No. 24-437

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF 19 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are nineteen Members of the United States Congress, five Senators and fourteen Members of the House of Representatives. A complete list of *Amici* is found in the Appendix to this brief. As pro-life elected representatives, *Amici* are committed to protecting mothers, unborn children, and families from the harms of the abortion industry. *Amici* defend the rights of health care institutions that conscientiously object to participating in abortion, including through abortion referrals. *Amici* have voted annually to adopt the Weldon Amendment within appropriations legislation. Under proper statutory interpretation, the Weldon Amendment protects health care institutions, such as the Oklahoma State Department of Health ("OSDH"), from discrimination against the institution's right to conscientiously object against ending unborn human life.

SUMMARY OF ARGUMENT

Just last term, the Supreme Court unanimously held that "federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences." *Food & Drug Admin. v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1559 (2024). The

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of the intent to file this brief.

Court, however, did not address the application and scope of these anti-discrimination laws to health care *institutions*.[2] This case now presents that issue: "[w]hether the Weldon Amendment prohibits the federal government from requiring a state's health department to provide abortion referrals." Pet. for a Writ of Cert. at i.

The Weldon Amendment robustly protects conscientious objections to participating in abortions.[3]

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[2] This federal issue is prevalent because of recent federal actions and statements that have interpreted a limited institutional right of conscience. The Department of Justice indicated conflicting views on the application of federal conscience protections to institutions during recent abortion litigation. *See* Transcript of Oral Argument at 91–94, *Moyle v. United States*, 144 S. Ct. 2015 (2024) (No. 23-726). In a final rule, the Department of Health and Human Services ("HHS") added a balancing test that removed conscience protections, finding "the Federal health care conscience protection statutes represent Congress' attempt to strike a careful balance between the rights of both providers and patients, and the Department intends to respect that balance." Safeguarding the Rights of Conscience as Protected by Federal Statutes, 89 Fed. Reg. 2078, 2088 (Jan. 11, 2024) (to be codified at 45 C.F.R. pt. 88). HHS Secretary Xavier Becerra delivered contrary testimony, asserting that states must inform patients about available abortion services under Title X, but it's "not the case" providing the 1-800 number for abortion information would requalify a state for Title X funds. Lankford Fires Back During Finance Hearing with HHS Sec. Becerra Over Extreme Abortion Agenda, YouTube (Mar. 14, 2024), at 4:25, https://www.youtube.com/watch?v=yEatEuqsJ8I&t=258s; *see also* Mary Miller and Xavier Becerra Have Fiery Clash Over Gender Affirming Care for Minors Policies, YouTube (May 15, 2024), https://www.youtube.com/watch?v=tZ_6PzWC6S8.

[3] "Conscience clause" and "conscientious objection" are legal terms of art. *See Black's Law Dictionary* 381 (12th ed. 2024).

Under the law, federal funds are not available to federal agencies that discriminate against any health care entity "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(1), 118 Stat. 2809, 3163 (2004); *see also* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. H, § 507(d)(1), 136 Stat. 4459, 4908 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. D, tit. V, § 507(d)(1), 138 Stat. 460, 703. The Weldon Amendment broadly applies to health care entities, including a "health care facility, organization, or plan." *Id.* Since 2004, Congress has annually adopted the Weldon Amendment in appropriations legislation for the U.S. Department of Health and Human Services ("HHS").

Oklahoma has a public policy stance of protecting mothers and unborn children from the harm of elective abortion. Accordingly, the state prohibits any person from advising or procuring an elective abortion for a woman throughout her pregnancy. Okla. Stat. tit. 21, § 861 (1999). Consistent with this policy, OSDH could not make abortion referrals and objected to directing patients to a private national hotline that gave "information on their full range of pregnancy

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Amici refer to the Weldon Amendment as a conscience protection because it contributes to the United States' rich legal tradition of conscience rights. However, *Amici* recognize that Congress extended the Weldon Amendment to all health care entities' objections to abortion regardless of the reason for the objection. *See infra* Section II.

options, including pregnancy termination." *Oklahoma v. U.S. Dep't of Health & Hum. Servs.*, 107 F.4th 1209, 1228 (10th Cir. 2024) (Federico, J., dissenting). Notwithstanding the Weldon Amendment, HHS terminated OSDH's Title X grant because OSDH objected to providing abortion referrals. The district court and Tenth Circuit then held the Weldon Amendment did not protect OSDH's objections to abortion referrals. *See id.* at 1214.

