No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR INDEPENDENT WOMEN'S FORUM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE* [1]

The Independent Women's Forum ("IWF") is a non-partisan, 501(c)(3) research and educational institution. IWF seeks the advancement of women in today's marketplace and the full flourishing of human dignity through freedom and choice. IWF believes that gender equality and access to health care, including preventive services like contraception, are compelling government interests. IWF is concerned, however, that the contraception mandate may disadvantage women by adversely affecting health and employment options and impinging on religious liberty.

As this Court held in *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751 (2014), more is at stake than contraception. This case, too, is about the principles of liberty that animate our Constitution. It is about empowering women to choose the healthcare and salary options that best fit their needs. And it is about empowering charitable employers, many of them women, to follow their deeply held religious conviction that life begins at conception—regardless of the form of charitable entity. IWF believes in this Court's decision in *Hobby Lobby*: That businesswomen—whether they operate for-profit or non-profit ventures—do not check their religious liberty rights at the office door.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* Independent Women's Forum states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received notice of *amicus curiae*'s intent to file this brief. Petitioner and Respondent have filed blanket consent requests in this case with the Clerk of the Court.

In short, the deeply personal choices about when life begins and whether or not to use birth control are decisions for women and their families, not the Government. IWF therefore urges this Court to grant this petition and to decide whether the HHS "accommodation" discriminates among religious organizations in violation of the First Amendment.

SUMMARY OF THE ARGUMENT

HHS has overstepped its bounds in making the unprecedented decision to discriminate among religious employers, subjecting some to the contraceptive mandate and exempting others. By making "explicit and deliberate distinctions between different religious organizations" without good cause, *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982), HHS is interfering with the right of non-profit businesswomen to run their businesses according to their conscience—and all because of the determination that such non-profits are not sufficiently "religious." That is a judgment the Constitution does not allow.

Such blatant discrimination not only runs afoul of Congress's directive that all religious institutions are worthy of accommodation, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. §§ 2000bb *et seq*., it also violates the First Amendment's religion clauses. The First Amendment prevents the Government from meddling in the internal affairs of religious associations.

What is more, HHS's discriminatory dictate comes from an agency that has neither the authority nor the expertise to decide whether nuns—or any other religious employer—are sufficiently "religious." Such a determination would be highly suspect were it to come from Congress, *see Hosanna-Tabor Evangelical*

Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 706 (2012); it is unquestionably so where it comes from an agency with no religious expertise.

Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001). Courts, not agencies, have the primary role in interpreting statutes that raise questions of "deep economic and political significance." *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015). Here, there is no legislative delegation—much less a sufficiently specific one—to HHS, HRSA, the IRS, or any other agency of the authority to discriminate among religious groups by deciding which of them is sufficiently religious. Unsurprisingly, the ACA has *nothing* to say about religion: Congress assumed that the "very broad protections" of RFRA would apply. *See Hobby Lobby*, 134 S.Ct. at 2760. Instead, administrative bureaucrats took it upon themselves to determine the sorts of religious persons and organizations that are entitled to exercise conscience rights. But on an issue of such social and indeed constitutional significance, Congress must delegate, and it must do so expressly.

This Court should grant certiorari on the questions presented and hold that the First Amendment prohibits an agency from discriminating against certain religious organizations.

ARGUMENT

I. The Key Insight Of *Hobby Lobby*—That Business Owners And Operators Do Not Give Up Their Conscience Rights Regardless Of The Legal Form They Take—Controls This Case.

The core holding of *Hobby Lobby* controls this case. In *Hobby Lobby*, this Court held that business people do not check their religious liberty rights at the office door, even if they operate for-profit ventures. It follows directly from this principle that the entity structure of a *non-profit* organization should not defeat the ability of that organization's leadership to exercise rights of conscience.

Under the rules promulgated by HRSA, the Little Sisters of the Poor would be exempt from the contraceptive mandate had they organized their ministry under the authority of the Catholic Bishop. And while they could have chosen to do so, the Sisters determined that the best way to provide for the elderly poor was to fund, operate, and control the ministry themselves. According to the Government, the Sisters' conscience rights turn on the organizational form of their ministry. On the basis of their ministry form, the Government seeks to force the Sisters to violate the convictions of their faith, or alternatively, to fine them millions of dollars a year. *Cf. Hobby Lobby*, 134 S.Ct. at 2767 ("HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.").

