19-4254(L)

20-32, 20-32, 20-41 (con.)

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, 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, No. 19-cv-4676
Before the Honorable Paul A. Engelmayer

BRIEF FOR 78 CURRENT MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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May 26, 2020

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, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION,

Intervenors-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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are 13 Senators and 65 Representatives duly elected to serve in the 116th Congress of the United States. They have a strong interest in ensuring that Congress's numerous conscience and anti-discrimination laws are properly implemented and enforced. *Amici* offer their perspective, as Members of Congress, on the meaning of the key provisions at issue in this case. *Amici* submit this brief as governmental entities, in an official capacity as officers of the United States, pursuant to Fed. R. App. P. 29(a)(2).[2]

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has a longstanding bipartisan tradition of enacting legislation that promotes the rights of those whose conscience precludes participation in certain controversial actions. Consistent with that tradition, Congress has repeatedly passed legislation shielding individuals and organizations from being forced to violate their consciences by performing, participating in, or referring patients for

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

[2] Members of Congress, as officers of the United States, may file *amici curiae* briefs without the parties' consent or leave of the Court. *See* Fed. R. App. P. 29(a)(2). In any event, counsel for the parties have consented to the filing of this brief.

certain procedures, including abortion, sterilization, and physician-assisted suicide. In particular, many of these statutory provisions—including the Church, Coats-Snowe, and Weldon Amendments—protect individuals and entities from discrimination based on their opposition to these procedures. These laws recognize our society's deep disagreement over these important issues and, consequently, aim to prevent recipients of federal funds from infringing on First Amendment conscience rights.

To ensure compliance with these federal conscience protections, the Department of Health and Human Services (HHS) promulgated the Conscience Rule on May 21, 2019 to interpret and implement existing federal statutes, often in "laws [that] have existed for decades." 84 Fed. Reg. 23,170, 23,222; *see* 45 C.F.R. §§ 88.1-88.3. Specifically, the Rule describes HHS's process for enforcing these protections by providing HHS's definitions of key terms and explaining how HHS will take enforcement action. But the Rule itself is not the source of HHS's enforcement power; instead, the federal conscience protections place these conditions on federal funding. It is Congress—not HHS—that made the policy determination to protect health care entities against government-funded discrimination.

The lower court held that the Conscience Rule went beyond the statutory language and Congress's intent in passing the federal conscience protections.

Specifically, the court held that HHS lacked the authority to define statutory terms addressed by the Rule, including "health care entity," "assist in the performance," and "discriminate or discrimination." *See* Op. 137.[3] But all of the challenged definitions flow directly from the statutory text of the federal conscience protections. The district court's holding thus flies in the face of the clear statutory text of the relevant protections. Essentially, the district court was asking the wrong question—namely, whether the definitions were previously adopted rather than whether the definitions were consistent with what Congress said in the relevant statutory texts.

For the last fifty years, Congress has been very clear: governmental and private entities cannot receive federal funds and discriminate against health care entities that refuse to perform or assist in the performance of particular procedures. HHS should be allowed to enforce this statutory prerogative. *Amici curiae* Members of Congress respectfully submit this brief to highlight the plain meaning of the statutory text at issue in order to show that HHS was doing nothing more than implementing the widespread consensus in Congress to protect the conscience rights of healthcare professionals.

[3] Opinion and Order, Dist. Ct. Dkt. 248 (SA1-SA147 and referred to herein as "Op.").

ARGUMENT

To protect healthcare providers' ability to practice medicine in accord with their religious beliefs and moral convictions, Congress has repeatedly passed conscience protections—including the Church Amendments, Coats-Snowe Amendment, Weldon Amendment, and the Patient Protection and Affordable Care Act (ACA)—prohibiting recipients of federal funds from discriminating against healthcare providers who have religious or moral objections to particular procedures, including abortion, sterilization, and physician-assisted suicide. These provisions are all clear: federally-funded entities cannot discriminate against healthcare providers who have conscientious objections to these procedures.

