19-4254(L), 20-31, 20-32, 20-41

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK; CITY OF NEW YORK; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WISCONSIN; CITY OF CHICAGO; AND COOK COUNTY, ILLINOIS,
Plaintiffs-Appellees,

(*Caption continued on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICI CURIAE* SENATOR DANIEL COATS AND REPRESENTATIVE DAVID WELDON IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC., NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, PUBLIC HEALTH SOLUTIONS, INC.,
Consolidated-Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES OF AMERICA,
Defendants-Appellants,

DR. REGINA FROST AND CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS,
Interveners-Defendants-Appellants,

ROGER T. SEVERINO, IN HIS OFFICIAL CAPACITY AS DIRECTOR, OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Consolidated-Defendants-Appellants.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are two former members of Congress: Daniel Coats, who served for sixteen years as a United States Senator from Indiana, and Dr. David Weldon, a practicing physician who served for fourteen years as a United States Representative from Florida's 15th congressional district.

Senator Coats was a sponsor of the Coats-Snowe Amendment, which protects physicians, residency programs, and residents from discrimination for refusing to provide or participate in abortion training. Representative Weldon sponsored the Weldon Amendment, which protects institutions and individuals in the health care profession from discrimination for refusing to participate in abortions.

Senator Coats and Representative Weldon have an interest in ensuring that legislation that bears their names is properly understood. Moreover, as the sponsors of the Coats-Snowe Amendment and Weldon Amendment respectively, their statements on the floor of Congress provide important evidence of legislative intent. *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990 (2d Cir. 1990) (citing *Regents of*

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[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than *amici* or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to this filing.

Univ. of Cal. v. Pub. Emp't Relations Bd., 485 U.S. 589, 595–97 (1982)). Interpretation of these two pieces of legislation is a central issue in this case.

INTRODUCTION

Over the last half-century, Congress has had to act repeatedly to protect freedom of conscience in health care. Conscience rights opponents—organizational and governmental—have persistently attempted to narrow and enfeeble these laws. In response, Congress has adopted a series of ever-broadening provisions safeguarding freedom of conscience for the health care profession. Today, there are "more than 30 statutory provisions that recognize the rights of conscience-based objectors in the health care arena." *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 496 (S.D.N.Y. 2019). Of these provisions, the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment are among the most consequential.

In 2019, the Department of Health and Human Services ("HHS") issued a regulation ("Conscience Rule") that implemented these protections and provided tools for their enforcement. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019). In short, HHS promulgated the Conscience Rule to ensure that recipients of its federal awards comply with existing federal law.

The lower court's conclusion that HHS exceeded its authority through its definitions of "health care entity" and "discrimination" conflicts with the text and history of the Coats-Snowe and Weldon Amendments and contravenes the intent of Congress. Indeed, the HHS Conscience Rule implements congressional intent to protect rights of conscience broadly. The district court's ruling was based on an incomplete and incorrect understanding of the relevant underlying legislation, and it should be reversed.

ARGUMENT

I. Congress Has Consistently Prioritized the Conscience Rights of Those in the Health Care Industry.

"Conscience is the most sacred of all property."[2] Those who work in the health care field surely appreciate that truth more than most. They dedicate themselves to caring, healing, and helping. Yet they regularly face decisions where the line between "care" and "harm" is not agreed upon. And in some lawful procedures—such as abortion—the line between care and harm bestrides the line between life and death. The deeply held religious and moral beliefs of health care workers deserve great respect when the stakes are so high.

[2] James Madison, *Property* (1792), *in* 1 *The Founders' Constitution* 598, 598 (Philip B. Kurland and Ralph Lerner eds., 1986).

Rather than force health care workers to choose between their career and their conscience, Congress has passed many laws safeguarding freedom of conscience. Shortly after *Roe v. Wade*, 410 U.S. 113 (1973), Congress passed the "Church Amendments." *New York*, 414 F. Supp. 3d at 498. The amendments' sponsor, Senator Frank Church of Idaho, foresaw that the right to access abortion might be morphed into the power to compel providers to perform or participate in abortions:

> It is the duty of Congress to fashion the law in such a manner that no Federal funding of hospitals, medical research, or medical care may be conditioned upon the violation of religious precepts. . . . Even though [*Roe*] does not impose the obligation [to perform abortions] upon a hospital, there is nothing in existing law to prevent zealous administrators from requiring the performance of abortions . . . as a part of their regulations pertaining to federally funded programs.