Amici agree with Petitioner that the Tenth Circuit's opinion contradicted this Court's Spending Clause precedents and split with other Circuits. *See* Pet. for a Writ of Cert. at 11–23. *Amici* write separately to highlight the important federal question the Weldon Amendment issue presents for health care institutions that object to abortion referrals. *Amici*'s argument is three-fold: (I) Congress passed the Weldon Amendment as a broad conscience protection to fill in the gaps of existing conscience laws, especially for health care institutions that conscientiously object to abortion; (II) the Weldon Amendment protects all objections to abortion referrals, regardless of the reason a health care entity refuses to facilitate an abortion; and (III) caselaw views conscientious objections from the perspective of the objector, so OSDH's beliefs about what constitutes an abortion referral are critical to an analysis of the Weldon Amendment. Accordingly, *Amici* urge the Court to grant the petition for a writ of certiorari.

ARGUMENT

I. The Weldon Amendment Robustly Protects the Conscientious Objections of Health Care Institutions, Such as the Oklahoma Department of Health.

Congress passed the Weldon Amendment to provide broad anti-discrimination protections for health care entities, including institutions, with conscientious objections to abortion. Yet, the district court determined that the Weldon Amendment does not apply to OSDH because it is not the "provider of the services." Pet. for a Writ of Cert. App. at 126a. The district court's assertion is erroneous. As Judge Federico stated in his dissent to the Tenth Circuit's opinion, "OSDH qualifies as such a 'facility, organization, or plan' because it engages in direct patient care at OSDH clinics." *Oklahoma*, 107 F.4th at 1234; *see also* Pet. for a Writ of Cert. at 24–26. The district court's holding also overlooks how Congress created a robust definition for health care entities within the Weldon Amendment to fill in the gaps of existing federal laws, and, in particular, ensure protection for institutional conscientious objections to abortion.

Congress passed conscience protections prior to the Weldon Amendment, but these laws have a more limited scope. The Church Amendments of 1973 safeguard the conscientious objections of a health care

"individual or entity." 42 U.S.C. § 300a-7.[4] Health care facilities and individuals have the right to conscientiously object "to perform[ing] or assist[ing] in the performance of any . . . abortion if . . . [it] would be contrary to his religious beliefs or moral convictions." *Id.* § 300a-7(b)(1). The Church Amendments further protect a health care facility that conscientiously objects to permitting abortion in its facilities if it is against the entity's "religious beliefs or moral convictions." *Id.* § 300a-7(b)(2)(A).

In 1988, Congress adopted the Danforth Amendment to the Civil Rights Restoration Act. 20 U.S.C. § 1688. The amendment clarifies that sex discrimination under Title IX of the Education Amendments of 1972 "[cannot] be construed to require . . . any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." *Id.*

Congress enacted the Coats-Snowe Amendment in 1996 to ensure federal fund recipients do not discriminate against any health care entity that "refuses to undergo training in the performance of

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[4] Shortly after the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), the District Court of Montana determined a private Catholic charitable hospital must provide sterilizations against the hospital's religious conscientious objections since the hospital had accepted federal aid under the Hill-Burton Act and, thus, must follow federal law. *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973). Citing this case, Senator Frank Church raised concerns about the effect the Hill-Burton Act, in combination with *Roe*'s creation of an abortion right, would have upon health care providers conscientiously objecting to abortion. 119 Cong. Rec. 9,595 (1973).

induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions." 42 U.S.C. § 238n(a)(1).[5] The Coats-Snowe Amendment defines "health care entity" to "include[] an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." *Id.* § 238n(c)(2).

In 1997, Congress amended the federal Medicaid and Medicare programs "to prohibit managed-care plans from restricting the ability of health-care providers to discuss treatment options." Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 31 (2010). Congress, however, simultaneously "exempted managed-care providers from the requirement to provide, reimburse, or cover counseling or referral services [for abortion] if they objected on moral or religious grounds." *Id.* at 31–32; *see* 42 U.S.C. § 1395w-22(j)(3)(B) *and* 42 U.S.C. § 1396u-2(b)(3)(B).