But First Amendment liberties do not depend on so flimsy a distinction. The First Amendment requires

that all religious groups be treated equally, regardless of their internal organizational structure. *See Hosanna-Tabor*, 132 S.Ct. at 706.

Indeed, this Court has already rejected the sort of argument made by the Government here. In *Hobby Lobby*, HHS argued that when "merchants cho[o]se to incorporate their businesses—without in any way changing the size or nature of their businesses—they … forfeit all RFRA (and free-exercise) rights." 134 S.Ct. at 2767.[2] This Court rejected that claim out of hand. The contraceptive mandate was "unlawful," the Court held, precisely because owners of companies do not forfeit their religious liberty rights "when they decide[] to organize their businesses as corporations rather than sole proprietorships or general partnerships." *Id*. at 2759. Conscience rights do not depend on organizational form. Rather, "[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs." *Id*. So too here. How best to operate a ministry is a decision best left to those ministering.

Respecting the rights of individuals to structure their business or ministry as they see fit not only best

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[2] "In order to ensure broad protection for religious liberty, RFRA provides that 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.'" *Hobby Lobby*, 134 S.Ct. at 2761 (quoting § 2000bb–1(a)). "If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Id.* at 2761 (quoting § 2000bb–1(b)).

accords with the First Amendment and federal law, it encourages the entrepreneurship and innovation our federalist system was meant to protect. "It is one of the happy incidents of the federal system," Justice Louis D. Brandeis observed in 1932, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). One can make a powerful case for decentralized authority envisioned by Justice Brandeis.

The same benefits accrue when individuals, businesses and ministries are left free to structure their enterprises according to their own ideas and deepest convictions. As Justice Brandeis put it, "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation." *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting). Certainly our nation would be worse off without the Little Sisters.

All this to say, furthering the religious freedom of charities and non-profits also "furthers individual religious freedom." *Hobby Lobby*, 134 S.Ct. at 2769. Just as "[p]rotecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being," protecting religious charities protects the religious liberty of the individuals who own and operate those companies. *Id.* at 2768.

Indeed, the contraception mandate overlooks the fact that women and their families benefit from a flexible work environment that allows them the option of their preferences. Women may choose to prioritize a

higher salary, or the ability to work from home, over more generous contraceptive coverage. Older women, in particular, may prioritize other health benefits, like cancer coverage. As this case aptly demonstrates, women of faith may prefer to work for a faith-based organization that refuses to facilitate practices with which they have a profound moral disagreement.

This Court has already held that the "Corporate Form" is no grounds on which to deny religious freedom. Neither is the internal business structure taken by a religious non-profit like the Little Sisters. This Court should grant certiorari and reverse the decision below.

II. HHS's Religious Exemption Violates Fundamental Principles of First Amendment and Administrative Law.

HHS's religious exemption violates fundamental principles of First Amendment and administrative law. To begin, Congress in no way, shape, or form delegated to HHS the authority to regulate religion—much less make untenable distinctions among religious groups. Indeed, there was no need for Congress to delegate a religious exemption power because Congress had already exempted all religious employers through the broad protections of the Religious Freedom and Restoration Act. Second, even if HHS had authority to regulate religion, the Constitution does not permit an agency to treat one religious group different from another based solely on religious organizational form.

A. The double delegation

The ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without

"any cost sharing requirements." 42 U.S.C. § 300gg–13(a)(4). But Congress did not define "preventive care and screenings." Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to determine what types of care must be covered. *Id*. That authorization is quite narrow: Covered plans must provide preventive care and screening for women "as provided for in comprehensive guidelines *supported by the Health Resources and Services Administration for purposes of this paragraph*." *Id.* (emphasis added). Congress thus required HHS only to determine the scope of women's "preventive care and screenings" covered by the ACA. That authorization, as it is, says nothing about religious accommodation and cannot possibly be read to delegate to HHS the authority to say who is or is not sufficiently religious.

