# Nos. 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

***AMICUS CURIAE* BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, AND THE COMMITTEE TO PROTECT THE CONSCIENCE RIGHTS OF HEALTH CARE WORKERS, IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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[redacted]

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.; NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION; AND 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 Service; AND UNITED STATES OF AMERICA,

Defendants-Appellants,

DR. REGINA FROST AND CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS,

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.

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## CORPORATE DISCLOSURE STATEMENT

The American Center for Law and Justice is a nonprofit organization that has no parent and issues no stock.

## INTEREST OF *AMICUS*[1]

The American Center for Law & Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. The Committee to Protect the Conscience Rights of Health Care Workers consists of more than 148,000 of the ACLJ's members.

The ACLJ has represented, and continues to represent, individuals who have suffered adverse employment action based on their objection to facilitating or participating in abortions or abortion-inducing drugs. *See Fernandes v. City of Philadelphia*, 2:14-cv-05704-JP (E.D. Pa filed Oct. 7, 2014); *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007); *Nead v. Eastern Ill. Univ.*, No. 05-2137, 2006 U.S. Dist. LEXIS 36897 (C.D. Ill. June 6, 2006); *Adamson v. Superior Ambulance Serv.*, No. 04C-3247 (N.D. Ill. filed May 7, 2004); *Moncivaiz*

[1] All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

*v. Dekalb*, No. 03-C-50226, 2004 U.S. Dist. LEXIS 3997 (N.D. Ill. Mar. 12, 2004).

In *Nead*, a nurse brought suit against her public employer alleging that she was passed over for a promotion based on her objection to participating in emergency contraception protocols. The district court rejected the nurse's claim under the Church Amendment, holding that the Church Amendment does not confer a private right of action. 2006 U.S. Dist. LEXIS 36897, at *13–14.

Amicus believes that "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23170 (May 21, 2019) ("Final Rule"), is a critical tool to ensure that federal conscience laws, including the Church Amendment, are enforced. Because no court has yet held that the Church Amendment confers a private right of action, the Final Rule is essential "to provide clear and appropriate interpretation of Federal conscience and anti-discrimination laws, to engage in outreach to protected parties and covered entities, to conduct compliance reviews, to investigate alleged violations, and to vigorously enforce those laws." 84 Fed. Reg. at 23178.

Amicus believes that the Final Rule comports fully with the Administrative Procedure Act. It respectfully submits this brief to make two points explaining how the lower court went badly astray in holding Title VII cabined HHS's authority to promulgate the Final Rule. First, Title VII is irrelevant to the correct interpretation of the Conscience Amendments because Title VII and the Conscience Amendments

are grounded in separate constitutional powers and serve distinct governmental purposes. Second, importing Title VII's religious discrimination framework into the Conscience Amendments would result in a constitutionally indefensible preference for those who oppose abortion for nonreligious reasons over those who oppose abortion for religious reasons.

## INTRODUCTION

The Final Rule enforces the Conscience Amendments which include (1) the Church Amendments (42 U.S.C. § 300a-7); (2) the Coats-Snowe Amendment (42 U.S.C. § 238n(a)); (3) the Weldon Amendment (*see* Departments of Defense and Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d), Pub. L. No. 115-245, 132 Stat. 2981 at 3118); and (4) conscience protection provisions in the Patient Protection and Affordable Care Act (*i.e.*, 42 U.S.C. § 18113; 42 U.S.C. § 14406(1); 26 U.S.C. § 5000A; 42 U.S.C. §18081; 42 U.S.C. §§ 18023(b)(1)(A) and (b)(4)).

The Conscience Amendments fit within the grand, national tradition of respecting individual conscience. George Washington, the Father of our Country, noted that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle." Michael Novak & Jana Novak, *Washington's God: Religion, Liberty, and the Father of Our Country* 111 (2006). In his famous 1789 letter to the Quakers, he wrote:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.

Letter from President George Washington to the Annual Meeting of Quakers (1789*), in The Papers of George Washington*, 266 (W.W. Abbot & Dorothy Twohig eds., 1993).