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[5] The Coats-Snowe Amendment was a response to the Accreditation Council for Graduate Medical Education ("ACGME")'s 1995 adoption of "new accreditation standards requiring obstetrics and gynecology residency programs to provide abortion training." Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 30 (2010). "[The new ACGME accreditation standards] meant that all fifty Catholic hospitals with OB/GYN residency programs, as well as other religiously-affiliated hospitals, would have to provide abortion training or lose accreditation to train OB/GYN residents." *Id.*

Congress passed the Weldon Amendment in 2004 with broader language than any of its previous conscience laws. The Weldon Amendment provides:

> (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.

Consolidated Appropriations Act, 2005, div. F, § 508(d), 118 Stat. at 3163.

When compared with prior conscience protections, the Weldon Amendment applies to a wider range of health care providers and has a broader scope of protection for conscientious objections to abortion. Unlike the Church Amendment and Coats-Snowe Amendment, the Weldon Amendment includes a broad definition for "health care entity," even covering "any other kind of health care facility, organization, or plan" that Congress did not enumerate. *Id.* The Weldon Amendment is not limited to one program like

the Danforth Amendment or conscience protections within the Medicare and Medicaid programs. Rather, it applies to all HHS appropriations. Finally, the Weldon Amendment covers a wider range of conscientious objections to participating in abortion by providing an anti-discrimination protection for a health care entity that "does not provide, pay for, provide coverage of, or refer for abortions." *Id.* Accordingly, the Weldon Amendment "remedies [then-]current gaps in Federal law and promotes the right of conscientious objection by forbidding federally funding government bodies to coerce the consciences of health care providers who respect fundamentally the right to life and basic human rights for the unborn." 150 Cong. Rec. 10,095 (2004) (statement of Rep. Chris Smith).

Congress passed the Weldon Amendment to strengthen institutional rights of conscience. Although the Church Amendments extend to health care institutions, *see* 42 U.S.C. § 300a-7, there were serious threats against institutional rights of conscience prior to the passage of the Weldon Amendment. *See* Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 Ave Maria L. Rev. 527, 528–530 (2007). As Representative Weldon described, "[a]bortion advocates argue[d] that the term 'health care entity' only covers individuals and not institutions. Abortion advocates argue[d] that because an entity receives Federal funds they are required to provide abortions." 150 Cong. Rec. 10,090 (2004).

Prior to the Weldon Amendment, there were many instances of infringements upon the conscience rights of institutions that objected to abortion. The Alaska Supreme Court required a nonprofit hospital to perform elective abortions at its facility over the hospital's conscientious objections in *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*. 948 P.2d 963 (Alaska 1997). "In New Jersey, abortion advocacy groups urged the State of New Jersey to require a 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. 10,090 (statement of Rep. Weldon). "[T]he State of New Mexico refused to approve a hospital lease because the community-owned hospital declined to perform elective abortions." *Id.* Other attacks on institutional rights of conscience included:

- Forcing a private community hospital to open its doors for late-term abortions,
- Denying a certificate of need to an out-patient surgical center that declined involvement in abortion, after an abortion rights coalition intervened in the proceedings,
- Forcing a private non-sectarian hospital to leave a cost-saving consortium, because the consortium abided by a pro-life policy in its member hospitals,
- Dismantling a hospital merger, after abortion advocates approached a State attorney general to challenge the merger,

- Pressuring a hospital to place $2 million in trust for abortions and sterilizations before allowing the hospital to consolidate,
- Attempting to require a Catholic hospital to build an abortion clinic and pay for abortions,
- Threatening a Catholic-operated HMO with loss of State contracts because it declines to provide abortions,
- Prohibiting hospitals from ensuring that the property they sell is not used for abortions.

150 Cong. Rec. 10,095 (statement of Rep. Chris Smith) (bullet points added). Accordingly, the Weldon Amendment was Congress' response to violations of health care institutions' conscience rights.

In sum, Congress drafted the Weldon Amendment to broadly protect conscientious objections and fill in the gaps of existing conscience law. It robustly defines "health care entity" to protect institutions from the type of discrimination that OSDH suffered because it objected to abortion referrals.

