81 Fed. Reg. at 31,380. Moreover, HHS predetermined that the government had a compelling interest. See *id.* So, according to HHS, religious groups' only recourse to obtain a religious exemption was to ask a department dedicated to health regulation whether a rule substantially burdened their religious exercise. *Ibid.*

Multiple religious healthcare organizations sued. Yet even after they were granted temporary relief, see *Franciscan Alliance, Inc.* v. *Azar*, 414 F. Supp. 3d 928, 944 (N.D. Tex. 2019), the agency walked them around "a legal Penrose staircase." *Franciscan Alliance, Inc.* v. *Becerra*, 553 F. Supp. 3d 361, 373 (N.D. Tex. 2021). HHS first amended the rule in 2020, removing the 2016's sex-discrimination definition and incorporating Title IX's religious exemption. 85 Fed. Reg. 37,160, 37,162 (June 19, 2020). Then, without any notice and comment, HHS issued a 2021 interpretation "materially indistinguishable from the 2016 Rule." *Franciscan*, 553 F. Supp. 3d at 373.

Ultimately, multiple courts of appeal upheld injunctions protecting religious groups from performing gender-reassignment procedures. See *Franciscan Alliance, Inc.* v. *Becerra*, 47 F.4th 368 (5th Cir. 2022); *Sisters of Mercy* v. *Becerra*, 55 F.4th 583 (8th Cir. 2022). And aware of the host of problems underlying its position (ranging from RFRA to the nondelegation and major questions doctrines), the Solicitor General recently decided not to seek certiorari in either case. But like the contraceptive mandate, the history of the

transgender mandate amply demonstrates the negative impact of unchecked federal regulators on religious exercise.

III. Only careful checking and balancing of the Executive can avoid the wrongful suppression of religious exercise.

There are at least three methods by which the judiciary may check overbroad executive power that threatens religious liberty. One is not to apply deference where religious liberty is at stake. A second is the major questions doctrine. And a third is the principle of nondelegation.

A. *Chevron* deference empowers federal regulators to infringe on free exercise rights.

1. The cases discussed above exemplify why it is a category error to begin statutory interpretation with deference to an agency's resolution of statutory ambiguity. "Those who ratified the Constitution knew that legal texts would often contain ambiguities." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). As Madison put it: "All new laws * * * are considered as more or less obscure and equivocal." The Federalist No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961). The mere existence of ambiguity says nothing about who should resolve that ambiguity. If any presumption is made under our system, it would be that resolving statutory ambiguities are the "proper and peculiar province of the courts." The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). "Laws" under our system "are a dead letter without courts to expound and define their true meaning and operation." The Federalist

No. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Constitution does not assign a God-of-the-regulatory-gaps role to regulators.

Nor do judge-made deference doctrines reflect Congress's interpretive intentions. Congress provided in the Administrative Procedure Act that "*the reviewing court shall* * * * interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. 706 (emphasis added). This assignment of interpretive power is a crucial "check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.,* 338 U.S. 632, 644 (1950).

2. Religious liberty cases often highlight the mismatch between the rationales for judicial deference in the face of statutory ambiguity and how agencies exploit that ambiguity.

Judicial deference "recognize[s] and excuse[s]" removing issues from democratic judgment on various grounds: administrative "oversight," "insulat[ion]" from politics, "expertise," and the "necessity" of swift decision-making. See Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1945 (2015); see also *Unlawful?* 377-402, 419-440. These rationales "deny the political component of agency action," and "foster a view of rulemaking as a more or less mechanical, value-free, nonpolitical exercise." Antonin Scalia, *Rulemaking as Politics,* 34 Admin. L. Rev. xxv, xxxi, xxviii (1982). But the exercise of administrative power over religious liberty

brings "the political, accommodationist, value-judgment aspect of rulemaking out of the closet." *Id.* at xxxi. That's because "the administrative idealization of scientism and centralized rationality usually renders administrative acts—compared with acts of Congress—relatively indifferent and even antagonistic to religion and religious concerns." Hamburger, *Exclusion*, 90 Notre Dame L. Rev. at 1939-1940.

The Little Sisters' decade-long ordeal exemplifies the mismatch between judicial deference and agencies' exploitation of statutory ambiguity. "[N]o language in [the ACA] itself even hints that Congress intended that contraception should or must be covered" as an aspect of "preventive care." *Little Sisters*, 140 S. Ct. at 2382; *id.* at 2381 ("even the dissent recognizes [this]"). Yet HHS created a context-free understanding of the ACA's "preventive care and screenings" requirement to mandate insurance coverage of contraceptives and abortifacients. *Supra* 11-13. It then crafted religious exemptions to this mandate based on political calculation. *Supra* 12-13. HHS took these actions despite the understanding of Congress and a presidential Executive Order. *Supra* 11-13. The result was differential treatment of religious groups based on their tax classification. Sophisticated political and ideological thinking produced that choice, but that is hardly a basis for judicial deference.