119 Cong. Rec. 9,595 (Mar. 27, 1973) (statement of Sen. Church).

His concerns were prescient. Today, more than thirty conscience laws protect individuals and institutions that might otherwise be required to participate in controversial procedures. The sheer number of these laws reflects Congress's consistent prioritization of conscience over coercion and illustrates well the ethical and moral dilemmas health care workers may face absent meaningful legal protections.

This brief focuses on two of the most significant protections—the Coats-Snowe Amendment and the Weldon Amendment. A correct understanding of these

laws—based on an examination of their text and history—belies any argument that the Conscience Rule's definitions of "health care entity" and "discrimination" are not grounded in or inconsistent with the text and purpose of those two provisions.

II. The Coats-Snowe Amendment's Non-Exclusive Definitions Provide Broad Protections.

The Coats-Snowe Amendment exhibits Congress's intent to protect any health care entity that chooses not to be trained in or provide training for participation in abortions. These protections arose in response to proposed changes to the Accreditation Council for Graduate Medical Education ("ACGME") standards for accreditation. ACGME is responsible for accrediting all residency and fellowship programs for physicians.[3] "[A] great deal of federal funding is tied to" ACGME accreditation. 142 Cong. Rec. S2264 (Mar. 19, 1996) (statement of Sen. Coats).

Before 1996, hospitals and OB/GYN residency programs were not required to include induced abortion training as a condition of ACGME accreditation. *Id.* "[H]ospitals were only required to train residents to manage medical and surgical complications of pregnancy," which included "treatment of life-threatening conditions to the mother or complications of a spontaneous abortion, miscarriage, or stillbirth." *Id.* But in 1996, ACGME changed its standards to require programs to

[3] *What We Do*, Accreditation Council for Graduate Med. Educ., https://www.acgme.org/What-We-Do/Overview (last visited Apr. 17, 2020).

train residents to perform induced abortions. As part of this new standard, ACGME incorporated an exception for "religious or moral objection[s]" to providing abortion training.[4] Any residency program that failed to incorporate abortion training and did not qualify for the exception risked losing its accreditation. And losing accreditation could mean losing access to federal funds.

To prevent this outcome, *amicus* Senator Coats co-sponsored legislation to shield programs that omitted abortion training. Now codified at 42 U.S.C. § 238n (2018), the "Coats-Snowe Amendment" is divided into three subsections. Subsection (a) prohibits discrimination, by the federal government and any state or local government receiving "federal financial assistance," against any "health care entity" that refuses to participate in induced abortion training. *Id.* § 238n(a). Subsection (b) directs the federal government and any state or local government receiving federal financial assistance to deem accredited any training program that would be accredited but for its refusal to participate in induced abortion training. *Id.* § 238n(b). Finally, subsection (c) defines key terms used in the statute.

The Coats-Snowe Amendment affirms and extends the policy of the Hyde Amendment. Since its adoption in 1976, the Hyde Amendment has restricted the use of federal funds for elective abortions. *See Harris v. McRae*, 448 U.S. 297, 302

[4] *1996–1997 Graduate Medical Education Directory*, Accreditation Council for Graduate Med. Educ. (1996), http://acgme.org/Portals/0/PDFs/1996-97.pdf.

(1980). Coats-Snowe takes this one step further: governments receiving federal funds cannot compel or coerce participation in abortion training as a condition of accreditation or licensure.

Two specific aspects of the Coats-Snowe Amendment support HHS's Conscience Rule. First the definitions subsection of Coats-Snowe is non-exclusive, preserving the conscience rights of all manner of individuals and training programs. Second, Coats-Snowe protects all manner of objections, departing from the more limited conscience protections of Title VII of the Civil Rights Act of 1964 and its associated regulations.

A. The Coats-Snowe Amendment uses examples to define "Health Care Entity" non-exclusively.

The definitions in the Coats-Snowe Amendment are purposefully broad and flexible:

> (1) The term "financial assistance", with respect to a government program, *includes* governmental payments provided as reimbursement for carrying out health-related activities.
> (2) The term "health care entity" *includes* an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.
> (3) The term "postgraduate physician training program" *includes* a residency training program.