II. The Weldon Amendment Protects All Health Care Objectors Regardless of the Reason for the Objection.

The Weldon Amendment does not limit its protection to religious or moral objections. In fact, "[t]he Weldon Amendment is silent as to whether a health care entity must state its basis for objecting, or why it does not refer for abortions." *Oklahoma*, 107

F.4th at 1236 (Federico, J., dissenting). Yet, the district court denied the motion for a preliminary injunction based on the court's view that "state policy" objections are different from objections based upon "conscience or religious beliefs" and do not fall within the scope of the Weldon Amendment's protection. Pet. for a Writ of Cert. App. at 126a. This reasoning rewrites the Weldon Amendment and undercuts the clear federal policy of safeguarding conscientious objections to abortions.

The plain language of the Weldon Amendment extends to all types of objections. It applies "to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(2), 118 Stat. at 3163. The text says nothing about why the health care entity objects to abortion. *See* Pet. for a Writ of Cert. at 31–32.

Congress has limited some federal anti-discrimination laws to religious or moral conscientious objections to abortion. The Church Amendments protect the "religious beliefs or moral convictions" of health care individuals and institutions. 42 U.S.C. § 300a-7. The Medicare and Medicaid programs recognize that certain requirements for managed care providers do not apply if the "organization . . . objects to the provision of such service on moral or religious grounds." 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B). Congress, however, did not pass the Weldon

Amendment with those limitations. Rather, the plain language of the Weldon Amendment extends to any type of objection to abortion.[6]

The Weldon Amendment is a broad anti-discrimination law. It expansively defines health care entities, discussed *supra* Section I, and extends to abortion-related objections regardless of the objector's reason. Part of the policy behind this law is that forcing health care entities to participate in abortion raises grave issues involving religion, morality, and ethics. Fundamentally, conscientious objections to abortion are refusals to violate human dignity and take a life. *See* Okla. Stat. tit. 63 § 1-738.3(A)(2)(d) (2022) ("Abortion . . . terminate[s] the life of a whole, separate, unique, living human being."). "[A]lthough we have obvious national disagreements over whether abortion is a killing . . . our laws recognize that unwilling individuals cannot and should not be coerced into participating in these practices, even in tangential ways." Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L. Rev. 121, 175 (2012).[7]

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[6] Other federal conscience protections also extend to abortion-related objections regardless of the objector's reason. *E.g.*, Coats-Snowe Amendment, 42 U.S.C. § 238n. Ultimately, whether Congress limits a federal conscience protection to only religious or moral objections is a statute-specific question.

[7] To be clear, *Amici* are not asking the Court to answer the question of whether abortion kills another human being, *i.e.*, unborn child. As *Amici* discuss *infra* Section III, caselaw examines conscientious objections from the perspective of the objector. *Amici* only ask the Court to examine the Weldon Amendment's application and scope of protection for institutional rights of conscience.

In fact, Congress has drawn a clear line against forced participation in abortions.[8]

Over the past half-century, Congress has enacted numerous statutes protecting medical professionals who conscientiously object to taking a human life through abortion, including the Church Amendments, 42 U.S.C. § 300a-7, Coats-Snowe Amendment, 42 U.S.C. § 238n, and Weldon Amendment, *see, e.g.*, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. F, § 508(d)(2), 118 Stat. at 3163. There are conscience protections throughout federal law, such as in the Danforth Amendment to Title IX's definition of sex discrimination, 20 U.S.C. § 1688, amendments regulating managed-care providers in the Medicare and Medicaid programs, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B), and Affordable Care Act provisions regarding insurance, 42 U.S.C. § 18023(b)(4). "It is the sheer breadth of the protections that confirms a widely shared public understanding that participating in what is even arguably a killing is a deeply personal decision that is generally beyond the government's reach." Rienzi, *supra*, at 175 (emphasis omitted).

When the Supreme Court crafted *Roe v. Wade*'s right to abortion it notably did not extend this right

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[8] The federal government's protection of conscientious objectors that refuse to kill other human beings is not limited to the abortion context. The federal government has a rich tradition of protecting conscientious objections to taking a human life through capital punishment, *see* 18 U.S.C. § 3597(b), assisted suicide, *see* 42 U.S.C. § 18113, and military conscription, *see, e.g.*, *Welsh v. United States*, 398 U.S. 333 (1970).

so far as to invalidate conscience protections. *See* 410 U.S. 113 (1973). In *Doe v. Bolton*, *Roe*'s companion case, the Supreme Court considered a conscience protection within Georgia's abortion law. 410 U.S. 179, 181, 205 (1973). This "provision . . . [gave] a hospital the right not to admit an abortion patient and [gave] any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure." *Id.* at 184. Even as *Roe* "effectively struck down the abortion laws of every single State," *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241 (2022), it did not invalidate Georgia's conscience provision in *Doe*. 410 U.S. 179. Rather, "*Doe* upheld unequivocally the constitutional validity of a statutory provision protecting rights of conscience of both health-care institutions and individual health-care providers . . . ." Wardle, *supra*, at 15.