But HHS took matters into its own hands. With no authorization from Congress, HHS issued regulations purporting to empower its subsidiary agency, HRSA, to establish exemptions from the contraceptive mandate for "religious employers." 45 CFR § 147.131(a). This so-called delegation simply authorizes HRSA to "establish an exemption" from the contraceptive mandate for "religious employer[s]." 45 CFR § 147.131(a). That "delegation" is itself limited: it authorizes a religious-liberty exemption but says nothing about discriminating among religious employers.

In exercising authority under this double delegation, HRSA exempted churches and their "integrated auxiliaries" from the contraceptive mandate while demanding compliance—at pain of millions of dollars in fines—by religious non-profit ministries, religious hospitals, and religious universities. *See* 78 Fed. Reg. at 39,874 (citing 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii)).

The only reason given by HRSA for this distinction was the agency's guess as to how closely religious nonprofits might follow established church doctrine: the Government opined that churches and integrated auxiliaries "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

Such guesswork cannot be the basis on which to deny First Amendment rights. And Congress cannot be presumed to have authorized it without a statement saying so. This Court has been clear that Congress is not presumed to delegate authority over major social and political questions, to say nothing of questions implicating constitutional rights, without at least saying *something*. Here, the ACA is entirely silent on the issue. And no wonder: Had Congress sought to distinguish between religious groups based solely on their organizational form, the First Amendment would prevent such discrimination.

B. HHS' religious exemption violates administrative law principles.

The administrative state "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Administrative agencies now exercise substantial authority over our nation's "economic, social, and political activities." *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting). And the federal bureaucracy only continues to grow. *Id*. Indeed, the Patient Protection and Affordable Care Act itself

authorizes dozens of new entities. *Id*. (citing Congressional Research Service, C. Copeland, New Entities Created Pursuant to the Patient Protection and Affordable Care Act 1 (2010)). The current administrative state gives rise to Separation of Powers concerns. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1244 (2015) (Thomas, J., concurring).

Within this Court's province and duty to say what the law is, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), resides the responsibility to provide a check on the vast apparatus we know as the administrative state. *See Sackett v. EPA*, 132 S.Ct. 1367, 1374 (2012) (rejecting EPA's attempt to "strong arm" "regulated parties into 'voluntary compliance' without the opportunity for judicial review"). As an unaccountable "Fourth Branch," certain restrictions inhere. Principally, an agency "cannot exercise" regulatory or interpretive authority "until it has it." *City of Arlington*, 133 S.Ct. at 1877 (Roberts, C.J., dissenting).

Indeed, the whole idea of *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King v. Burwell*, 135 S.Ct. at 2488 (quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000)). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id*.

As the Chief Justice put it in *King*: "This is one of those cases." *Id.* Even more than questions involving tax credits, issues of moral conscience, religious governance, and the difficult question of when life begins, are of deep "economic and political significance." *Id*. It would be a "drastic step" to assume that Congress intended for an agency to make the call as to

whether a nonprofit religious ministry is sufficiently religious to merit protection under the law. *See Burwell v. Hobby Lobby*, Oral Argument Transcript, 134 S.Ct. 2751 (March 25, 2014) (Nos. 13-354, 13-356) ("Now, what—what kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined? I recognize delegation of powers rules are somewhat moribund insofar as their enforcement in this Court. But when we have a First Amendment issue of this consequence, shouldn't we indicate that it's for the Congress, not the agency, to determine that this corporation gets the exemption on that one, and not even for RFRA purposes, for other purposes?"). Indeed, "one might claim" a "background canon of interpretation" to the effect that decisions with enormous social consequences "should be made by democratically elected Members of Congress rather than by unelected agency administrators." *FDA v. Brown & Williamson*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting).