Thomas Jefferson observed that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." Letter from President Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809). Like Madison, Jefferson understood the right of conscience to be a pre-political right that could not be surrendered to the government as a term of the social contract: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God." Thomas Jefferson, Notes on the State of Virginia, *in The Basic Writings of Thomas Jefferson*, 157–58 (Philip S. Foner ed., 1944).

In sum, "[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946). The longstanding commitment to this principle has animated the "happy tradition" in our country "of

avoiding unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1970).

In this spirit, the Conscience Amendments were adopted in response to and consistent with the Supreme Court's abortion decisions. Beginning in *Roe v. Wade* itself, the Supreme Court acknowledged a strong governmental interest against coercing individuals into complicity with abortion. The Court quoted resolutions of the American Medical Association confirming that "no party to the [abortion] should be required to violate personally held moral principles." 410 U.S. 113, 143 n.38 (1973). And in *Doe v. Bolton*, the Court left intact a rule stating that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure." 410 U.S. 179, 197–98 (1973).

## ARGUMENT

Title VII is irrelevant to the interpretation of the Conscience Amendments and therefore to HHS's authority to promulgate the Final Rule. The district court wrongly held that Title VII's framework governing religious discrimination claims extends to the Conscience Amendments and Final Rule. *New York v. HHS*, 414 F. Supp. 3d 475, 513 (S.D.N.Y. 2019).

The lower court's ruling is grounded on two false premises: 1) that Title VII must apply to the Conscience Amendments simply because it also protects against religious discrimination and predated the Conscience Amendments; and 2) the

Conscience Amendments protect only those who object to abortion for religious reasons.

The false premise invoking Title VII to cabin the Conscience Amendments ignores controlling Supreme Court precedent and the important distinction between federal laws rooted in Congress's Spending Clause power and federal laws rooted in Congress's Commerce Clause powers. The false premise limiting objectors protected by the Conscience Amendments ignores the Amendments' broad scope and would lead to a constitutionally indefensible, two-tiered system in which those who object for religious reasons would be granted less protection than those who object for nonreligious reasons.

## I. Title VII Is Irrelevant to the Correct Interpretation of the Conscience Amendments and to HHS's Authority to Promulgate the Final Rule Because Title VII and the Conscience Amendments Are Grounded in Separate Constitutional Powers and Serve Distinct Governmental Purposes.

Title VII does not bear on the correct interpretation of the Conscience Amendments because it is a "vastly different" statute that imposes federal anti-discrimination policy on the states involuntarily and provides remedies for those who have suffered past discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2004). By contrast, the Conscience Amendments are binding only upon those governmental and private entities that voluntarily seek federal funding. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (stating that

federal-state cooperative programs are "voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding"). Those differences preclude the application of Title VII's religious discrimination framework to the Conscience Amendments.

Title VII and the Conscience Amendments are grounded in fundamentally different constitutional powers and serve distinct governmental goals. Rooted primarily in the Spending Clause power, the Conscience Amendments provide broad protection from discriminatory practices carried out by recipients of federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (stating that the Spending Clause empowers Congress to "attach conditions . . . to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives"). Health care entities need not accept federal funds if they do not wish to protect the conscience rights of their employees. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (noting that state governments and private parties that object to a condition on the receipt of federal funding are free "to decline the funds."). The Conscience Amendments have not been held to provide any remedies to those who suffer discrimination from federal funding recipients.

By contrast, Title VII was enacted under the Commerce Clause, Art. I, § 8, cl. 3, and § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458

(1976) (Brennan, J., concurring). Title VII compels all employers above a certain size not to engage in discrimination and provides a comprehensive remedial scheme for employees who prove their claims. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). The differences between Title VII and the Conscience Amendments compel reversal of the district court's ruling that Title VII's religious discrimination framework applies to the Conscience Amendments. *Id*. at 286-87; *Jackson*, 544 U.S. at 175.

In *Gebser*, the plaintiff brought a sex-discrimination claim under Title IX. Gebser suffered sexual harassment from a teacher and sought to hold the school district liable under a *respondeat superior* theory. She argued that agency principles governing the liability of employers under Title VII applied to her claim. Noting the different purposes and constitutional sources of Title VII and Title IX, the Court refused to import Title VII standards to Gebser's claim. "Congress enacted Title IX in 1972 with two principal objectives: to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens effective protection against those practices." *Id*. at 286 (internal citations omitted). As a Spending Clause statute, Title IX conditioned "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Id*.