The *Doe* Court not only upheld the provision but recognized the strength of the protection. It used the statute's breadth to justify the invalidation of a provision requiring a hospital staff abortion committee to approve abortion procedures. As the *Doe* Court wrote:

> Under [the conscience protection], the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in

> the statute in order to afford appropriate protection to the individual and to the denominational hospital. [The conscience protection] affords adequate protection to the hospital, and little more is provided by the committee prescribed by [the committee provision].

410 U.S. at 197–98. This holding was critical because it "represented the unanimous view of the Court (even the dissenters who objected to invalidating some provisions agreed in upholding these provisions)." Wardle, *supra*, at 18. Accordingly, "all nine justices in the seminal abortion cases[] expressed clearly that statutory conscience protections for both individual and institutional health-care providers are constitutionally permissible," even under *Roe*'s now-defunct abortion right. *Id.* at 18–19.

Federal conscience laws and *Doe*'s holding highlight the distinction between negative and positive rights. In *Roe v. Wade*, Jane Roe's attorney argued "for a 'liberty *from* being forced to continue the unwanted pregnancy[.]' She argued before the Court for a negative right, for a restraint on governmental interference in the abortion decision, not for a positive right of access or governmental entitlement to abortion." Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 Fordham Urb. L.J. 783, 783 (2004) (citing Transcript of Oral Argument, *Roe*, 410 U.S. 113 (No. 70-18)). The Supreme Court emphasized this distinction in *Harris*

v. McRae when the Court upheld the Hyde Amendment as constitutional. According to the Court:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.

Harris v. McRae, 448 U.S. 297, 316 (1980); *see also id.* at 327–28 (White, J., concurring). In litigation over the Weldon Amendment, Representative Dave Weldon echoed this difference, noting that "[w]hile the United States Supreme Court [in *Roe*] concluded that women have a liberty interest that enables them to receive reproductive health services, the Court has never recognized a corresponding constitutional duty of governments to provide such reproductive services." Brief Amici Curiae of Congressman Henry Hyde, Dave Weldon, M.D. et al. at 16–17, *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006) (No. 05-5406) (citation omitted). Rather, Congress and the *Doe* Court have distinguished between *Roe*'s negative right to abortion, and a positive right that would force health care entities to participate in abortions over their objections. The Weldon Amendment exemplifies this distinction by robustly defending health care entities'

conscience rights, regardless of why they object to abortion.

In sum, the Weldon Amendment is not limited to conscience or moral objections. Rather, it protects all health care entities who object to abortion, including OSDH. The breadth of the Weldon Amendment is consistent with Congress' robust public policy stance against coercing health care providers to participate in abortions. As the Supreme Court recognized in *Doe*, there is a clear line between permitting abortion and forcing health care entities to participate in abortion. The Weldon Amendment draws this same distinction by broadly protecting conscience rights.

III. Caselaw Views Conscientious Objections from the Perspective of the Objector.

The Weldon Amendment prevents discrimination against health care entities that refuse to "refer for abortion." Nevertheless, the Tenth Circuit held "the district court didn't err by tentatively rejecting Oklahoma's argument that the mere act of sharing the national call-in number would constitute a referral for the purpose of facilitating an abortion." *Oklahoma*, 107 F.4th at 1222. As Petitioner notes, the Tenth Circuit's holding is contrary to HHS' position that the telephone number counts as an abortion referral, and "the only reason to use the hotline in Oklahoma would be to direct someone toward abortion." Pet. for a Writ of Cert. at 32–35. But more fundamentally, the Tenth Circuit's stance disregards caselaw that limits a court to analyzing whether an objector's belief is sincerely held, and not whether the

belief is rational or conforms with a court's idea of the what the belief should be.