The transgender mandate exemplifies the mismatch too. When HHS imported Title IX's definition of "sex" discrimination into Section 1557 of the ACA, it did so without incorporating Title IX religious exemptions—claiming "Section 1557 was doing 'new work.'" *Franciscan*, 227 F. Supp. 3d at 690. And as to "'[f]ederal statutory protections for religious freedom

and conscience,'" HHS "refused to agree the protections would apply," thereby inviting Franciscan and other health care ministries to "roll the dice and risk the withdrawal of federal funding and civil liability." *Id.* at 678 n.13. But the district court "decline[d] to give HHS *Chevron* deference" (*id.* at 690), having already concluded that "the scope and meaning of sex discrimination prohibited by Title IX and incorporated by Section 1557" is a major question. *Id.* at 687. "If Congress wished to assign that decision to HHS, it surely would have done so expressly." *Ibid.* Interpreting the text free from the deferential blur, the district court rightly held that "[f]ailure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX." *Id.* at 690-691. Applying *Chevron* deference would have glossed over that reality.

Neither the First Amendment nor RFRA permit agencies to have the last word on statutory ambiguities. The First Amendment has long prohibited leaving "[w]hat was religious * * * to the discretion of a public official." *Saia* v. *New York*, 334 U.S. 558, 560 (1948) (discussing *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940)). As to RFRA, failing to account for religious burdens when interpreting statutory ambiguity is "failing to consider an important aspect of the problem." *Little Sisters*, 140 S. Ct. at 2383-2384 (cleaned up). But requiring agencies to evaluate religious burdens—as both the First Amendment and RFRA do (see, *e.g.*, 42 U.S.C. 2000bb-3(a))—does not mean an agency's RFRA interpretation receives judicial deference. It is "in a judicial proceeding," not a bureaucracy, where RFRA "claim[s] or defense[s]" are resolved. 42

U.S.C. 2000bb-1(c). So too for the First Amendment. See, *e.g.*, 42 U.S.C. 1983.

Yet as the above examples show, judicial deference permits regulators to disregard known substantial burdens on religious exercise. Take the transgender mandate. HHS invoked *Chevron* deference to import Title IX's "sex" discrimination prohibition into the ACA, while disregarding the corresponding federal religious liberty protections *in the text of Title IX*. See *Franciscan*, 227 F. Supp. 3d at 678 n.13, 690-691. Nor did HHS's cherry-picking change after *Bostock*. *Compare Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1753-1754 (2020) ("free exercise of religion" "lies at the heart of our pluralistic society," and RFRA "operates as a kind of super statute"); *with supra* 18 (court holding that HHS's post-*Bostock* interpretation was "materially indistinguishable from the 2016 Rule.").

Finally, rejecting the deference paradigm in religious liberty cases corrects some of the false premises of Free Exercise jurisprudence. Over thirty years ago, this Court presumed that religious liberty cases would involve otherwise "solicitous" legislatures choosing not to accommodate unfamiliar religious practices. See *Employment Division* v. *Smith*, 494 U.S. 872, 890 (1990). But "most religious freedom cases at the Supreme Court in the past decade have come from administrative actions"—and those cases show that agencies are "generally disinclined to accommodate" religious people. William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 Harv. J.L. & Pub. Pol'y 419, 450-451 (2023) (collecting examples).

One of the premises of religious liberty jurisprudence should therefore be that single-focus regulators

are *particularly unlikely* to accommodate religion because religious objectors often ask for exceptions. Cf. *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) ("If I make an exception for you, I'll have to make one for everybody, so no exceptions.") And when regulators overreach, "modest estimates" of the Court's own competence are no reason to refuse to perform "the function of this Court when liberty is infringed." *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 640 (1943).

B. Religious liberty is presumptively a major question under the major questions doctrine.

The major questions doctrine provides a second method of restraining executive overreach with respect to religious liberty. Where a proposed agency rule infringes on free exercise rights, the rule should be evaluated under the major questions doctrine. See *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608 (2022). Put simply, free exercise is a "major question."

Applying that doctrine to religious liberty means evaluating the "context" that created the substantial religious burden—*i.e.*, the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion." *West Virginia*, 142 S. Ct. at 2608 (cleaned up). If that "context" does not provide "a clear delegation" from Congress to burden religious liberty in that way, then the regulatory action is invalid. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2374 (2023); see also *id.* at 2376 (Barrett, J., concurring) (major questions doctrine "emphasize[s] the importance of *context* when a court interprets a delegation to an administrative agency.").