To ensure compliance with these protections, HHS promulgated the Conscience Rule to give effect to the congressional anti-discrimination mandate reflected in existing federal statutes. Specifically, the Rule implements and enforces federal laws protecting freedom of conscience by requiring employers to certify their compliance with federal law and providing an enforcement mechanism to protect healthcare professionals who hold religious or moral convictions regarding certain procedures from discrimination. In so doing, the Conscience Rule provided HHS's working definitions of certain terms as used in various federal statutes that prohibit discrimination in the healthcare field by those governmental and private entities that accept federal funds—namely the terms

"health care entity," "assist in the performance of," and "discriminate or discrimination."

The lower court held that the Conscience Rule's definitions of key terms exceeded its statutory authority in that they "go beyond merely expressing what the statute has always meant." Op. 50 (internal quotation marks and alterations omitted). This holding was error, as all of the challenged definitions flow directly from the federal conscience statutes.

As always, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also United States v. Gonzales*, 520 U.S. 1, 4 (1997) (same). A court's "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [The] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (internal quotation marks omitted); *see also United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003) (same). Here, each of the statutory terms at issue has a plain and unambiguous meaning, as laid out below.

I. CONGRESS USED THE TERM "HEALTH CARE ENTITY" EXPANSIVELY

Congress made a policy determination to protect health care entities against government-funded discrimination. Three of the major federal conscience

protections—the Coats-Snowe Amendment, the Weldon Amendment,[4] and the ACA—prohibit discrimination against health care entities who have objections to particular procedures. To effect that prerogative, Congress defined the term "health care entity" expansively to cover large swaths of the health sector. Specifically, in all three of these provisions, Congress defined "health care entity" not by an exhaustive definition, but with a list of illustrative examples. The district court, however, erroneously held that statutory definition of the term was *limited* by these examples and thus that the Rule's definition "extends beyond what the face of these statutes disclose." Op. 53.

The text of the provisions themselves demonstrate the district court's error. The Coats-Snowe Amendment prohibits the federal government and any state or local governments that receive federal financial assistance from subjecting any "health care entity" to discrimination because the health care entity declines to provide abortions or training for abortions. *See* 42 U.S.C. § 238n. Under the statute, "[t]he term 'health care entity' *includes* an individual physician, a

[4] As used in this brief, the term "Weldon Amendment" refers to an annual rider to the Appropriations Act. The Conscience Rule refers to Department of Defense and Labor, Health and Human Services, and Education Appropriations Act of 2019, and Continuing Appropriations Act of 2019, Pub. L. No. 115-245, § 507(d), 132 Stat. 2981, 3118 (2018); however, the same amendment has been passed on numerous occasions, dating back to the Hyde-Weldon Amendment, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d), 118 Stat. 2809, 3163 (2004).

postgraduate physician training program, and a participant in a program of training in the health professions." *Id*. § 238n(c)(2) (emphasis added). Similarly, the Weldon Amendment prevents federal agencies and state or local governments from receiving federal funding if they subject a "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." *See, e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act of 2019, and Continuing Appropriations Act of 2019, Pub. L. No. 115-245, § 507(d)(1), 132 Stat. 2981, 3118 (2018). The Weldon Amendment likewise provides a definition through non-exhaustive examples: "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." *Id*. § 507(d)(2) (emphasis added). Finally, section 1553 of the ACA, which protects any "health care entity" from discrimination for refusal to provide services for assisted suicide, defines "health care entity" identically to the Weldon Amendment. 42 U.S.C. § 18113(a).