The sincerity test originated in religious liberty caselaw. In *United States v. Ballard*, the Supreme Court considered the mail-fraud prosecution of a religious movement that received money because, among other assertions, they represented they were "divine messenger[s]" and "through super-natural attainments, [had] the power to heal persons of ailments and diseases." 322 U.S. 78, 79–80 (1944). The Court held that the jury could not decide whether the religious leaders' representations were true, only whether the religious leaders "honestly and in good faith" believe them. *Id.* at 81, 88. According to the *Ballard* Court, "[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." *Id.* at 86 (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Likewise, "[h]eresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." *Id.* at 86.

The Supreme Court affirmed that courts may not analyze the belief itself, only whether the objector sincerely holds the belief in *Thomas v. Review Board of the Indiana Employment Security Division*. 450 U.S. 707 (1981). In *Thomas*, a Jehovah's Witness had

worked in a roll foundry that fabricated sheet metal, which he viewed as consistent with his beliefs, even if a manufacturer later used the sheet metal for producing a tank. *Id.* at 710–11. Thomas, however, conscientiously objected to working in a department that manufactured military tank turrets because "the production of arms violated his religion." *Id.* The Indiana Supreme Court held Thomas was not entitled to unemployment benefits after analyzing his religious beliefs and determining he "was 'struggling' with his beliefs and that he was not able to 'articulate' his belief precisely." *Id.* at 713, 715.

The Supreme Court reversed. According to the Court, "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. As the *Thomas* Court elaborated:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Id. at 714 (citation omitted). Accordingly, "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.

Rather, courts only may analyze the sincerity of the belief.

The sincerity test is firmly established within conscience caselaw. The Supreme Court has applied the sincerity test to cases concerning compelled speech, *e.g.*, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2309 (2023), the Religious Freedom Restoration Act, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 & n.28 (2014), and military conscription, *e.g.*, *United States v. Seeger*, 380 U.S. 163, 185 (1965). Not all these claims involve a religious objection. In *United States v. Seeger*, the Court recognized a statutory conscience exemption for an ethical objection to military conscription that was based upon the objector's "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." *Id.* at 166. In *Welsh v. United States*, the Court extended the conscience exemption to military conscription for "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." 398 U.S. 333, 344 (1970). These cases reaffirm that in conscience cases, "the 'truth' of a belief is not open to question, [although] there remains the significant question whether it is 'truly held.'" *Seeger*, 380 U.S. at 185.

The Supreme Court has applied the sincerity test to federal conscience laws concerning abortion. In *Food and Drug Administration v. Alliance for Hippocratic Medicine*, the Court unanimously held that "federal conscience protections encompass 'the doctor's beliefs rather than particular procedures,'

meaning that doctors cannot be required to treat mifepristone complications in any way that would violate the doctors' consciences." 144 S. Ct. at 1560 (unanimous opinion) (citation omitted). Although the Court ultimately held the plaintiffs did not have Article III standing, the Court recognized as part of its analysis that "[t]he plaintiffs have sincere legal, moral, ideological, and policy objections to elective abortion and to FDA's relaxed regulation of mifepristone." *Id.* at 1565. Likewise, there is no "time-intensive procedure to invoke federal conscience protections. A doctor may simply refuse; federal law protects doctors from repercussions when they have 'refused' to participate in an abortion." *Id.* at 1560–61 (citations omitted).

Congress adopted the sincerity test within the Weldon Amendment under the prior construction canon. The Weldon Amendment does not define "refer for abortion." In this way, Congress did not limit the Weldon Amendment's scope to what Congress views as an abortion referral. Under the prior construction canon, however, "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015) (citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). From Daniel Seeger's ethical objection to military conscription to Alliance for Hippocratic Medicine's refusal to provide elective abortions, caselaw firmly establishes that a conscientious objection is from the perspective of the

objector. The only question a court may ask is whether the belief is sincerely held.

Here, OSDH has a sincerely-held objection to providing the telephone number, which it views as an abortion referral. Pet. for a Writ of Cert. at 7–8. As Judge Federico highlighted, "[t]he record supports that OSDH raised a sincere objection to compliance with the referral requirement, which HHS disregarded by terminating the grant." *Oklahoma*, 107 F.4th at 1236 (Federico, J., dissenting). In fact, "HHS notified OSDH that the grant would be terminated because of 'the deletion of referral to the All-Options Talk Line in this policy without any other provision for abortion referrals.'" Pet. for a Writ of Cert. at 8 (citing Pet. for a Writ of Cert. App. at 154a). However, OSDH has passed "the threshold question of sincerity which must be resolved in every [conscience] case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector." *Seeger*, 380 U.S. at 185. OSDH has a sincerely-held objection to abortion referrals, including the distribution of the telephone number.