Justifications for the major questions doctrine vary,[11] but using it to prevent religious burdens from statutory ambiguity comports with the traditional judicial protection for natural rights like religious liberty. Both before and at the Founding, courts used "equitable interpretation * * *, which entails the narrow construction of statutes so as to avoid violations of natural rights." Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009-2010 Cato Sup. Ct. Rev. 13, 18 (2010). This created a legal environment where "natural rights control in the absence of sufficiently explicit positive law to the contrary," which can be viewed "as a clear statement rule for abrogating unenumerated natural rights." *Ibid*. The same logic shows why religious liberty is a major question: "clear delegation" ensures that Congress—as the Constitution contemplates—accounts for "'profound burdens' on individual rights," like religious liberty, along with broader "separation of powers concerns." *Biden*, 143 S. Ct. at 2374-2375.

Further, the major questions doctrine is an important complement to RFRA. That statute requires agencies to account for substantial burdens when agencies "implement[]" "Federal law." 42 U.S.C. 2000bb-3(a). And it imposes a requirement that, if

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[11] Some explain the doctrine "matter[s]" because, "[i]f administrative agencies seek to regulate the daily lives and liberties of millions of Americans, * * * they must at least be able to trace that power back to a clear grant of authority from Congress." *NFIB* v. *OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring). Others explain that the doctrine avoids "interpret[ing] a statute for all it is worth when a reasonable person would not read it that way." *Biden*, 143 S. Ct. at 2384 (Barrett, J., concurring).

Congress does not want RFRA to apply to subsequent Federal law, Congress must "explicitly exclud[e]" RFRA's application. 42 U.S.C. 2000bb-3(b). This clear statement requirement complements the major questions doctrine. At the same time, the major questions doctrine ensures agencies cannot circumvent RFRA or subject it to political vagaries. *See Franciscan*, 227 F. Supp. 3d at 690-691 (applying major questions doctrine to ACA).

As the Little Sisters' decade of litigation reveals, the Government frequently flip-flops on RFRA's inquiries—protracting the risk of a religious liberty violation. See, *e.g.*, *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring) ("In *Hobby Lobby*, the Government asserted and we assumed for the sake of argument that the Government had a compelling interest * * *. Now, the Government concedes that it lacks [one]."). There is also judicial reluctance toward "exercis[ing] our own judgment on the question" of what interests are "compelling." *Ibid.* By contrast, under the major questions doctrine, the question "is not whether something should be done; it is who has the authority to do it." *Biden*, 143 S. Ct. at 2372. This inquiry doesn't depend on the changing litigation positions of alternating administrations. Rather, the major questions doctrine evaluates the "context" of the burden—fixed by "the history and the breadth of the authority that the agency had asserted, and the economic and political significance of that assertion." *Ibid.* (cleaned up). This is a matter of "common sense." *Id.* at 2379 (Barrett, J., concurring) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

The contraceptive mandate also implicates the major questions doctrine. The Court has already recognized that "what types of preventive care must be covered" is an "important and sensitive decision." *Hobby Lobby*, 573 U.S. at 697; see also *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring) (calling this "the great national debate about whether the Government should provide free and comprehensive medical care for all"). "The basic and consequential tradeoffs" inherent in such a question "are ones that Congress would likely have intended for itself." *West Virginia*, 142 S. Ct. at 2613. As the legislative debate confirms, Congress *did* consider those tradeoffs—and *did not* "even hint[] that [it] intended that contraception should or must be covered." *Little Sisters*, 140 S. Ct. at 2382. Indeed, the ACA wouldn't have passed Congress had such coverage been expressly included. *Supra* 11-13. It is "telling" that Congress "considered and rejected" such an approach, but HHS nevertheless sought a "work around the legislative process to resolve for itself a question of great political significance." *West Virginia*, 142 S. Ct. at 2620-2621 (Gorsuch, J., concurring) (cleaned up).

What's more, the authority HHS asserted was not limited to defining "preventive services." It also included gerrymandering the "church" exemption. *Supra* 13. This was a political choice, one made with "no evidence." Nor does it comport with the First Amendment. Leaving "[w]hat was religious * * * to the discretion of a public official" is prohibited. *Saia*, 334 U.S. at 560. So is the "state entanglement with religion and denominational favoritism" that follows from "scrutinizing whether and how a religious [organization] pursues its * * * mission." *Carson* v. *Makin*, 142 S. Ct.

1987, 2001 (2022). Yet these prohibitions are embraced by the contraceptive mandate, backed up by a "huge" and "substantial" noncompliance penalty. *Priests for Life* v. *HHS*, 808 F.3d 1, 19 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

The contraceptive mandate thus implicates "many of the factors present in past cases raising similar separation of powers concerns." *Biden*, 143 S. Ct. at 2358. The lack of a clear statement of authorization from Congress, means it defies "common sense as to the manner in which Congress is likely to delegate * * * policy decision[s] of such economic and political magnitude." *Brown & Williamson*, 529 U.S. at 133.