42 U.S.C. § 238n(c) (emphases added).

Each of these definitions uses the verb "includes," which signals that each definition is non-exclusive. The United States Senate's *Legislative Drafting Manual* directs drafters to "use 'includes' to specify that a term includes certain elements (and may also include other elements)." *Legislative Drafting Manual*, Off. Legis. Couns., U.S. Senate § 316(a)(2) (Feb. 1997). By contrast, the verb "means," when used in a legislative definition, "establish[es] comprehensive meanings." *Id.* § 316(a)(1). Moreover, the *Legislative Drafting Manual* instructs that further attempts to signal inclusion can be counterproductive. "Since 'includes' and its derivatives are not exhaustive or exclusive, the use of ', but is not limited to' is redundant and invites misinterpretations." *Id.* § 316(b)(1). And to add more items to the definition might inaccurately suggest that the list is intended to be exhaustive, inviting an undesired, narrow interpretation of the scope of the protected class. *See* Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012) (explaining that the "Negative-Implication canon" applies when a list "can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved").

Properly understood, the language of subsection (c) was used to avoid placing hard limits on the scope of the protected class. The result is that "health care entity," the term that sets the scope of the protected class, extends beyond "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." 42 U.S.C. § 238n(c)(2). The definition uses

these illustrative examples because they were the subject of the ACGME accreditation standard that was the impetus for this provision.

When subsections (a) and (c) are read together, Congress's intent is unmistakable. Subsection (a) affirms the right of training programs and trainees to refuse to participate in abortion training. Subsection (c) sets the protected class in non-exclusive terms to ensure that all training programs and trainees receive the benefit of that protection. By leaving this definition open-ended, Congress signaled a clear desire to protect *all* training programs and participants. In so doing, Congress resolved the immediate challenge posed by the new ACGME standard. But Congress also built into the statute a degree of flexibility to meet future challenges to conscience rights.

B. The Coats-Snowe Amendment intentionally deviates from Title VII's framework for conscience protections.

As with the statute's protected class, the scope of its protected conduct is broad. Providing further evidence of Congress's intent to expand conscience safeguards beyond existing limits, Coats-Snowe places no condition on the nature of a health care entity's objection. Any and all objections receive the benefit of this statutory protection.

By design, this protection is broader than ACGME's proposed exemption to its abortion training accreditation standard, which would have limited valid objections to those based on religious or moral reasons. As Senator Coats noted,

> [W]e had testimony before our committee from a number of individuals who felt that [ACGME's] exception language was *unnecessarily restrictive* for those who [were concerned that], because they were a secular hospital or because they were residents in a training program at a secular hospital, [ACGME's] conscience-clause exception *would not protect them from the loss of accreditation or protect their basic civil rights*.

142 Cong. Rec. S2265 (Mar. 19, 1996) (statement of Sen. Coats) (emphases added). Such limitations would have excluded programs that, for economic or practical reasons, declined to train residents to participate in induced abortions. For instance, Senator Coats quoted a letter from "The University of Texas Medical Branch at Galveston" describing how that program ceased its abortion training program because it was losing money and causing morale problems among the residents due to "perceived maldistribution of work." *Id.* Coats-Snowe protected that program's autonomy where ACGME would not have.

By rejecting the narrower scope of the ACGME exception, Congress also eschewed similarly limited Title VII protections. Title VII of the Civil Rights Act of 1964 protects, among other things, employees from discrimination because of an employee's religion. 42 U.S.C. § 2000e-2(a). Although this protection extends to "all aspects of religious observance and practice, as well as belief," there is an exception if "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* §

2000e(j). The EEOC has extended "religious practices to include moral or ethical beliefs . . . held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (2019).

There are therefore two parts to the Title VII religious objection framework—the nature of the employee's objection and the employer's response. If the employee's religious or moral practices interfere with her job, then the employer must provide a reasonable accommodation unless doing so would cause the employer undue hardship.

The Coats-Snowe Amendment forgoes the first part of this formula and protects *all* objections, full stop, not just religious or moral objections. The district court failed to consider this aspect of Coats-Snowe in finding that the Conscience Rule improperly departed from the Title VII framework in the way it defined "discrimination." As the district court pointed out, Title VII governs "the duties of employers *with respect to religious objections* in the employment context." *New York*, 414 F. Supp. 3d at 513 (emphasis added). Without an explicit statement from Congress showing an intent to override that framework, the district court held that "the [Conscience] Rule's definition of 'discrimination' is game-changing" because it foregoes the reasonable accommodation-undue hardship formulation of Title VII. *Id.* at 523–24.

But the Coats-Snowe Amendment was meant to be a game-changer.[5] Indeed, the Coats-Snowe Amendment scraps the entire first part of the Title VII inquiry. It protects *all* reasons for objecting to participating in abortion training, including "religious reasons," "moral reasons," "practical reasons," "economic reasons," reputational reasons, or any other conceivable reasons. 142 Cong. Rec. S2265 (Mar. 19, 1996) (statement of Sen. Coats).