Consistent with these provisions, HHS's Conscience Rule made clear that the definition of "health care entity" for the purposes of the Coats-Snowe Amendment, the Weldon Amendment, and ACA Section 1553 is not limited to the statutory examples but extends to health care facilities of all types—exactly as

Congress said. The Rule further elucidated the statutory definition by describing other examples of a covered "health care entity," consistent with the statutes' non-exhaustive lists. *See* 45 C.F.R. § 88.2. For all three, the Rule defines "health care entity" as including physicians, pharmacists, health care personnel, medical trainees, applicants for medical training programs, post-graduate medical training programs, hospitals, pharmacies, medical laboratories, entities that engage in medical research, and "any other health care facility." *Id*. For the purposes of the Weldon Amendment and ACA Section 1553 only, the definition also "includes" provider-sponsored organizations, health maintenance organizations, health insurance issuers, health insurance plans, plan sponsors, third-party administrators, and "any other kind of health care organization . . . or plan." *Id*. The Rule's definition for the Coats-Snowe Amendment also includes "any other health care provider." *Id*.

As a matter of statutory interpretation, the lists of health care entities in the Coats-Snowe Amendment, Weldon Amendment, and ACA Section 1553 are, by their terms, non-exhaustive. Rather than provide a comprehensive definition of "health care entity," these statutes provide "an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). In explaining the term "health care entity," all three statutes state, "the term 'health care entity' *includes* …." 42 U.S.C. § 238n(c)(2); Pub. L.

No. 115-245, § 507(d)(2), 132 Stat. 3118; 42 U.S.C. § 18113(b) (emphasis added). The word "include" typically signals a non-exhaustive list.[5] This principle of interpretation has been widely recognized, including by this Court. *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979) ("The definition [begins] with the word 'includes.' This indicates that the list is not exhaustive but merely illustrative.") (citing *Federal Land Bank*, 314 U.S. at 99-100)).[6] Based on this principle alone, Congress made clear in these statutes that the terms at issue should be interpreted broadly.

Relatedly, the Weldon Amendment and ACA Section 1553 definitions of "health care entity" expressly contain catch-all provisions at the end of their respective lists, further making clear that they are not intended to be exhaustive. The lists in both statutes include "an individual physician *or other health care professional*" and "any other kind of health care facility, organization, or plan."

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[5] It is unclear whether the District Court disagreed with this point, as it noted: "HHS defends its definition … on the ground that the definitions in each statute use the term 'include,' connoting a non-exhaustive list of covered entities… . *whether or not so*, the issue here is whether HHS had authority to construe these statutes to cover such entities … ." Op. 54 (citation omitted and emphasis added).

[6] Other circuits have also recognized this principle. *See, e.g., United States v. Cruz-Sanchez*, 47 F. App'x. 914, 915 (10th Cir. 2002) ("The list following the use of the word 'includes' is not exhaustive. The Application Note does not state … 'includes only.' If the list were exhaustive, the first part of the definition would be unnecessary."). In fact, purely as a matter of language, the word "include[s]" has "traditionally introduced a non-exhaustive list." Garner, *Garner's Modern American Usage* 500 (Oxford Univ. Press, 4th ed. 2016).

Pub. L. No. 115-245, § 507(d)(2), 132 Stat. 3118; 42 U.S.C. § 18113(b) (emphasis added). The references to "other" professionals or entities clearly imply that there are in fact other, non-listed professionals or entities covered by the provision. In light of this broad catch-all provision, it makes little sense to conclude, as the lower court did, that pharmacies, health plan sponsors, and third-party administrators are not within the scope of the statutory term "health care entity."

The statutory text thus reflects that "health care entity" is a term of considerable breadth, not narrowly confined to the examples in the statutes. Had Congress intended to limit the provision to hospitals, it could have said "hospitals." Had Congress intended only individual doctors, it could have said "doctors." Instead, "health care entity" confers rights to a broad category of healthcare-related individuals and institutions whose involvement with abortion-related activities would violate their consciences.