At a minimum, had Congress wished to assign the task of determining religious sufficiency to an agency, "it surely would have done so expressly." *City of Arlington*, 133 S.Ct. at 1881 (Roberts, C. J., dissenting) (citation omitted). Nowhere in the 900-and-some page ACA is there any reference to any agency determining whether a religious ministry is sufficiently religious to merit protection—much less a Congressional delegation involving the "specific provision" and "particular question" at issue here. *Id.* Indeed, the Government cannot point to any "legislative delegation to [HHS or HRSA] on a particular question [involving religiosity]." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (emphasis in original). That is why HHS

had to come up with its own delegation. But the Constitution does not permit an agency to delegate to itself.

That Congress did not choose to delegate authority over questions of religious sufficiency is not surprising. Congress believed that it had already spoken to the issue. The Religious Freedom Restoration Act was passed by a bipartisan Congress and signed into law by President Clinton. This uncontroversial statute (at least at the time) provided expansive religious liberty rights to all—not just those groups that an unaccountable agency deemed worthy. Given this statutory backdrop, HHS' power grab is untenable. Even if the ACA could somehow be interpreted to grant authority to HHS over religion (it cannot), where Congress has exempted particular provisions from that interpretive authority, that exemption must be respected. *Id*. RFRA is just such an exemption.

This Court's cases foreclose the arguments HHS has attempted here. Consider *FDA v. Brown & Williamson*, 529 U.S. 120 (2000). The question in that case was whether FDA had authority to regulate tobacco and tobacco products. The relevant statutory language defined drug to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C) (1994). Under that language, the FDA concluded that it could regulate tobacco. This Court disagreed, however. Congress had passed other statutes that clearly regulated tobacco—such legislation should "preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products." 529 U.S. at 155. Moreover, the conclusion that the FDA had no authority over tobacco was influenced "by the nature

of the question presented." *Id*. at 159. In "extraordinary cases," the Court observed, courts should "hesitate" before concluding that Congress intended an implicit delegation. *Id.* The Court relied on then-Judge Breyer's 1986 essay, for the proposition that, when considering agency authority, it is appropriate for the court to "ask whether the legal question is an important one." *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). There is a difference, Judge Breyer had written, between "major questions," on which "Congress is more likely to have focused," and "interstitial matters." *Id.* With regards to the regulation of tobacco, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

In short, the ACA must be read against Congress' long history of granting religious accommodation to *all* religious groups. In light of that history, Congress cannot be presumed to delegate to an agency questions regarding religious intensity. And even if such a delegation could be presumed, the ACA is silent in critical respects. Instead of identifying the "specific provision" that delegates specific authority to the agency, *City of Arlington*, 133 S.Ct. at 1881—the statute is entirely silent as to religion.

Were this not enough, this case involves issues of unquestionable significance: "difficult and important question[s] of religion and moral philosophy." *Hobby Lobby*, 134 S.Ct. at 2778. As in *Brown and Williamson*, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id. See also MCI v.*

AT&T, 512 U.S. 218, 231 (1994) (Congress does not usually delegate "enormous" questions).

Finally, even were such an enormous delegation conceivable, HHS would not be the agency of choice. While HHS may have expertise in the area of women's health, it has no expertise in the field of religious intensity. "It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting [religious exemptions] of this sort." *King v. Burwell* (*citing Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006); *see also Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (related expertise of agency relevant to authority).

Moreover, Congress could not delegate authority to an agency on this question even if it wanted to. The First Amendment prohibits government from making "explicit and deliberate distinctions between different religious organizations" without good reason. *See* Petr's Br. at 34 (quoting *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982), and citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *Fowler v. Rhode Island*, 345 U.S. 67, 69- 70 (1953)). HHS admits that it has made just such deliberate distinctions in exempting houses of worship and "integrated auxiliaries" from the contraceptive mandate while demanding that the Little Sisters and other religious nonprofits comply. Since the HHS rule turns merely on the organizational form of the religious entity, a nonprofit religious ministry may be penalized under the regulations even as it engages *in precisely the same religious exercise* as exempted "integrated auxiliary."