There is no basis to assume, as the district court did, that Congress intended to graft Title VII standards onto this legislation.[6] To the contrary, Congress rejected the application of Title VII standards—protecting all reasons for objection, not just religious or moral ones. It makes no sense to assume, without any indication in the

[5] This argument applies with equal force to the Weldon Amendment. *See infra* Part III.B.

[6] Though this brief focuses only on the Coats-Snowe and Weldon Amendments, none of the statutes at issue in this case explicitly adopt the reasonable accommodation-undue hardship standard. 42 U.S.C. § 300a-7 (the Church Amendments); *id.* §§ 1395w–22(j)(3)(B), 1396u–2(b)(3)(B) (the Medicare and Medicaid Advantage provisions); *id.* §§ 14406(1), 18023(b) (the Affordable Care Act provisions). Thus, even though the Church Amendments protect against certain actions "contrary to religious beliefs or moral convictions," *id.* § 300a-7, there is no reason to infer that Congress intended to adopt the reasonable accommodation-undue hardship standard for any of the conscience protections at issue in this case. Indeed, at least one district court has flatly rejected this argument regarding the Conscience Rule. *City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1020 (N.D. Cal. 2019) ("[N]o federal conscience statute ever defined 'discriminate' or 'discrimination,' ever referred to Title VII, or itself provided any undue hardship exception. At first blush, therefore, it is a bit hard to grasp plaintiffs' grievance.").

text or legislative history, that Congress nevertheless intended to mandate Title VII's reasonable accommodation-undue hardship formulation in defining "discrimination." Neither the text nor the legislative history of the Coats-Snowe Amendment supports that conclusion.

The understanding of "discrimination" in Coats-Snowe is unmistakably broader than that of Title VII. The Conscience Rule's departure from the Title VII framework recognizes that Congress's policy aims in protecting conscience are different in the context of abortion than they are in the generic context of employment discrimination. Congress intended these protections to be stronger in this more sensitive context—where the objection is often based on the belief that participating involves taking the life of another human being—which is why it deviated from the Title VII framework. The Conscience Rule's definition of "discrimination" is therefore consistent with the policy set by Congress.

III. The Weldon Amendment's Broad Protections Similarly Support the Conscience Rule's Definitions.

The Weldon Amendment is even broader than Coats-Snowe. It protects all corners of the health care profession from governmental coercion in the context of abortion, stripping federal funds from any governmental entity that discriminates on the basis that a health care entity does not provide, pay for, provide coverage of, or refer for abortions. Aggressive litigation by conscience rights opponents compelled Congress to enact the Weldon Amendment.

According to floor statements by the amendment's sponsor, *amicus* Representative Weldon, one of the first dominoes fell in 1997, when the Supreme Court of Alaska required a nonprofit hospital to allow elective abortions at its facility over the hospital board's objections. 150 Cong. Rec. H10,090 (Nov. 20, 2004) (statement of Rep. Weldon); *see also Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 971 (Alaska 1997). Based largely on the state's certificate of need laws, the court declared the hospital a "quasi-public institution" and held that the hospital was required to allow elective abortions under the state constitution. *Valley Hosp. Ass'n*, 948 P.2d at 970–71. After stripping the hospital of its moral autonomy, the court partially invalidated a state statute protecting individual and institutional freedom of conscience. *Id.* at 972.

In another troubling incident, three abortion-rights advocacy groups moved to intervene in a Catholic organization's purchase of a bankrupt private hospital. Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 Fordham Urb. L.J. 783, 790–91 (2004). Their goal was "to require [the] Catholic health system to build an abortion clinic on its premises to serve what they stated was a right of access to abortion." 150 Cong. Rec. H10,090 (Nov. 20, 2004) (statement of Rep. Weldon). This intervention failed because the judge found that "there was sufficient access to abortion in the community." Kramlich, *supra*, at 791. And in 2004, "the State of New Mexico refused to approve a hospital lease

because the community-owned hospital declined to perform elective abortions." 150 Cong. Rec. H10,090 (Nov. 20, 2004) (statement of Rep. Weldon). These incidents were not isolated but were part of a larger, coordinated effort to narrow or circumvent conscience rights laws. *See* 150 Cong. Rec. H10,095 (Nov. 20, 2004) (statement of Rep. Smith) (demonstrating how advocacy groups were coordinating litigation strategy to chip away at conscience rights laws).