> *That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition.* Title VII

> applies to all employers *without regard to federal funding* and aims broadly to eradicate discrimination throughout the economy. Title VII, moreover, seeks to make persons whole for injuries suffered through past discrimination. Thus, *whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on protecting individuals from discriminatory practices carried out by recipients of federal funds.*

*Id*. at 286-87 (internal quotations and citations omitted) (emphases added).

Because Title IX contained no statutory language similar to that in Title VII indicating that agency principles should be applied in determining employer liability, Title VII's agency principles could not be imported merely because Title VII and Title IX statutes both prohibited sex discrimination. *Id*.

Ignoring *Gebser*, the district court asserted that in *Jackson v. Birmingham Bd. of Educ.*, the Supreme Court rejected a "similar attempt to construe an anti-discrimination statute enacted after Title VII as *sub silentio* departing from the Title VII framework." 414 F. Supp. 3d at 524 n.21. In fact, however, the district court's reading turns *Jackson* on its head. *Jackson* reaffirmed *Gebser's* holding that Title VII provisions are irrelevant to the interpretation of Spending Clause statutes prohibiting employment discrimination. 544 U.S. at 175.

The issue in *Jackson* was whether Title IX encompassed claims of retaliation for complaints about sex discrimination. 544 U.S. at 172. Relying on Title IX's expansive language, the Court held that Title IX protects retaliation claims. "Courts 'must accord' Title IX 'a sweep as broad as its language.'" *Id.* at 175 (quoting *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982)). "Retaliation against a person

because that person has complained of sex discrimination is another form of intentional sex discrimination." 544 U.S. at 173-74 (citations omitted).

*Jackson* rejected the board of education's argument that Congress must not have intended Title IX to protect retaliation claims because Title VII expressly included protection for retaliation claims. *Id*. at 175. "Congress certainly could have mentioned retaliation in Title IX expressly, as it did in § 704 of Title VII of the Civil Rights Act of 1964. … *Title VII, however, is a vastly different statute from Title IX*, *Gebser*, 524 U.S. at 283-284, 286-287, and the *comparison the Board urges us to draw is therefore of limited use*." *Id.* (emphases added).

*Jackson* thus contradicts the district court's conclusion that "as in *Jackson*, there is no basis to infer that the Congresses that enacted the Conscience Provisions intended to repudiate the familiar Title VII understanding of religious discrimination." To the contrary, when a Spending Clause anti-discrimination statute contains broad language prohibiting discrimination, any Title VII language is immaterial unless Congress expressly incorporated it into the Spending Clause statute. *Id.*; *see also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009) (holding that Title VII's burden-shifting framework did not apply to the Age Discrimination in Employment Act because Congress did not add such a provision to the Act).

Like Title IX, the Conscience Amendments are vastly different statutes than Title VII and confer much broader protection against discrimination. Like Title IX,

the Conscience Amendments offer states the option to comply with Congressional policy prohibiting the use of federal funds to support discriminatory practices. *See Gebser*, 524 U.S. at 286. The difference between the Conscience Amendments and Title VII is even greater, however, than that between Title IX and Title VII. Unlike Title IX, the Conscience Amendments have not been held to contain an implied right of action and thus provide no remedies for those who suffer discrimination from federal funding recipients. *See Cannon v. University of Chicago*, 441 U.S. 677, 705 (1979) (recognizing implied right of action for equitable relief under Title IX). If Title VII standards governing sex discrimination claims expressly authorized by Congress are irrelevant to implied rights of action under Title IX, Title VII's religious discrimination framework is even more irrelevant to the Conscience statutes, which afford no private rights of action.

Under *Gebser* and *Jackson*, this Court "must accord" the Conscience Amendments "a sweep as broad as [their] language," 544 U.S. at 175, irrespective of any Title VII provisions. Title VII does not cabin HHS's authority to promulgate the Final Rule.

## II. Extending Title VII's Religious Discrimination Framework to the Conscience Amendments Would Result in an Unconstitutional Two-Tiered System in Which Those Who Oppose Abortion for Religious Reasons Enjoy Less Protection than Those Who Oppose Abortion for Nonreligious Reasons.