HHS argues that its discrimination is justified. Certain forms of church hierarchy, HHS speculates,

like integrated auxiliaries, "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. But there is no reason to think that the employees of nuns who compose the Little Sisters are any more likely to disobey church teachings than employees of the Catholic church proper. Indeed, these employees have deliberately come to work for the Little Sisters and their ministry, which is dedicated to serving the church and its teachings, not least by living out the biblical command to care for the poor. *See, e.g.*, *Matthew* 19:21 ("Jesus answered, If you want to be perfect, go, sell your possessions and give to the poor, and you will have treasure in heaven. Then come, follow me."); *Luke* 14:13 ("But when you give a banquet, invite the poor, the crippled, the lame, the blind."); *Luke* 18:22 ("When Jesus heard this, he said to him, You still lack one thing. Sell everything you have and give to the poor, and you will have treasure in heaven. Then come, follow me."). These facts expose HHS' determinations for what they are: pure guesswork unauthorized by law.

Finally, "intensity of ... belief" is a dangerous ground on which to regulate. *Christian Univ. v. Weaver*, 534 F.3d 1245, 1249 (10th Cir. 2008) (McConnell, J.). It involves courts in the messy business of examining and ranking religious institutions. This is the very definition of entanglement. Faith understandably motivates believers to participate in broader religious ministries and outreach. *Id.* at 1249. People of faith do not always (nor even often) practice their faith "in that compartmentalized way." *Korte v. Sebelius*, 735 F.3d 654, 681 (10th Cir. 2013). That such ministries

often serve real people with real needs does not make those ministries any less religious. Nor, again, does it mean that participants are any less likely to agree with church doctrine.

C. HHS' religious exemption is invalid because it creates significant First Amendment concerns.

Even if it was constitutionally permissible for Congress to make deliberate distinctions based on the form of church entity (which it is not), HRSA may not do so. As an agency, it may not construe an ambiguous statute so as to raise serious constitutional doubts. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

At the outset, there is no real dispute about the serious constitutional problems created by HRSA' discriminatory religious liberty exemption. As the Government recently put it, "allow[ing] houses of worship [an exemption], but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "*create a serious Establishment Clause problem*." Gov't Amicus Br. at 11, *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2008) (No. 08- 35532) (emphasis added).

The interpretive consequences are equally clear: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This requirement stems from a two-fold concern: First, the Court's "prudential desire not to needlessly reach constitu-

tional issues." *Id.* at 172. Second, the court's "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.[3]

Ironically, HHS specifically provided that the religious exemption was not limited to any "particular form of entity under state law." 78 Fed. Reg. at 39,874. ("The Departments also proposed to clarify that, for purposes of the religious employer exemption, an employer that is organized and operates as a nonprofit entity is not limited to any particular form of entity under state law."). Despite this implicit acknowledgement that the *state legal* form of a ministry should not control the First Amendment analysis, HRSA proposed to make distinctions based upon *internal religious organization*. If anything, the latter should receive more deference under the First Amendment.

HHS is not Congress. It is an agency that derives its authority from congressional delegation and cannot expand the scope of its own jurisdiction via regulatory fiat. Moreover, even the scope of that purported delegation does not allow HRSA to discriminate among religious believers. The provision simply authorizes HRSA to determine the scope of women's preventive care. It says nothing about religion. And this is as one would expect—Congress does not ordinarily leave such "enormous" questions to a regulatory agency. *MCI*, 512 U.S. at 231.

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[3] In a similar way, agencies may not interpret ambiguous statutes to apply extraterritorially. *EEOC v. Arabian Am. Oil Co*., 499 U.S. 244, 248 (1991). Nor may an agency interpret ambiguous statutes to apply retroactively. *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988).

This discrimination among religious groups is especially troublesome given that the contraceptive mandate "presently does not apply to tens of millions of people." *Hobby Lobby*, 134 S.Ct. at 2764 (citation omitted). The employees of Pepsi Bottling and Exxon are exempt from the contraceptive mandate. Yet the Little Sisters and those like them must violate firmly held religious beliefs—or pay punitive fines simply because of the way they chose to organize their ministry. This the Constitution does not permit.

CONCLUSION

For these reasons, *amicus curiae* respectfully requests that this Court grant certiorari.

Respectfully submitted,

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