To counter this mounting campaign against the freedom of conscience, Representative Weldon, a practicing physician, proposed one of the broadest conscience protections enacted into law. The "Weldon Amendment" mandates that

> (d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination *on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions*.
> (2) In this subsection, the term "health care entity" *includes* an individual physician or *other health care professional*, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, *or any other kind of health care facility, organization, or plan*.

Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, Div. B, § 507(d), 132 Stat. 2981, 3118 (2018) (emphases added).

The Weldon Amendment first appeared in the 2005 appropriations bill for the Departments of Labor, Health and Human Services, and Education. H.R. 5006, 108th Cong. (2004). It later passed as part of the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. F, § 508(d), 118 Stat. 2809, 3163 (2004). Congress has included the Weldon Amendment in each successive appropriations act for these three departments. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,172 (May 21, 2019) (codified at 45 C.F.R. pt. 88).

Like the Coats-Snowe Amendment, the Weldon Amendment "is a continuation of the Hyde policy of conscience protection." 150 Cong. Rec. H10,090 (Nov. 20, 2004) (statement of Rep. Weldon). However, by 2004, both the Church and Hyde Amendments had proved incapable of stopping zealous administrators from coercing hospitals and professionals to provide or participate in abortions—just as Senator Church had feared. As the incidents in Alaska, New Jersey, and New Mexico show, conscience rights opponents were committed to narrowing the Church Amendments' protections significantly and had gained significant ground toward that goal. These opponents surely had no desire to stop there. Absent strong, clear protections and implementing rules, opponents would slowly marginalize existing conscience protections in the abortion context.

The text of the Weldon Amendment reveals the clear intent to stop end-runs around existing protections. It does so in two ways, both reminiscent of, but broader than, the Coats-Snowe Amendment: 1) it sets the protected class broadly; and 2) it protects all manner of objections to participating in abortions.

A. The Weldon Amendment broadly defines "health care entity."

Like the Coats-Snowe Amendment, the Weldon Amendment establishes safeguards that are both broad and flexible. And it does so in similar ways. The district court held that the Conscience Rule's definition of "health care entity" "extends beyond what the face of" the Weldon Amendment and other statutes reveal. *New York*, 414 F. Supp. 3d at 525. To the contrary, the Conscience Rule's definition fits neatly within the parameters of the Weldon Amendment's protected class.

The Weldon Amendment defines the term "health care entity" non-exclusively, using the verb "includes." The U.S. House of Representatives' *Manual on Drafting Style* makes the same distinction as its Senate counterpart between "means" and "includes" in bill definitions. "In definitions, 'means' should be used for *establishing complete meanings* and 'includes' when the purpose is to make clear that a term *includes a specific matter*." *House Legislative Counsel's Manual on Drafting Style*, Off. Legis. Couns., U.S. House of Representatives, § 351(i)(6)(A) (Nov. 1995) (emphases added). Accordingly, the examples that follow the word "includes" are illustrative, not exhaustive. In its *Guide to Legislative Drafting*, the

Office of Legislative Counsel to the United States House of Representatives explains further:

> If a definition says that "the term 'X' means A, B, and C", then X means *only* A, B, and C and cannot also mean D or E. If a definition says that "the term 'X' includes A, B, and C", then X must include A, B, and C, but it may also include D or E, or both. Thus, the phrase "includes, but is not limited to" is redundant.[7]

In light of this drafting choice, the specific enumerations contained within the definition of "health care entity" should be read as a non-exclusive list of examples.

Congress deliberately chose the verb "includes" instead of "means." But even if Congress had chosen "means," the scope of "health care entity" in the Weldon Amendment would still be expansive. It contains additional, broad catch-all terms that describe vast swaths of both individual and institutional health care entities. The provision explicitly protects the conscience rights of physicians, hospitals, and health insurance plans among others. It also protects "*other health care professional[s]*" and "*any other kind of health care facility, organization, or plan*." The plain meaning of the text provides a multitude of individual and institutional

[7] *HOLC Guide to Legislative Drafting*, Off. Legis. Couns., U.S. House of Representatives, https://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html (revised Jan. 13, 2019).

actors within the health care industry the benefit of the Weldon Amendment's protections.