II. HHS'S DEFINITION OF "ASSIST IN THE PERFORMANCE" FITS SQUARELY WITHIN THE PLAIN TEXT OF THE CHURCH AMENDMENTS

Congress did not only protect health care entities from *performing* procedures to which they object; it also, in the Church Amendments, prohibited discrimination based on a health care entity's objection on religious or moral grounds to *assisting in the performance of* a procedure. The Church Amendments use the word and phrase "perform" and "assist in the performance" repeatedly. For example, the statute provides that "[n]o individual shall be required to *perform* or

assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his *performance* or *assistance in the performance* of such part of such program or activity would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d) (emphasis added). The statute also provides that the receipt of federal funds by an individual or entity does not authorize a public official or court to require the recipient "to *perform* or *assist in the performance* of any sterilization procedure or abortion if his *performance* or *assistance in the performance* of such procedure or abortion would be contrary to his religious beliefs or moral convictions." *Id.* § 300a-7(b)(1) (emphasis added). Further, the statute prohibits discrimination based on "refus[ing] to *perform* or *assist in the performance of* [a sterilization] procedure or abortion on the grounds that his *performance* or *assistance in the performance* of the procedure or abortion would be contrary to his religious beliefs or moral convictions." *Id.* § 300a-7(c)(1)(B) (emphasis added).

HHS's definition of the phrase "assist in the performance" in the Conscience Rule comports with the Church Amendments; contrary to the lower court's holding, it does not "give rise to previously unannounced rights and obligations." Op. 55. HHS's definition of "assist in the performance" flows directly from the text of the Church Amendments. The Court must therefore adhere to Congress'

intent and find that the Rule's definition of "assist in the performance" is permissible.

The meaning of "assist in the performance" in the Church Amendments is plain, and the Conscience Rule's definition of this term comports with the statute. As an initial matter, it is clear from the statute's text that Congress distinguished the "performance" of an act from "assisting in the performance" of that act. Congress separated the word "performance" from the phrase "assist in the performance" with the disjunctive "or." "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). So, "[t]o read the next clause, following the word 'or,' as somehow repeating that requirement, even while using different words, is to disregard what 'or' customarily means. As we have recognized, that term's 'ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.'" *Loughrin v. United States*, 573 U.S. 351, 357 (2014). To treat these disjunctive terms to mean only "performance," as Plaintiffs argued, *see*, *e.g.*, Planned Parenthood Summ. J. Br. 21-23 (Dist. Ct. Dkt. 184), in effect reads "assist in the performance" out of the statute altogether. This Court generally "avoid[s] construing a statute so as to render a provision mere surplusage." *See Burrus v. Vegliante*, 336 F.3d 82, 91 (2d Cir. 2003). Assisting in

the performance of an act is not the same as performing an act; to "assist" has an independent meaning, necessarily broader and encompassing more than just performance.

Next, to interpret "assist in the performance" requires examining the ordinary meaning of "assist." *Gayle*, 342 F.3d at 92. To "assist" means "to give support or aid."[7] "Support" is in turn defined as "to promote the interests or cause of … [to] help…."[8] And "Aid" means "to provide with what is useful or necessary in achieving an end."[9] Thus, the term "assist in the performance" plainly means to help or provide with what is useful in the performance of an action.

The Conscience Rule's definition of "assist in the performance" reflects this ordinary meaning. The Rule defines "assist in the performance" as "to take an action that has a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity." 45 C.F.R. § 88.2. It then provides a list of representative actions that would count as "assisting in the performance": "This

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[7] "Assist," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/assist (visited May 26, 2020). *See VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 187 (2d Cir. 2010) (referring to the *Merriam-Webster* online dictionary).

[8] "Support," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/support (visited May 26, 2020).

[9] "Aid," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/aid (visited May 26, 2020).

may include counseling, referral, training, or otherwise making arrangements for the procedure or a part of a health service program or research activity, depending on whether aid is provided by such actions." *Id.*