The district court's ruling that Title VII's hardship framework must apply to the Conscience Amendments contravenes the clear language of the Amendments and would lead to second class status for religious objectors. The Conscience Amendments do not only protect religiously-motivated conscientious objectors. Instead, the Conscience Amendments broadly protect the conscience rights of all persons, whether religiously devout, agnostic, or atheist.[2] Because the scope of protection for conscience rights in the Amendments far exceeds protection of religious belief under Title VII, [3] Title VII does not constrain HHS's authority to promulgate the Final Rule.

By contrast to the sweeping protections of the Conscience Amendments, Title VII protects only healthcare employees who suffer discriminatory treatment because

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[2] Opposition to abortion is not limited to people of religious faith. In a 2014 survey conducted by the Pew Research Forum, 11% of atheists believed that abortion should be illegal in "all or most cases." Pew Research Center, *Religious Landscape Study* (2014), https://tinyurl.com/y7o47hx5 (last visited May 19, 2020).

[3] For a thorough discussion of how the Coats-Snow and Weldon Amendments in particular provide much broader protection than Title VII, *see* Brief of Senator Daniel Coats and Representative David Weldon as Amici Curiae Supporting Defendants-Appellants, *New York v. HHS*, (No. 19-4254(L)) (2d Cir. filed May 12, 2020), ECF No. 201.

they oppose abortion for religious reasons. Title VII's language, EEOC regulations, and Title VII case law do not support the district court's apparent assumption that Title VII protects conscience rights regardless of the employee's reasons for objecting. Title VII prohibits employers from discriminating against an employee (or potential employee) on the basis of religion. 42 U.S.C. § 2000e-2(a)(1)-(2). The statute's 1972 amendment defined the term "religion" "to include all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate the religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[4]

Under prevailing definitions of religion,[5] opposition to abortion – standing apart from a comprehensive belief system – is not protected as religious belief under

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[4] The EEOC defines religious practice to include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. Somewhat contradictorily, however, the EEOC's Compliance Manual states that "religion typically concerns ultimate ideas about life, purpose, and death. Social, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII." EEOC Compliance Manual (July 22, 2008) (internal citations and quotation marks omitted), https://www.eeoc.gov/sites/default/files/migrated_files/policy/docs/religion.pdf.

[5] The Federal Courts of Appeal have defined religion in varying ways but one widely accepted definition consists of three parts. First, "religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain

Title VII. *See, e.g., Fallon v. Mercy Catholic Med. Ctr. of Se. Pa*., 877 F.3d 487, 490-91 (3d Cir. 2017) (holding that opposition to the flu vaccine did not qualify as religious belief under Title VII because it did not implicate "fundamental and ultimate questions having to do with deep and imponderable matters, nor [is it] nor [is it] comprehensive in nature").

Contrary to the narrow protection given to religious based objections under Title VII, the Conscience Amendments broadly protect the right of any health care provider to refuse to be complicit in abortion for any conscience-based reason. Applying Title VII's framework for accommodating an employee's religious objection to claims under the Conscience Amendments would result in a discriminatory two-tiered system: employees who object to abortion on religious grounds would be subject to Title VII's undue hardship and reasonable accommodation inquiry, while those that oppose abortion for nonreligious reasons would enjoy broader protection under the Conscience Amendments. Such disparate

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formal and external signs." *E.g.*, *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981); *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000); *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir.1994). *Cf. Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) (noting that religion is typified by "a fairly complex set of doctrines relating to . . . ultimate questions of human life); *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (stating that religion includes "beliefs dealing with issues of ultimate concern that occupy a place parallel to that filled by . . . God in traditionally religious persons").

levels of protection would be patently unconstitutional. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (stating that the First Amendment does not permit "government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities") (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)).

## CONCLUSION

By wrongly importing Title VII's religious discrimination framework into the Conscience Amendments, the district court's opinion constricts the Amendments' expansive scope and reduces religiously motivated objectors to second class status. Amicus respectfully requests this Court to reverse the judgment below.

Respectfully submitted,

Dated: May 26, 2020

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