The Tenth Circuit went further than the sincerity-of-the-belief test and analyzed whether the provision of the telephone number constituted an abortion referral. As the Tenth Circuit discussed, "[t]he dissent characterizes Oklahoma's objection as *sincere*. Even if Oklahoma had sincerely considered use of the national call-in number as a *referral for abortion* under the Weldon Amendment, the language in the

amendment doesn't entrust health-care entities with the authority to define *referral for abortion*." *Oklahoma*, 107 F.4th at 1224 (citation omitted) (emphasis in original). By going beyond the sincerity test and analyzing whether the belief is rational, the Tenth Circuit contradicted conscience rights caselaw.

The Tenth Circuit's reasoning is a slippery slope that would nullify the Weldon Amendment's conscience protections. Under the Tenth Circuit's reasoning, and despite the sincerely-held beliefs of the conscientious objector, federal agencies and states could redefine terms within the Weldon Amendment so that:

- A doctor does not "provide" an abortion when she merely gives requisite informed consent counseling about the procedure, *cf. Lacy v. Torrez*, No. 1:22-cv-953 (D.N.M. dismissed Apr. 5, 2023);
- An insurance plan does not "provide coverage of" abortion because coverage itself would not cause the abortion and the connection between the insurance coverage and conscientious objection is attenuated, *cf. Burwell,* 573 U.S. at 723;
- A state department of health does not "refer for abortion" when it gives a patient a 1-800 number solely so the patient may access abortion counseling, *see* Pet. for a Writ of Cert. at 23–24, 35–36;
- A hospital does not perform an elective "abortion" when it ends a pregnancy due to the

mother's mental health, because the procedure is medically necessary, *cf. Doe*, 410 U.S at 192;

- A medical professional does not participate in an "abortion" to end human life, because it is their belief that human life only begins at a certain stage of development, such as implantation, the presence of the unborn child's heartbeat (six weeks gestation), the ability of the unborn child to feel pain (fifteen weeks gestation), or birth, *cf.* 775 Ill. Comp. Stat. 55/1-15(c) (2019).

The Tenth Circuit's reasoning would authorize recipients of federal funds to discriminate against health care conscientious objectors simply by adopting their preferred definitions for "does not provide, pay for, provide coverage of, or refer for abortions." This outcome not only subverts Congress' intent to protect objecting health care entities from discrimination through the Weldon Amendment, but it also conflicts with precedent that directs courts to apply the sincerity test in conscience cases.

In sum, caselaw directs courts to analyze whether an objector's belief is sincerely held, and not delve into how the conscientious objector formulates the objection. Here, OSDH has a sincerely-held objection to providing the telephone number, which it views as an abortion referral. Caselaw dictates that courts cannot "say that the line [the objector] drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

CONCLUSION

"The right of conscience is fundamental to our American freedoms. We should guarantee this freedom by protecting all health care providers from being forced to perform, refer or pay for elective abortions." 150 Cong. Rec. 10,090 (statement of Rep. Dave Weldon). The Weldon Amendment robustly defends the conscience rights of health care institutions, including their objections to abortion referrals. The Court should grant the petition for a writ of certiorari.

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November 18, 2024

APPENDIX

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LIST OF *AMICI CURIAE*

Oklahoma Congressional Delegation

Lead Senator: Sen. James Lankford

Lead Representative: Rep. Tom Cole (OK-04)

Sen. Markwayne Mullin

Rep. Stephanie Bice (OK-05)

Rep. Josh Brecheen (OK-02)

Rep. Kevin Hern (OK-01)

Rep. Frank Lucas (OK-03)

U.S. Senators

Sen. Bill Cassidy (LA)

Sen. Steve Daines (MT)

Sen. Cindy Hyde-Smith (MS)

Members of the U.S. House of Representatives

Rep. Jim Banks (IN-03)

Rep. Michael Burgess (TX-26)

Rep. Dan Crenshaw (TX-02)

Rep. Vince Fong (CA-20)

Rep. Michael Guest (MS-03)

Rep. Doug LaMalfa (CA-01)

Rep. John Rose (TN-06)

Rep. Christopher H. Smith (NJ-04)

Rep. Beth Van Duyne (TX-24)