The district court found some of the activities laid out in this provision of the Conscience Rule to go beyond the statute. Specifically, the district court found the phrase "'counseling, referral, training, or otherwise making arrangements' for a procedure" to be "beyond any previously articulated definition," because it covered "activities ancillary to a covered procedure (e.g., scheduling and receptionist services, transportation of a patient, and provision of information relating to the procedure) and activities carried out on days before and after these procedures." Op. 52. But the district court found this without properly examining what "assist" means. Every listed action "give[s] aid" to the performance of an action—for example, an abortion—because they "provide … what is useful or necessary in achieving an end." As HHS reasonably found, actions such as "[s]cheduling an abortion or preparing a room and the instruments for an abortion are necessary parts of the process of providing an abortion, and it is reasonable to consider performing these actions as constituting 'assistance.'" 84 Fed. Reg. at 23,186-23,187. Further, counseling or referring a service is a predicate and necessary step in the ultimate performance of that act, making them "necessary to achieve [that] end." That these actions occur prior to, or on different days than the actual

procedure does not remove them from the statute's coverage of "assist[ing] in the performance." 42 U.S.C. § 300a-7. The Church Amendments provide no date range or timeline delineating what constitutes assistance.

III. HHS PROVIDED A REASONABLE LIST OF EXAMPLES TO FLESH OUT THE PLAIN MEANING OF THE TERM "DISCRIMINATE"

Likewise, the district court's analysis of the terms "discriminate" and "discrimination" is erroneous, a flawed construction born out of a flawed approach. The district court focused almost exclusively on legislative history and policy outcomes, not even attempting to define "discriminate" or "discrimination" as the terms are used in the Church Amendments, Coats-Snowe Amendment, and the Weldon Amendment. Instead, it dismissed HHS's assertion that both the Amendments and Conscience Rule use the plain meaning of the terms as "an *ipse dixit*" without offering a word of analysis. Op. 51. Moreover, the court chided HHS for failing to identify legislative history establishing that Congress as a whole understood the terms "discriminate" and "discrimination" in the Amendments to "embody the content and ground rules" of the Conscience Rule.[10] *Id.* The district

[10] A court should only turn to legislative history where the text is ambiguous or susceptible to multiple meanings. *See Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) ("Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous."). Here, as explained, the meaning of the statutory text is unambiguous.

court's framework is unsalvageable. On *de novo* review, application of sound, correct principles of statutory construction should lead this Court to reverse.

The Church Amendments, Coats-Snowe Amendment, and the Weldon Amendment all prohibit federally-funded entities from discriminating against healthcare providers who have objections to particular procedures, including abortion, sterilization, and physician-assisted suicide. *See, e.g.*, 42 U.S.C. § 300a-7(c)(1)(A) (federally-funded entities cannot "discriminate in the employment, promotion, or termination of employment of any physician or health care personnel" or "discriminate in the extension of staff or other privileges to any physician or other health care personnel"); *id.* § 238n(a) (federally-funded entity cannot "subject any health care entity to discrimination"). All parties agree that these terms are never explicitly defined in any of the statutes. Thus, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n*, 477 U.S. at 108; *see Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir.1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms.").

Congress's "normal definition" of "discriminate" or "discrimination" is "differential treatment." *See, e.g.*, *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) (interpreting the term "discrimination" in the Age Discrimination in Employment

Act of 1967, 29 U.S.C. § 633a(a)); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (interpreting the term "discrimination" in Title IX, 20 U.S.C. § 1681(a)). If Congress had intended to place Title VII's protections on the protections set forth in the later-in-time conscience and anti-discrimination laws (as the lower court held it had intended to do, Op. 51), it would have done so explicitly. The fact that Congress created those specific prohibitions in Title VII is evidence that it intended to preclude courts from implying similar specific prohibitions in other, different laws. The statutory language is thus clear that the "normal definition" applies. *Cf. NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325 (1951) (explaining that if Congress intended statutory terms "to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition").

Further, the dictionary definition of "discriminate" is "to make a difference in treatment or favor on a basis other than individual merit"[11] or "to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs rather than according to actual merit; show partiality."[12] *See Mayo Found. for Med. Educ. & Research v. United*

[11] "Discriminate," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/discriminate (visited May 26, 2020).

[12] "Discriminate," *Dictionary.com*, https://www.dictionary.com/browse/discriminate (visited May 26, 2020).