Representative Weldon's floor statements support this interpretation. *See In re Ionosphere Clubs, Inc.*, 922 F.2d at 990 (citing *Regents of Univ. of Cal. v. Pub. Emp't Relations Bd.*, 485 U.S. 589, 595–97 (1982)) (asserting that the statements of the primary sponsor of an amendment help determine legislative intent). Reflecting his unique insights as a practicing physician, Representative Weldon consistently expressed an understanding that the scope of "health care entity" reaches beyond the enumerated classes. For instance, "[t]he reason" Representative Weldon "sought to include this provision in the bill . . . is that the majority of *nurses*, *technicians*, and doctors" that he interacted with had personal objections to participating in abortions—even those who supported abortion politically. 150 Cong. Rec. H10,090 (Nov. 20, 2004) (statement of Rep. Weldon) (emphasis added). This was true even though neither "nurses" nor "technicians" are explicitly named in the definition of "health care entity" in the Weldon Amendment. Similarly, Representative Weldon said that "[t]his provision is intended to protect the decisions of physicians, *nurses*, *clinics*, hospitals, *medical centers*, and even *health insurance providers* from being forced by the government to provide, refer, or pay for abortions." *Id.* (emphases added). These emphasized classes are protected—as the primary sponsor said they

were—because the definition of "health care entity" is open-ended with broad catch-all terms.

The district court nevertheless wrongly held that the Weldon Amendment's non-exclusive definition and catch-all terms, working in tandem, failed to include entities like plan sponsors and third-party administrators. *New York*, 414 F. Supp. 3d at 525 ("Representative Weldon specifically stated that the amendment extended to 'health insurance providers,' yet the Rule's definition also covers 'plan sponsor[s]' . . . and 'third-party administrator[s]' . . . .") (first and third alteration in original). Specifically, the district court cited Representative Weldon's floor statement that the amendment protects "*even* health insurance *providers*" to show that Congress did not extend protection to other insurance-related entities. *Id.* (second emphasis added).

This holding misreads the text and misapprehends Representative Weldon's explanation and Congress's intent. Just as nurses and technicians facilitate care in support of a physician, insurance providers facilitate coverage under a health insurance plan, as do plan sponsors and third-party administrators. If nurses and technicians are protected despite only physicians being named as a "health care entity," and insurance providers are protected despite only health insurance plans being named, it follows that plan sponsors and third-party administrators are covered as well. Otherwise, governments could circumvent protection of health care plans

by targeting plan sponsors and third-party administrators. Congress intended to stop such elusive regulatory encroachments on conscience.

In any event, Representative Weldon's statement that the amendment protects "even health insurance providers" does not so limit the law's facially broad text. Plan sponsors and third-party administrators are within the contemplated parameters of "health care entity" given the text and purpose of the Weldon Amendment. The Conscience Rule's definition of "health care entity" is thus in harmony with the underlying legislation.

B. The Weldon Amendment, like the Coats-Snowe Amendment, intentionally departs from the Title VII framework for conscience protections.

The Weldon Amendment places a categorical ban on discriminating against a health care entity for failing to participate in abortions, just as the Coats-Snowe Amendment did in the abortion training context. The Weldon Amendment places no limitations on the grounds for objecting. No governmental body can discriminate against a health care entity for refusing to participate in abortions, regardless of the nature of the entity's objection.

Again, this is a marked departure from the Title VII framework for religious discrimination. Title VII requires employers to provide a reasonable accommodation to an employee with a conflicting *religious or moral practice* subject to an undue hardship standard. 42 U.S.C. § 2000e(j). Title VII does not

apply, however, if the conflict stems from something other than religious or moral observance.

The Weldon Amendment, like the Coats-Snowe Amendment, establishes a different standard. There are no criteria provided to test or assess the validity of an objection—any objection entitles the person or institution raising it to protection. As with Coats-Snowe, Weldon's departure from the Title VII framework undercuts the district court's assumption that HHS was somehow bound to the Title VII reasonable accommodation-undue hardship standard in defining "discrimination." *See also supra* Part II.B.

CONCLUSION

The lower court's conclusion that HHS exceeded its authority through its definitions of "health care entity" and "discrimination" conflicts with the text and history of the Coats-Snowe and Weldon Amendments and contravenes the intent of Congress. Indeed, the HHS Conscience Rule implements congressional intent to protect rights of conscience broadly. This Court should reverse the district court's grant of summary judgment.

Date: May 12, 2020

Respectfully submitted,

/s/ *Michael V. Hernandez*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) and Local Rules 32.1(a)(4)(A) and 29.1(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 4,839 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Michael V. Hernandez*
Michael V. Hernandez

Date: May 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on May 12, 2020. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Michael V. Hernandez*
Michael V. Hernandez