C. Congress should be presumed not to have delegated powers that infringe on religious liberty.

A third method for constraining overbroad executive power that infringes on religious liberty would be to apply Article I's Vesting Clause. That Clause does "not allow" Congress to delegate "major national policy decisions * * * even if Congress expressly and specifically delegates that authority." See *Paul* v. *United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.). Congress may not "merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy* v. *United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). This problem could be avoided by "a nondelegation principle for major questions," including substantial burdens on religious liberty. See *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J.).

Adopting a nondelegation principle for substantial burdens on religious liberty would be "a contemporary incarnation of the founding effort to link protection of individual rights, and other important interests, with appropriate institutional design." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000). In particular, the nondelegation principle would recognize the "genuine constitutional problem" that always exists when "Congress grants improper discretion to other actors." Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 236 (2006). The First Amendment already recognizes the problem of unbridled discretion. And the Court responds to it by "condemn[ing] licensing schemes that lodge broad discretion in a public official to permit speech-related activity." *Police Dep't of City of Chicago* v. *Mosely*, 408 U.S. 92, 97 (1972) ("Similar[]" to the rule in religion cases); see also *e.g.*, *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) ("more covert forms of discrimination * * * may result when arbitrary discretion is vested in some governmental authority"); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (strict scrutiny applies when a policy "invites the government to decide which reasons for not complying with the policy are worthy of solicitude.") (cleaned up). Violations of religious liberty created by the delegation of discretion should be no different.

In fact, the Court has already invoked this non-delegation principle to prevent a roving religious liberty violation, albeit an unspoken one. In *A.L.A. Schechter Poultry Corporation* v. *United States*, the Court in-

voked the non-delegation principle to invalidate a statute authorizing the President "to approve codes of fair competition" for slaughterhouses. 295 U.S. 495, 521-522 (1935) (cleaned up). Based on that statute, "the President adopted a lengthy fair competition code written by a group of (possibly self-serving) New York poultry butchers." *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

Although the *Schechter* Court did not mention religious exercise, the issue was the hidden heart of the case. "Kosher butchers such as the Schechters had a hard time following these rules." *Ibid.* "Sorting out dangerously unhealthy animals of any sort was a core principle of kashruth," "the principle of keeping kosher." Amity Shlaes, *The Forgotten Man* 215-216 (2007). But "*[k]ashruth* was not a modern health code," so it lacked credence with regulators. *Id.* at 216.

"[T]he government apparently singled out the Schechters as a test case," with repeated inspections, abusive treatment, and ultimately "a criminal indictment running to dozens of counts." *Gundy*, 139 S. Ct. at 2137-2138 (Gorsuch, J., dissenting). "To sell a sick chicken broke the NRA code, and that was all the government lawyers understood. But to suggest, as they had, that Schechter chicken were unfit was also to suggest something * * * far worse: that they were not good Jews." Shlaes 220.

The Schechters were tried and convicted of "selling one allegedly 'unfit' chicken and other miscellaneous counts." *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting). The Supreme Court invalidated the law on non-delegation grounds. *Ibid.* Justice Cardozo lambasted the discretion given to federal regulators: the law created "a roving commission to inquire into evils

and upon discovery correct them," a "delegation running riot." *Schechter*, 295 U.S. at 553 (Cardozo, J., concurring). The Court thus used the nondelegation principle to protect the Schechters' religious exercise.

Similarly, this Court has suggested the propriety of "a constitutional challenge to the breadth of the delegation involved" in the contraception mandate. See *Little Sisters*, 140 S. Ct. at 2382. The ACA does not "provide an exhaustive or illustrative list of the preventive care and screenings that must be included." *Id.* at 2380. Nor is there "any criteria or standards to guide HRSA's selections," or "require that HRSA consult with or refrain from consulting with any party in the formulation of the guidelines" on what services must be covered. *Ibid.* Moreover, HRSA has "virtually unbridled discretion" to determine who is religious enough to receive an exemption. See *id.*

As the Court knows, the Little Sisters have long taken the position that RFRA and the First Amendment can resolve the contraceptive mandate controversies on their own. However, for the reasons set forth above, it would also be appropriate for courts to use the nondelegation doctrine to eliminate the prospects for such long-running mischief by requiring Congress, rather than agencies, to make the important policy judgments at issue.

CONCLUSION

Sir Coke told the King he was "*sub Deo et Lege*" and lost his job because of it. It is beyond this Court's writ to ensure that the executive power remains under God. But it is emphatically this Court's province and duty to ensure that the Executive remain under the

law. The Little Sisters urge the Court to reverse the decision below and abjure *Chevron* deference.

Respectfully submitted.

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