States, 562 U.S. 44, 52 (2011) (applying a dictionary definition in an agency interpretation case). In sum, the plain meaning of "discriminate" is "to treat differently for reasons other than merit."[13] There is no ambiguity in the text of the Church, Coats-Snowe, or Weldon Amendments to suggest that Congress deviated from this dictionary definition of "discriminate" or "discrimination."

The Conscience Rule accordingly accepts that the terms "[d]iscriminate" and "discrimination" carry their plain meaning as used in the Amendments, and provides a non-exclusive list of relevant forms of "discrimination" that fall within the plain meaning of that term. *See* 45 C.F.R. § 88.2. Because the dictionary definition of "discriminate" is broad, the Conscience Rule explicitly lists some—but not all—of its relevant manifestations. None of the Rule's examples expand, contract, or modify the statutory plain meaning of the terms. Conversely, each of the enumerated exemplars is a form of non-merit based differential treatment in the workplace. The Rule's examples of actions constituting "discrimination" include

[13] Other dictionary definitions of "discriminate" include "to make distinctions on the basis of a class or category without regard to individual merit," *The American Heritage Dictionary*, https://bit.ly/3bYHK2W, "to treat a person or particular group of people differently [and] especially in a worse way from the way in which …people [are usually treated]," *Cambridge Dictionary*, https://bit.ly/2XlgiHw, "to make distinctions in treatment," *Collins American Dictionary*, https://bit.ly/2WXPUVf, and "[t]o treat a person or group in an unjust or prejudicial manner, esp. on the grounds of race, gender, sexual orientation, etc.," *Oxford English Dictionary*, https://bit.ly/3bUgbb5. *See Bauer v. Holder*, 25 F. Supp. 3d 842, 854 & n.20 (E.D. Va. 2014) (collecting definitions), *vacated on other grounds*.

"[t]o withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny any grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, title, or other similar instrument, position, or status," 45 C.F.R. § 88.2(1), "[t]o withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny any benefit or privilege or impose any penalty," *id.* § 88.2(2), or the use of "any criterion, method of administration, or site selection … that subjects individuals or entities protected under this part to any adverse treatment … ," *id.* § 88.2(3). Because the dictionary definition is not ambiguous, and because the Conscience Rule's list of examples of "discrimination" fit squarely within that definition, the district court's analysis should not have proceeded beyond that step.

Overall, "this case presents a question of statutory interpretation, not a question of policy. [Courts] have no authority to second-guess Congress…." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018). A faithful interpretation of the plain text and ordinary meaning of the statutory terms demonstrates that the Conscience Rule does not move "beyond any previously articulated definition[.]" Op. 52. The Conscience Rule is consistent with the text of the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and the ACA and furthers the statutes' purpose to protect objectors from discrimination on the basis of their religious or moral convictions.

CONCLUSION

The judgment of the district court should be reversed.

May 26, 2020

Respectfully submitted,

/s/ Matthew T. Martens

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(g) and 2d Cir. Local Rules 29.1(c) & 32.1(a)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,477 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Matthew T. Martens
MATTHEW T. MARTENS

APPENDIX

APPENDIX: LIST OF AMICI

Senator James Lankford of Oklahoma

Senator Mike Braun of Indiana

Senator Tom Cotton of Arkansas

Senator Kevin Cramer of North Dakota

Senator Steve Daines of Montana

Senator Michael B. Enzi of Wyoming

Senator Deb Fischer of Nebraska

Senator Cindy Hyde-Smith of Mississippi

Senator James M. Inhofe of Oklahoma

Senator Kelly Loeffler of Georgia

Senator James E. Risch of Idaho

Senator Ben Sasse of Nebraska

Senator Tim Scott of South Carolina

Representative Ralph Abraham, M.D. of Louisiana, 5th Congressional District

Representative Robert B. Aderholt of Alabama, 4th Congressional District

Representative Brian Babin, D.D.S. of Texas, 36th Congressional District

Representative Andy Barr of Kentucky, 6th Congressional District

Representative Andy Biggs of Arizona, 5th Congressional District

Representative Andy Harris, M.D. of Maryland, 1st Congressional District

Representative Larry Bucshon, M.D. of Indiana, 8th Congressional District

Representative Ted Budd of North Carolina, 13th Congressional District

Representative Michael C. Burgess, M.D., of Texas, 26th Congressional District

Representative Ben Cline of Virginia, 6th Congressional District

Representative Tom Cole of Oklahoma, 4th Congressional District

Representative Doug Collins of Georgia, 9th Congressional District

Representative K. Michael Conaway of Texas, 11th Congressional District

Representative Jeff Duncan of South Carolina, 3rd Congressional District

Representative Neal Dunn, M.D., of Florida, 2nd Congressional District

Representative Bill Flores of Texas, 17th Congressional District

Representative Matt Gaetz of Florida, 1st Congressional District

Representative Greg Gianforte of Montana, At-Large Congressional District

Representative Bob Gibbs of Ohio, 7th Congressional District

Representative Paul Gosar, D.D.S. of Arizona, 4th Congressional District

Representative Mark E. Green, M.D. of Tennessee, 7th Congressional District

Representative H. Morgan Griffith of Virginia, 9th Congressional District

Representative Glenn Grothman of Wisconsin, 6th Congressional District

Representative Michael Guest of Mississippi, 3rd Congressional District

Representative Vicky Hartzler of Missouri, 4th Congressional District

Representative Kevin Hern of Oklahoma, 1st Congressional District

Representative Jody Hice of Georgia, 10th Congressional District

Representative Mike Johnson of Louisiana, 4th Congressional District

Representative Jim Jordan of Ohio, 4th Congressional District

Representative John Joyce, M.D. of Pennsylvania, 13th Congressional District

Representative Mike Kelly of Pennsylvania, 16th Congressional District

Representative Steve King of Iowa, 4th Congressional District

Representative Doug LaMalfa of California, 1st Congressional District

Representative Doug Lamborn of Colorado, 5th Congressional District

Representative Robert E. Latta of Ohio, 5th Congressional District

Representative Debbie Lesko of Arizona, 8th Congressional District

Representative Barry Loudermilk of Georgia, 11th Congressional District

Representative Kenny Marchant of Texas, 24th Congressional District

Representative Roger Marshall, M.D. of Kansas, 1st Congressional District

Representative Kevin McCarthy of California, 23rd Congressional District

Representative Carol Miller of West Virginia, 3rd Congressional District

Representative Alex Mooney of West Virginia, 2nd Congressional District

Representative Gregory F. Murphy, M.D. of North Carolina, 3rd Congressional District

Representative Ralph Norman of South Carolina, 5th Congressional District

Representative Pete Olson of Texas, 22nd Congressional District

Representative Steven M. Palazzo of Mississippi, 4th Congressional District

Representative Bill Posey of Florida, 8th Congressional District

Representative Martha Roby of Alabama, 2nd Congressional District

Representative Phil Roe, M.D. of Tennessee, 1st Congressional District

Representative John Rose of Tennessee, 6th Congressional District

Representative Chip Roy of Texas, 21st Congressional District

Representative Adrian Smith of Nebraska, 3rd Congressional District

Representative Christopher H. Smith of New Jersey, 4th Congressional District

Representative Ross Spano of Florida, 15th Congressional District

Representative W. Gregory Steube of Florida, 17th Congressional District

Representative Jackie Walorski of Indiana, 2nd Congressional District

Representative Michael Waltz of Florida, 6th Congressional District

Representative Randy K. Weber of Texas, 14th Congressional District

Representative Daniel Webster of Florida, 11th Congressional District

Representative Brad R. Wenstrup, D.P.M. of Ohio, 2nd Congressional District

Representative Bruce Westerman of Arkansas, 4th Congressional District

Representative Roger Williams of Texas, 25th Congressional District

Representative Joe Wilson of South Carolina, 2nd Congressional District

Representative Ron Wright of Texas, 6th Congressional District

Representative Ted S. Yoho, D.V.M. of Florida, 3rd Congressional District